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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas

The Honorable Clifton Newman, Post-Conviction Relief Judge
The Honorable James R. Barber, III, Trial Judge

Appellate Case No: 2019-001925

STEWART RANDALL ARD, #217645, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

APPENDIX

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STATE OF SOUTH CAROLINA — CIRCUIT COURT

COUNTY OF RICHLAND — 2014-GS-40-01777, -01756, -01766, -01767, & -01771

STATE OF SOUTH CAROLINA,

-vs- — TRANSCRIPT OF RECORD

STEWART ARD,
Defendant.

HEARD ON MONDAY, JUNE 23, 2014,
TUESDAY, JUNE 24, 2014,
& WEDNESDAY, JUNE 25, 2014

BEFORE:

THE HONORABLE JAMES R. BARBER, III

AND A JURY

APPEARANCES:

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ON MONDAY, JUNE 23, 2014 AT 11:46 A.M.:

THE COURT: I had a short pretrial conference with the attorneys to go over any pretrial motions that we have, go over the voir dire. I also had been informed last week that the State had made a plea offer to the -- Ms. Zmroczek, and that she had passed that on to her client, that she informed me just a little while ago that her client had elected not to accept that plea offer.

You were advised of that plea offer, Mr. Ard?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And you understand, of course, that you're looking at the possibility of life without parole if you're convicted of this offense?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And my understanding is the offer made to you was -- what was it?

MS. ZMROCZEK: To plead straight. To plead to the charges as indicted. Attempted murder.

THE COURT: Attempted murder. Is that the only charge?

MS. ZMROCZEK: And I believe there are three assault and battery second.

MS. GARFIELD: That's correct, Judge. And carrying a concealed weapon.

THE COURT: Pardon me?

MS. GARFIELD: And carrying a concealed weapon.

THE COURT: And is that correct? Is that right? You want to decline the proposal that was made by the State to your attorney; is that right?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: You understand if you lose this thing, I don't have any option in this case? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You've taken all the discretion away from the Court.

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: You've been fully advised by your attorney?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: That's your decision?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: You're making that freely and voluntarily?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And nobody's threatened you, coerced you, forced you, or pressured you into making that decision?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: You're doing it because you want to

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make that decision?

THE DEFENDANT: Yes, sir, Your Honor,

THE COURT: Okay. Y'all have a seat if you would. Do we have the strike sheet?

THE CLERK: No, Your Honor.

THE COURT: All right. Folks, while we're waiting on the strike sheet, why don't we take up some of the motions? Do y'all mind doing that?

MS. GARFIELD: No, sir.

THE COURT: Ms. Zmroczek has filed several motions, one of which is a motion to exclude the penalty of life without parole which would be a motion, in my opinion, we would deal with if in fact the Defendant is found guilty. If he's not found guilty of something that would be life without parole, then we don't need to address that.

MS. ZMROCZEK: Thank you, Your Honor.

Your Honor, I wanted to just go ahead and make sure that I filed it. I agree that it's appropriate to argue it should that be necessary.

THE COURT: Then the next next motion is a motion to quash the indictment. What do you want to tell me?

MS. ZMROCZEK: Your Honor, it simply is a matter of protecting the record.

This request or this motion is based on Blankford. Originally when Mr. Ard was arrested he was charged with

lesser crimes. And, Your Honor, we feel like -- and we've outlined it in the motion. We feel like the process by him requesting a bond and possibly receiving a reduction in bond, that that led to him being upgraded to charges specifically because he asserted his right to bond.

Your Honor, this is not even a year-old case at this point. And, additionally, I noted in the time line receiving as of last week or June 5th, over 500 pages of medical records. And I received additional discovery not previously provided to me on June 7th.

Your Honor, this is one of the issues I think that the State's been dealing with with regards to who's controlling the docket. And at this time we would ask that the indictments be quashed and/or dismissed due to what appears to be a vindictive prosecution in Mr. Ard's eyes.

THE COURT: What do you want to tell me, Ms. Garfield?

MS. GARFIELD: Your Honor, I find Ms. Zmroczek's argument offensive.

THE COURT: You find what?

MS. GARFIELD: Her argument offensive.

THE COURT: Why would you do that?

MS. GARFIELD: Mr. Ard requested a trial at a

second appearance. At that point I asked Ms. Zmroczek if this was really a trial because I was not in attendance, and Ms. Zmroczek and I had not had any discussion about the case up to that point.

She replied that what --

THE COURT: Well, first of all -- first of all, understand this. Her motion may be made because her client has requested that the motion be made.

MS. GARFIELD: I understand that. I'm addressing --

THE COURT: I don't know what she believes to be the merits of the motion or anything like that. So let's just argue the motion itself.

MS. GARFIELD: I'm addressing what she put in her written motion, Judge. She's trying to say that I increased the charges because he's exercising his right to trial. I did call her and tell her that upon looking at the discovery and reviewing the videos that I thought the appropriate charge with the -- regarding the case where Jesse Patterson was the victim, the correct charge should be attempted murder.

And also, Judge, there's other victims where -- two other victims involved in the case. He was initially charged with assault and battery in the first degree. I disagreed with that charge and I actually thought it

should be a lesser charge of assault and battery in the second degree.

I called Ms. Zmroczek in March and relayed to her that I intended to proceed to grand jury the following month with the charges that I thought were appropriate for purposes of trial. I did that out of courtesy. I didn't want to blind side her and I wanted her to understand if her client wanted to take advantage of the plea as charged which would be a lesser classified offense then he could do that before it got to the grand jury.

I just wanted to clear that up. I did not do anything to penalize Mr. Ard for electing a trial. I did that because based on the evidence that's what I thought the proper charges should be.

THE COURT: All right. I'm not exactly sure the basis of Ms. Zmroczek's -- she indicated initially that she had just gotten, received some discovery.

And that discovery had something to do with this motion. And then -- but it appears that her argument in her motion is that the motion is, I mean, the charges are more as a punishment against your client because your client elected to go forward with the trial.

I mean, she certainly has the right to do so. It's not that -- I mean, if you've got some problem with Brady or discovery or something like that, I'm not sure that

that, this is the motion that would be, encompass that kind of argument.

But, you know, the State has wide latitude in determining what it is, how they charge various defendants in every case. And in many instances they over-charge. In many instances they don't. And oftentimes when they over-charge it comes back to haunt them.

And, you know, there's a possibility of some lesser included in some of these. I don't know anything about the facts other than I understand it was some sort of altercation that took place down in Five Points and --

MS. ZMROCZEK: And, Your Honor, the only reason for including the discovery was that those were the medical records and Ms. Garfield is absolutely correct. She did advise me that she believed that attempted murder was the appropriate charge for Jesse Patterson.

Your Honor, I simply didn't have any way to express that to my client because I did not have medical records. So that's why I specifically put that in there as well.

THE COURT: Well, I guess if they don't prove the elements or miss one of them, there's no circumstantial or any direct evidence, then you might prevail on a directed verdict motion.

All right. But I'm going to deny your motion. I think that the State has --

MS. ZMROCZEK: The last motion I believe requires testimony of witnesses.

THE COURT: What is that, the last one?

MS. ZMROCZEK: It's a motion in limine regarding the cameras, the security cameras, the introduction of the videos and security cameras.

THE COURT: Are y'all ready to go forward on the jury?

MS. GARFIELD: Yes, sir.

THE COURT: All right. We'll take that up before we start the trial.

MS. ZMROCZEK: Thank you.

THE COURT: All right. Let's bring the jury up, if we could.

THE BAILIFF: Yes, Your Honor.

THE COURT: Ms. Garfield, do you have that organization?

(Document handed to the Judge.)

MS. GARFIELD: Judge, is that reciprocal, Number 11?

THE COURT: Yes, ma'am.

MS. GARFIELD: We would just ask you to include Project Innocence or Innocence Project. I'm not sure which one it is.

MS. ZMROCZEK: Innocence Project.

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MS. GARFIELD: Innocent Project or any other --

THE COURT: Wait a minute. What is the name of it? Innocence Project?

MS. ZMROCZEK: The Innocence Project.

MS. GARFIELD: Or any other prisoner's rights groups.

(Off-the-record discussion.)

(Jury panel enters courtroom at 12:20 P.M.)

THE COURT: Good afternoon, ladies and gentlemen. My name is Jim Barber. And I'm a Circuit Judge here in the Fifth Judicial Circuit. I'm holding what is called general sessions court or criminal court this week.

And we are about to select a jury in the case entitled the State of South Carolina versus Stewart Randall Ard.

And Mr. Ard has been indicted for a number of offenses, ladies and gentlemen. He has been indicted for the offense of attempted murder. And the indictment alleges that Mr. Ard did in Richland County on or about July 28, 2013, with the intent to kill or attempt to kill Jesse Patterson with malice aforethought, either express or implied.

He's indicted for the offense of carrying a concealed weapon which the indictment alleges that on or about July 28, 2013, Mr. Ard did unlawfully carry a deadly

weapon usually used for the infliction of personal injury, that being a knife, which was concealed about his person.

He's been indicted for the offense of assault and battery second degree wherein the indictment alleges that Mr. Ard did in Richland County on or about July 28, 2013, commit an assault and battery in the second degree upon the victim Gabriel McDaniel which resulted or could have resulted in serious bodily injury.

He's been indicted with another offense of assault and battery in the second degree where the indictment alleges that he did on or about July 28, 2013, commit an assault and battery in the second degree upon the victim of Joseph Molino which resulted or could have resulted in serious bodily injury.

And he's been indicted for a third offense of assault and battery in the second degree. That indictment alleges that Mr. Ard did in Richland County on or about July 28, 2013, commit an assault and battery in the second degree upon the victim Scott Flemming which resulted or could have resulted in moderate bodily injury.

Now, ladies and gentlemen, to these indictments the Defendant has entered pleas of not guilty which now places upon the State the burden of proving the Defendant guilty and proving him guilty beyond a reasonable doubt of each

and every charge for which he is here in this courtroom.

I want you to understand one thing, ladies and gentlemen. These indictments are not evidence and are not to be considered by you for any purpose other than they are notice documents. They have put the Defendant on notice of the respective charges. And as I told you, he has entered not guilty pleas to all of the charges.

In our system of justice, ladies and gentlemen, we have two basic bedrocks which you need to keep in mind throughout the course of this trial. The first is: In every instance the Defendant comes into the courtroom presumed to be innocent and that presumption of innocence remains with the Defendant throughout the course of the trial and would only change if the jury, after hearing all of the evidence, has determined that the Defendant is guilty and guilty beyond a reasonable doubt.

The second bedrock is that in every instance the burden of proving these offenses falls upon the State of South Carolina. The State must prove the Defendant guilty of each and every offense for which he is charged and prove him guilty by proof beyond a reasonable doubt. The Defendant has no burden of proof whatsoever. As I told you, he's presumed to be innocent and the burden falls upon the State of South Carolina.

Now before we begin this process, ladies and

gentlemen, I have certain questions that I want to ask you and I have some individuals who I want to either read their name or introduce you if they are here today.

First I want to introduce you to Mr. Ard. Mr. Ard, if you can please stand and face the jury.

THE DEFENDANT: (Complies.)

THE COURT: This is Mr. Stewart Ard, ladies and gentlemen. And I would inquire at this time: Is there any member of this jury panel or any member of the jury panel's immediate family who is related by blood or connected by marriage, or either now or in the past has had a close personal relationship with Mr. Ard, or either now or in the past has had an employment or a business relationship with Mr. Ard? If so, please stand.

(No response.)

THE COURT: All right. Thank you.

Ladies and gentlemen, in most instances when parties come into court they are represented by attorneys. And that is in fact the case here today. The State of South Carolina is represented by the Solicitor's Office of the Fifth Judicial Circuit. Those attorneys from the solicitor's office are Ms. Dolly J. Garfield. And this is Ms. Garfield standing right here. Ms. Luck Campbell, and this is Ms. Campbell, and Mr. Ramie Shalabi.

MR. SHALABI: That's right.

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THE COURT: You're young, aren't you?

MR. SHALABI: I am.

THE COURT: Ladies and gentlemen, these are all members of the South Carolina Bar. They're employed with the Fifth Circuit Solicitor's Office.

And I would inquire at this time: Is there any member of this jury panel or any member of the jury panel's immediate family who's related by blood or connected by marriage to any of these attorneys, or to anyone in the Solicitor's Officer of the Fifth Judicial Circuit, or either now or in the past has had an employment or a business relationship with the Fifth Circuit Solicitor's Office, or either now or -- let me finish -- had some connection with anybody in the solicitor's office?

Yes, ma'am. Tell me your name.

THE JUROR: I am Elizabeth Poole, Juror Number 213.

THE COURT: All right. Ms. Poole, what is your situation?

THE JUROR: My son-in-law is an Assistant Deputy Solicitor for the Fifth Circuit. He is working out of the Kershaw Office right now.

THE COURT: And who might that be?

THE JUROR: Curtis Hutchinson.

THE COURT: All right. I think probably with that

connection, I'm going to excuse you from service on this jury. Okay?

THE JUROR: Yes, sir.

THE COURT: If you'll just have a seat, ma'am. Thank you. All right.

Ladies and gentlemen -- yes, ma'am?

THE JUROR: My name is Helen Rapoport and my husband, Mark, works for the Prosecution Commission and represents the solicitors.

THE COURT: Well, that -- the fact that you have a husband that works for the Prosecution Commission, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: I can do that.

THE COURT: You can be fair and impartial?

THE JUROR: Yes, sir.

THE COURT: Okay. Thank you, ma'am.

Ladies and gentlemen, representing Mr. Ard is Ms. Aimee Zmroczek. And this is the young lady standing right here. And Mr. Wade Dowtin. This is Mr. Dowtin standing right here. And they too are members of the South Carolina Bar and their offices are in Columbia, but they practice throughout the State of South Carolina.

And I would inquire at this time: Is there any

member of this jury panel or any member of this jury's panel's immediate family related by blood or connected by marriage, or either now or in the past has had a close personal relationship with either of these attorneys, or either now or in the past has had an employment or a business relationship with either of these attorneys, or either now or in the past has been represented by either of these attorneys? If so, please stand.

(No response.)

THE COURT: All right. Thank you.

Ladies and gentlemen, I'm now going to read you the names of some potential witnesses who may testify in this trial. If any of these witnesses are here, I would ask them to stand so that the jury can see who they might be.

Mr. Scott Edward Fleming.

Kaitlyn Griffin, Richland EMS. Michael Menger, EMS. Steve Tackett, T-A-C-K-E-T-T, with the Richland County EMS.

Jesse Patterson.

Gabriel Michael McDaniel.

Jason Skaggs.

Benjamin Geno.

Brian Bundy.

Brett Babcock.

Stephen Richardson.

Alexander Donyphan Cromer.

James Edward Chitwood, Jr.

Amethyst Ladonna Lorraine Ganaway.

Kalyx Johnson.

Derrick Anderson.

Dr. Jeremy Reeves.

Moffatt Bradford.

Courtney Walker.

Ryan Kinard.

Investigator Matthew McCoy of the Columbia Police Department.

Carey Shealy.

Officer Joseph Czeladko of the Columbia Police Department. Officer Theodore MacLaughlin, Columbia Police Department.

Jackie Richburg with 9-1-1.

Corporal Matthew Buck with the Columbia Police Department. Sergeant Chad Branham with the Columbia Police Department. Tammy Davis Moore with the Columbia Police Department.

Dr. David Ford with the Palmetto Health Hospital.

Joseph Molino, Jr.

Sergeant Robert Waters, W-A-T-E-R-S, with the Alvin S. Glenn Detention Center.

I'll inquire at this time, ladies and gentlemen:

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Is there any member of the jury panel or any member of this jury panel's immediate family related by blood or connected by marriage, or either now or in the past have had a close personal relationship with any of those individuals, or either now or in the past has had an employment or a business relationship with any of those individuals? If so, please stand.

Yes, sir, your name?

THE JUROR: Brett Williams, 288. I work with Bell South. I've been to Scott's business before, just work related, nothing personal.

THE COURT: The fact that you've had that business relationship, would that prevent you from listening to the evidence in this case, and based upon such evidence render a fair and impartial verdict?

THE JUROR: I don't think so, no.

THE COURT: I need you to be --

THE JUROR: I would say no.

THE COURT: No. Okay. Thank you, sir. All right. Tell me your name.

THE JUROR: Jonathan King. I'm Juror 159. I'm a physician. I work with -- have interactions with David Ford at Palmetto.

THE COURT: The fact that you have that employment situation, would that prevent you from listening to the

evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir.

THE COURT: All right. Thank you, sir.

All right. Ladies and gentlemen, has any member of this jury panel ever been a witness in a criminal case? And I don't mean a traffic case or a DUI or something like that, but if you've been a witness in a criminal case please stand at this time.

Yes, ma'am, your name?

THE JUROR: Joni Splett, 251.

THE COURT: I'm sorry?

THE JUROR: Joni Splett.

THE COURT: Splett?

THE JUROR: Number 251.

THE COURT: What is your situation?

THE JUROR: I was, like, seven years old and there was just an incident of somebody, an assault, somebody hit my sister and I was there to see it.

THE COURT: The fact that you had that experience, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: I don't think so, no.

THE COURT: Thank you, ma'am.

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All right. Is there any member of this jury panel who is a member or of, or donates money to, or receives assistance from any community or law enforcement department or victim's advocacy group or prisoner rights group? And these include but not limited to Mothers Against Drunk Driving, South Carolina Law Enforcement Association, Al-Anon, partnership for a Drug-Free America, Sister Care, the State Office of Victim's Assistance, South Carolina Victim's Assistance Network, the Innocence Project, or any other similar organization? If so, please stand.

Oh, I'm sorry. Yes, ma'am, your name?

THE JUROR: Dianne Caldwell.

THE COURT: Ms. Caldwell, what's is your situation?

THE JUROR: I am a licensed clinical social worker so the agencies that you've mentioned, I work closely with them.

THE COURT: The fact that you have that employment experience, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, it wouldn't.

THE COURT: All right. Thank you, ma'am.

Yes, sir, your name again?

THE JUROR: Juror 159, Jonathan King. I care for patients who come to us through Victim's Assistance.

THE COURT: The fact that you have that employment experience, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: It will not adversely affect.

THE COURT: All right. Thank you, sir.

All right. Have any of you or your immediate family or close personal friends ever worked for or had other professional contact with any law enforcement, investigative agencies, security companies, or agencies or any prison agency? If so, please stand.

Yes, ma'am, your name?

THE JUROR: Carol Tripp.

THE COURT: All right.

THE JUROR: My daughter was a crime analyst with the City of Columbia Police Department.

THE COURT: The fact that you have a daughter that was in law enforcement, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, sir, your name?

THE JUROR: Sheldon Priester, Juror Number 217. I

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have aunts and uncles throughout Richland County, some retired.

THE COURT: You have some family members who either have been or may still be in law enforcement?

THE JUROR: Yes, sir.

THE COURT: Would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, it would not.

THE COURT: Thank you, sir.

Y'all think about these things.

Yes, ma'am, tell me your name, please.

THE JUROR: Barbara Byers, Juror 36. I have a son-in-law who is a deputy sheriff for Richland County.

THE COURT: The fact that you have a family member in law enforcement, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir.

THE COURT: Thank you, ma'am. Yes, ma'am, your name again, please?

THE JUROR: Dianne Caldwell. My son is an investigator with a state commission.

THE COURT: You have a son that's in investigative work. Would that prevent you from listening to the

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evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir.

THE COURT: Thank you, ma'am.

Yes, sir, Doctor, your name again?

THE JUROR: Jonathan King, Juror 159. I have a brother-in-law who's a former deputy sheriff.

THE COURT: The fact that you have a family member who was formerly in law enforcement, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir.

THE COURT: Thank you, sir. Yes, sir, your name?

THE JUROR: Juror 283, Derrick Washington. I used to work for the Juvenile Justice Department.

THE COURT: The fact that you formerly were employed with DJJ, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, Your Honor.

THE COURT: All right.

Ladies and gentlemen, has any member of this jury panel or any member of the jury panel's immediate family or close personal friend ever been the victim of a crime? And I mean something fairly serious. If so, please stand.

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THE COURT: What I want you to do is come down here and talk to me here with the court reporter if you would, please, sir.

(Juror approaches.)

THE COURT: Yes, sir. Tell me your name, please.

THE JUROR: Sheldon Priester.

THE COURT: All right. Mr. Priester, what do you want to tell me?

THE JUROR: A few years ago when I was roughly 20 my uncle by the name of Frederick Priester, he was stabbed several times while being robbed at an ATM. And I don't know if they ever caught the --

THE COURT: The fact that you have that history in your family, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir. It wouldn't.

THE COURT: Good. Thank you.

MS. GARFIELD: What's his name?

MR. SHALABI: Priester.

THE COURT: All right. Thank you, Mr. Priester.

(Juror approaches.)

THE COURT: Yes, sir, Doctor. Tell me your name again.

THE JUROR: Jonathan King, Juror 59.

My son was a victim of an assault this spring. It has yet to go to trial.

THE COURT: The fact that you have that, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir.

THE COURT: Thank you, sir.

Is there any member of this jury panel or any member of the jury panel's immediate family or close personal friends who has been or is a member of Five Points -- I think it may be Merchants Association, but Five Points Association? If so, please stand.

THE JUROR: May I have a moment with you, please?

THE COURT: Sure.

(Juror approaches.)

THE COURT: Yes, sir.

THE JUROR: Juror 293.

THE COURT: Wait a minute.

THE JUROR: I'm sorry. I'm Juror 293, Richard Williamson. I didn't want to say anything but my uncle was a captain of Richland County under Sheriff Sloan. I used to ride him on the graveyard shift and I saw a lot of garbage. He's now deceased.

THE COURT: The fact that you have that history

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would that prevent you --

THE JUROR: Most definitely. I saw a lot of garbage.

THE COURT: So you could not be fair and impartial?

THE JUROR: No, sir.

THE COURT: If you'll have a seat --

THE JUROR: I didn't want to embarrass anyone.

THE COURT: Just go all the way in the back where that bailiff is. Thank you, sir.

This juror has been excused. What's your number, please, sir?

THE JUROR: 293, sir.

THE COURT: Now, this was an interesting question. Does any member of this jury panel frequent Five Points on a regular basis? You define regular.

Yes, sir. Tell me your name.

THE JUROR: I'm Michael Heath.

THE COURT: Mr. Heath, the fact that you --

THE JUROR: Juror 47.

THE COURT: -- frequent Five Points, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, sir.

THE COURT: All right. Thank you, sir.

Yes, sir, your name?

THE JUROR: Patrick Schmeckpeper, Juror Number 235.

THE COURT: The fact that you frequent Five Points, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No, Your Honor.

THE COURT: All right. Thank you.

Yes, ma'am, your name?

THE JUROR: Elisabeth Engle, 82.

THE COURT: The fact that you frequent Five Points, would that prevent you from listening to the evidence in this case and based upon such evidence render a fair and impartial verdict?

THE JUROR: No.

THE COURT: All right. Thank you, ma'am.

Ladies and gentlemen, does any member of this jury panel have any knowledge about this case, read anything about it, seen anything about it, heard anything about it? If so, please stand.

(No response.)

THE COURT: Any member of this jury panel formed or expressed an opinion about this case or its outcome? If

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so, please stand.

(No response.)

THE COURT: All right. Ladies and gentlemen, at the end of this case I will charge you or instruct you as to the law as it applies to this type of case. You, if you are on the jury panel, will be the fact finders of the case. You will listen to the evidence and you'll determine what you believe to be the facts and then you will apply the law as I give it to you relating to this case. It is your obligation to accept the law as I give it to you and apply it to the facts of this case.

Is there any member of this jury panel who believes you will not be able to comply with my instructions? And by that I mean, accept the law as I give it to you and apply it to the facts of the case.

If you do not think you can comply with my instructions, please stand at this time.

(No response.)

THE COURT: Any member of this jury panel know of any bias or prejudice either for or against the State or for or against the Defendant in this matter? If you do, please stand.

(No response.)

THE COURT: Can each member of this jury panel be fair and impartial to both the State and to the

Defendant? If you believe you cannot be fair and impartial, please stand at this time.

(No response.)

THE COURT: All right. Any further instructions from the State?

MS. GARFIELD: No, sir.

THE COURT: Any inquiry, any further inquiry from the Defendant?

MS. ZMROCZEK: None from the defense.

THE COURT: Madam Clerk, we are going to pick two alternates, five and five.

THE CLERK: As I call your number, please come to the microphone at the center of the courtroom. At the microphone just state your place of occupation.

Juror 262. Please bring any personal items that you have with you.

(White male comes forward.)

THE JUROR: I'm a student at USC.

THE CLERK: What says the State?

MS. CAMPBELL: Please present the juror.

THE CLERK: What says the Defense?

MS. ZMROCZEK: Please have a seat in the jury box.

THE BAILIFF: Sir -- sir, come this way, please.

THE CLERK: Juror Number 184.

(White male comes forward.)

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THE JUROR: McEntire Produce.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please present the juror.
THE CLERK: Please have a seat in the jury box. Juror Number 39.
(Black female comes forward.)
THE JUROR: I'm a school social worker.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please excuse the juror for the trial of this matter.
THE CLERK: Please return to the back of the courtroom.
THE BAILIFF: This way, ma'am.
THE CLERK: Juror Number 239.
(White male comes forward.)
THE JUROR: I'm a law student at USC. Law clerk at South Carolina Attorney General's Office.
THE CLERK: What says the State?
MS. CAMPBELL: Please excuse the juror.
THE CLERK: Please return to the back of the courtroom.

Juror Number 201.
(White female comes forward.)
THE JUROR: I'm a professor and department chair at the University of South Carolina.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please seat the juror.
THE CLERK: Please have a seat in the juror box.
THE BAILIFF: Watch your step, please.
THE CLERK: Juror Number 86.
(White female comes forward.)
THE JUROR: University of South Carolina.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please excuse the juror for the trial of this matter.
THE CLERK: Please return to the back of the courtroom.
Juror Number 296.
(White male comes forward.)
THE JUROR: Time Warner Cable.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.

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THE CLERK: What says the defense?
MS. ZMROCZEK: Please seat the juror.
THE CLERK: Please have a seat in the jury box.
Juror Number 97.
(Black female comes forward.)
THE JUROR: Stay-at-home mom.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please seat the juror.
THE CLERK: Please have a seat in the jury box.
Juror Number 159.
(White male comes forward.)
THE JUROR: Physician.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please excuse the juror for the trial of this case.
THE CLERK: Please return to the back of the courtroom.
Juror Number 88.
(White female comes forward.)
THE JUROR: Teacher, Richland County School District One.

THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please seat the juror.
THE CLERK: Please have a seat in the jury box.
Juror Number 305.
(White female comes forward.)
THE JUROR: Teacher, Lexington County Schools.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please seat the juror.
THE CLERK: Please have a seat in the jury box.
Juror Number 244.
(White male comes forward.)
THE JUROR: Teacher, Lexington-Richland Five.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please seat the juror.
THE CLERK: Please have a seat in the jury box.
Juror Number 253.
(White female comes forward.)
THE JUROR: Teacher, Richland County.
THE CLERK: What says the State?

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MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please excuse the juror for the trial of this matter.
THE CLERK: Please return to the back of the courtroom.
Juror Number 221.
(White female comes forward.)
THE JUROR: Teacher at Columbia College, and I'm an attorney.
THE CLERK: What says the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: What says the defense?
MS. ZMROCZEK: Please excuse the juror for the trial of this matter.
THE CLERK: Please return to the back of the courtroom.
Juror Number 198.
(White female comes forward.)
THE JUROR: Teacher, Newberry County.
THE CLERK: What say the State?
MS. CAMPBELL: Please present the juror.
THE CLERK: Does the defense challenge for cause?
MS. ZMROCZEK: I do not.
THE CLERK: Please have a seat in the jury box.

Juror Number 140.

(White female comes forward.)

THE JUROR: Teacher, Lexington-Richland School District Five.

THE CLERK: What says the State?

MS. CAMPBELL: Please present the juror.

THE CLERK: Does the defense challenge for cause?

MS. ZMROCZEK: We do not.

THE CLERK: Please have a seat in the jury box.

Juror Number 109.

(White male comes forward.)

THE JUROR: Self-employed mortgage broker.

THE CLERK: What says the State?

MS. CAMPBELL: Please present the juror.

THE CLERK: Does the defense challenge for cause?

MS. ZMROCZEK: We do not.

THE CLERK: Please have a seat in the jury box.

Juror Number 75.

(White female comes forward.)

THE CLERK: What says the State?

MS. CAMPBELL: Please excuse the juror.

THE CLERK: Please return to the back of the courtroom.

Juror Number 251.

(White female comes forward.)

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THE JUROR: Post bachelor research fellowship at USC.

THE CLERK: What says the State?

MS. CAMPBELL: Please present the jurors.

THE CLERK: Does the defense challenge for cause?

MS. ZMROCZEK: We do not.

THE CLERK: Please have a seat in the jury box. Juror Number 295.

(Black male comes forward.)

THE JUROR: I'm a commercial truck driver.

THE CLERK: What says the State?

MS. CAMPBELL: Please present the juror.

THE CLERK: What say the defense?

MS. ZMROCZEK: Please seat the juror.

THE CLERK: Please have a seat in the jury box. Juror Number 163.

(Black female comes forward.)

THE JUROR: Teacher with Kershaw County School District.

THE CLERK: What says the State?

MS. CAMPBELL: Please present the juror.

THE CLERK: What says the defense?

MS. ZMROCZEK: Please seat the juror.

THE CLERK: Please have a seat in the jury box.

THE COURT: All right. Anything from the State

with respect to the composition of the jury?

MS. CAMPBELL: Beg the Court's indulgence.

(Pause.)

MS. CAMPBELL: No, sir.

THE COURT: Anything from the defense?

MS. ZMROCZEK: No motions from the defense, Your Honor.

THE COURT: All right. Ladies and gentlemen of the jury panel that did not get selected, I thank all of you for making yourself available. I'm going to ask you if you will return back downstairs to the jury assembly room. You'll get further instructions at that time.

Y'all have a nice day. Thank you again.

(Jury panel exits courtroom at 12:53 P.M.)

THE COURT: All right. Ladies and gentlemen, I'm not going to swear you at this time. We're getting ready to go to lunch. I'll let you leave and go to lunch. I'll swear you when you get back.

But before you go I want to take a few minutes and tell you about this process in case you've not served on a jury before or it's been some time that you have.

I want to tell you, this case is very, very, very important, both to the State and Defendant. So we want to do everything we can to make sure that the State and the Defendant get a fair and impartial trial. And one of the

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ways I'm going to ask you to help me do that, ladies and gentlemen, is that I'm going to ask that you not discuss this case with each other or with anyone else at any time until you have been given instructions by me that you can begin your deliberations.

So any time we take a break, when you go back to the jury room, do not discuss the case with each other. When we take a break and you go out of the courthouse, you go to lunch, you go home tonight, go home tomorrow night, do not discuss the case with anybody that you come in contact with.

And the reason I ask you to do that, ladies and gentlemen, you're the judges of the facts in this case and you are supposed to determine what you believe to be the facts based on what is put forth here in this courtroom.

And we want to make sure that both sides have been given a full opportunity to offer everything they wish to offer in front of you before you begin to formulate any opinion about the case. And if you go back to the jury room and start talking to each other about it before both sides have completed whatever it is they wish to offer, then you may begin to formulate some opinion about the case.

When you go home or go to lunch or go wherever you go, and you run into a family member or a friend or

whoever, I promise you if you talk to them about the case they'll offer you an opinion about the case and they will not have heard one thing that has been offered into evidence in this court. So, please do not do that at all.

And every time you leave this courtroom I will attempt to remember to remind you not to discuss the case with each other or with anyone else. When you come back in the morning, I will inquire, make inquiry with you about whether you've been approached or you've discussed the case.

The other thing I'm going to ask you to do is don't do any private investigation in this case. Don't get on the Internet, get on Google, don't see what you can find out about it. If they mention locations, don't drive by any locations. If they mention something that you think is interesting, don't do your own independent inquiry. As I told you, you are to decide this case based upon the evidence that's presented here in this courtroom and not on anything else.

Now, ladies and gentlemen, when we come back, I'm going to take a few minutes and tell you a little bit about the process, how a trial unfolds. I have a couple matters I have to take up with the attorneys before we can actually begin the trial. And when we begin the trial

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that will be -- I'll turn it over to the attorneys and they will make their opening statements and then begin the process of calling witnesses and putting up evidence.

I'm going to ask you to be back here at 2:30. That may seem like a long lunch but I have to take some time to deal with these other matters.

I've introduced you to a number of people that are going to testify in this trial. Let me tell you some of the people that you're going to have contact with that will be here to assist you and some of the people that you will see in the courtroom during the course of the trial.

The young lady seated right to my right is my law clerk and that's Kaitlin Preswick and somewhere around here I have another law clerk. I don't know where he is. Down there. The young lady that's seated in front of me is Ms. Pendergrass. She is a clerk with the clerk's office, and she will help me throughout the course of the trial as you've observed in the jury selection process.

You may have heard Judge Benjamin talk about a court of record this morning. Well, this is a court of record. And it's a court of record because everything that's being said is being taken down by our court reporter, Ms. Young, who's from Aiken, and is lucky enough to be up here in the hottest city in the State of South Carolina this week and, but she'll make a record of

everything that's being said.

The folks that you're going to have the most contact with, ladies and gentlemen, are our bailiffs. And you're fortunate that you have good bailiffs, experienced bailiffs, real gentlemen, and they will show you in just a few minutes how to get from where you are to the jury room, how to get to the jury room outside the courthouse. They'll take roll when you come back. They'll take your telephones when you come in in the morning or at lunch.

Our bailiffs are Mr. Dye, who is the gentleman seated all the way in the back; Mr. Addison, who is the gentleman seated there; and where is Mr. Talbert? There's Mr. Talbert. He's over there with my law clerk hiding out. So these men know what they're doing. They've been here. They know the courthouse. Any questions, any problems come up, bring it to their attention and they will either give you an answer or they will go find who can give you an answer. And they'll assist you in any way they possibly can.

So y'all have a nice lunch. Do not discuss the case with each other or anyone else while you're gone. Be back here so that we can start at 2:30.

One of the things that I -- really it's a pet peeve, promptness. And I expect everybody to be prompt. And I ask you to be prompt. I expect the litigants and my

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lawyers and all the court personnel to be on time. Your time is valuable. Everybody's time is valuable. So please be on time.

I operate on two rules; the Vince Lombardy Rule is when I say 2:30, probably 2:20 is a good time to be here. And I operate on the Chris Rock Rule. And that is, you're never early, you're either on time or you're late. So don't think getting here 10 minutes early is going to make you early.

So y'all have a nice lunch and we'll see you back here at 2:30 and we'll crank up the trial.

THE BAILIFF: Follow me, please.

THE COURT: Thank you all. If you'll go with Mr. Dye and Mr. Talbert and Mr. Addison.

(Jury exits courtroom at 1:00 P.M.)

THE COURT: What kind of -- y'all going to offer some testimony about this?

MS. CAMPBELL: Judge, she's requesting testimony. I can tell you just basically. We have -- there is a videotape from the cameras there in Five Points. We have the person who's in charge of all the videotapes and retrieved the videotapes in this case. He can authenticate them.

In addition to that, they can be authenticated by each and every witness that's in them as to what had

happened that night. I understand she's objecting, I believe, to authentication. I'm not sure what her grounds are.

And I don't know that any testimony is actually necessary.

THE COURT: What is it you want witnesses to testify to?

MS. ZMROCZEK: Thank you, Your Honor.

It's not -- it's not simply authenticity. Here's the issue, and you may or may not be familiar with the cameras down at Five Points.

THE COURT: I don't frequent Five Points. And I encourage my children not to go to Five Points.

MS. ZMROCZEK: If they did they would be on camera, Your Honor, because there are camera everywhere

THE COURT: That's probably a good thing.

MS. ZMROCZEK: Yes.

One of the issues, Your Honor, is that I had several questions regarding how many cameras were present. It's my understanding that they're entered into with a contract with a private third party. I don't know what kind of rules they have as far as monitoring or protecting.

And, Your Honor, I've attempted to contact this person over and over.

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THE COURT: Who is the camera person?
MS. CAMPBELL: Mr. Shealy.
THE COURT: Who?
MS. CAMPBELL: Mr. Shealy.
THE COURT: Well, what do you want to do? Do you want to talk to him?
MS. ZMROCZEK: That may solve --
THE COURT: I can't make him talk to you, but I'll -- before he testifies, I'll give you an opportunity to try and talk to him. I don't know why he wouldn't talk to her and tell her how many cameras are down there or whatever it is. She can certainly ask him on the stand.
MS. CAMPBELL: Your Honor, I think he'll be here at 1:30.
THE COURT: Well, I won't.
MS. CAMPBELL: I understand.
THE COURT: Is he going to be your first witness?
MS. CAMPBELL: Probably, yes.
THE COURT: All right. Well, if he's going to be here at 1:30, I can give you a couple minutes to approach him.
MS. CAMPBELL: Be back quarter after?
MS. ZMROCZEK: I'm not going anywhere, Your Honor, unless they tow my car --
THE COURT: Unless what?

MS. ZMROCZEK: I said, unless they tow my car but actually I'll still be here.

THE COURT: Are you still driving that short distance?

MS. ZMROCZEK: Well, I know. It's hot out.

THE COURT: Well, we'll make the witness available to talk to him first thing.

MS. ZMROCZEK: Thank you, Your Honor. That may solve a lot of issues.

THE COURT: You know, I don't see how that's going to affect whether he'll be able to testify or not testify. If they can't authenticate them, then they got a problem, but you can stop them at that point in time and they won't get to say much.

MS. ZMROCZEK: Thank you.

THE COURT: All right. Y'all have a nice lunch and we'll see you back here at 2:30. You be here at 2:15 or so.

MS. CAMPBELL: Yes, sir.

THE COURT: All right. Thank you all.

(Lunch break taken at 1:07 P.M., until 2:18 P.M., and the trial resumed:)

THE COURT: Who's here on the the 403? Y'all didn't get to come for jury selection?

UNIDENTIFIED SPEAKER: No, sir.

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THE COURT: All right. Go find another judge. Selecting a jury is one of the most important things on a trial.

A couple things, I received two notes from the jurors -- when y'all are finished y'all let me know.

MS. CAMPBELL: Sorry, Your Honor.

THE COURT: I have reviewed both notes with counsel for the State and for Mr. Ard. One of which was about one of our jurors is a nursing mother and she was concerned about her being able to take certain breaks in order for her to be able to do what she needed to do for her child. We've reviewed it with the attorneys and I told them, I got a great deal of expert advice from the lawyers after reviewing it. And I told her and she feels very comfortable that she'll be able to do what needs to be done and still serve on this jury.

Also got a note from a Juror, Rebecca Neeley. That other one was from Joni Splett.

Ms. Neeley says: I may or may not know one of the lawyers. She, I believe, is a friend of a friend. And I assume she's talking about defense counsel, and says: It will not affect my ability to be fair in this matter.

So, I've reviewed that. I will query her in just a moment before we start up.

Okay. Ms. Zmroczek?

MS. ZMROCZEK: Thank you, Your Honor.

I had an opportunity to speak with the private owner that runs the security system. And, Your Honor, my concern is that under Rule 106 the rule of completeness applies to, I know, when they are -- when typically a portion of a statement or a portion of a video is introduced and then defense counsel can request that the entire thing be produced.

Your Honor, my concern here is that we're provided -- I'm told that there were eight cameras within the bar and eight cameras outside of the bar, and there were some across the street as well. So my concern is that I wasn't provided all of those camera shots.

I was told, and I believe the testimony is going to be, that they were edited as -- according to what he, the private person who then delivers it to the police, determines is relevant. Your Honor, my concern is that we're not getting a complete picture of what happened that night. There are questions about -- there are questions that have been raised about who was the first arrest, what things were said, what happened within the time periods.

Additionally, my videos did not have time stamps. Apparently they are on the -- they are on the originals but they weren't on the ones that were provided to me or they didn't show up on my screen and I inquired about

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that.

But my greater concern, Your Honor, is that someone who's under no duty to preserve evidence or any kind of obligation to provide all the evidence, they simply pick out what they think is relevant which are a two-minute clip here, a four-minute clip here, instead of just giving the whole video and allowing us to decide if there's any exculpatory evidence on there or not.

I can't say that there was or not because we weren't allowed to see them. After three weeks the tapes were destroyed. My concern is that we're not getting a complete picture of --

THE COURT: You weren't allowed to see them?

MS. ZMROCZEK: Correct.

THE COURT: So they denied your being able to see the tapes?

MS. ZMROCZEK: Well, they denied them because they didn't exist.

THE COURT: So it wasn't a matter of you weren't allowed to see them. They weren't available for you to see because they had been damaged in some manner.

What do you want to tell me, Ms. Campbell? Anything?

MS. CAMPBELL: No, Your Honor. I mean, her argument, I think it's -- I guess she's arguing

completeness. The evidence is is what was pulled on the dates that shows there's eight different, I think, camera angles showing different angles of the actual altercation.

And the cameras that were used and the inventory that was retrieved was from the cameras that actually showed something.

I believe as far as authentication or admissibility, I'm not sure what her argument is. Maybe I missed that.

THE COURT: I don't think that's her -- she's arguing that she wasn't given the opportunity to see every video that was taken on, for some period --

MS. CAMPBELL: At Five Points on that night?

THE COURT: For some period of time. I assume at Five Points.

MS. CAMPBELL: Yes, sir.

THE COURT: Just to --

MS. CAMPBELL: And as in every case -- in every case involving an armed robbery case, a convenience store, or anything else, I mean, the same is true in every single case where we treat video. This is no different from a convenience store robbery or anything else.

THE COURT: Well, I don't know what your motion is, I guess to exclude this evidence. But I'm going to deny

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that. And you can cross-examine him and attempt to show what you think you can show on --

MS. ZMROCZEK: Certainly. And, Your Honor, can I just for -- I understand your ruling and I just want to be able to make sure that I understood that she said it's just like any other armed robbery. And my issue is that it just wasn't complete. And that's fine.

I understand that I can argue that to the jury.

THE COURT: All right. Are we ready to go?

MS. CAMPBELL: Yes, sir.

THE COURT: Let's bring the jury in -- bring in Juror Number 198 first, if you would, please.

MS. CAMPBELL: Your Honor, we have one other matter. I just need to put one other statement on the record. I just need to make a statement.

(Juror enters courtroom.)

THE COURT: Ms. Neeley, you can stay right there. I'm going to send you right back out. I got your note in which you indicate you may have some knowledge of one of the attorneys and I assume it's Ms. Zmroczek because --

THE JUROR: Yes, sir.

THE COURT: -- you've said that she might be a friend of a friend. And you indicated in your note that she -- it would not affect your ability to be fair and impartial in the trial. And I've reviewed your note with

the attorneys and don't be offended but your face is not familiar to her. So it may be through a friend of a friend --

THE JUROR: Yes, sir.

THE COURT: -- that you may have heard of her. She's well known all over the State of South Carolina.

So anyway, just to be sure, even though you may know somebody who knows this person, that would not affect your ability to be fair and impartial in this case; is that correct?

THE JUROR: Yes, sir.

THE COURT: All right. Thank you, ma'am. If you'll step back. We'll bring you back in just one minute.

(Juror exits courtroom.)

THE COURT: The note from Ms. Splett will be Court's Exhibit No. One, and the note from Ms. Neeley will be Court's Exhibit No. 2.

(Court's Exhibit Nos. 1 and 2, notes from Jurors Splett and Neeley, were marked and received into evidence.)

THE COURT: And what did you want to say, Ms. Campbell?

MS. CAMPBELL: Your Honor, the Defendant was advised of his rights and did give a statement; however, it is

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self-serving in nature, therefore we're not going to mention it and would not be mentioning it at all unless he of course takes the stand. We've just advised defense counsel of that so there wouldn't be any confusion or mention of it in opening statement or anything like that.

THE COURT: I think she was informed the other day that y'all did not intend to admit, to use the statement.

MS. CAMPBELL: Therefore wouldn't not be admissible so she would not be mentioning it.

THE COURT: I don't know what she might be doing with it. My guess is they're probably not going to -- I don't know, maybe they're going to put up a case but they do or they don't.

All right. Let's bring the jury in if we could, please, sir.

(Jury enters courtroom at 2:39 P.M.)

THE COURT: All right. Ms. Pendergrass, would you swear the jury, please?

THE CLERK: Yes, Your Honor.

(Jury impaneled.)

THE CLERK: You may be seated.

THE COURT: All right. Ladies and gentlemen, before I turn this matter over to the attorneys let me tell you a little bit about this process.

As I told you that when you come back and I let the

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lawyers get up and begin the trial, the first thing they're going to do is make an opening statement. The State will go first in making the opening statements. As a matter of fact, the State will go first throughout the course of this trial because, as I told you before we selected you, the State has the burden of proving their case and proving their case beyond a reasonable doubt. Because that burden falls upon the State, they get to go first throughout the course of the trial.

The opening statement, ladies and gentlemen, is the chance for lawyers to introduce themselves a little bit to you and for them to tell you what this case is all about. It's a chance for them to educate you or inform you about the case so as it unfolds you will have some knowledge about what the case is about.

As I told you, the Defendant, Mr. Ard, has been indicted for five offenses. One is attempted murder. And the State alleges that Mr. Ard did in Richland County on or about July 28, 2013, with intent to kill, attempt to kill Jesse Patterson with malice aforethought, either express or implied.

He's also been indicted for carrying a concealed weapon wherein the State alleges that he did on or about July 28, 2013, unlawfully carry a deadly weapon usually used for the infliction of personal injury, that being a

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knife, concealed with, about his person.

In addition he is charged with assault and battery second degree wherein the State says he in Richland County on or about July 28, 2013, committed an assault and battery in the in the second degree upon the victim, Gabriel McDaniel, which resulted or could have resulted in serious bodily injury.

The second assault and battery second degree alleges that Mr. Ard did in Richland County on or about July 28, 2013, commit an assault and battery in the second degree upon the victim, Joseph Molino, which resulted or could have resulted in serious bodily injury.

And the third assault and battery second degree alleges that Mr. Ard did in Richland County on or about July 28, 2013, commit an assault and battery in the second degree upon the victim, Scott Flemming, which resulted or could have resulted in moderate bodily injury.

As I told you earlier, ladies and gentlemen, these indictments are documents that have put the Defendant on notice of these particular charges. They are not evidence. They're not to be considered by you for any purpose other than they are notice documents.

And to these charges the Defendant has entered a plea of not guilty to each one which now places upon the State the burden of proving the Defendant guilty beyond a

reasonable doubt of all of the charges for which he has been indicted.

This Defendant is presumed to be not guilty. He's come into this courtroom with the presumption of not being guilty. And you are to remember that that presumption remains with him throughout the course of this trial and would only change if he is convicted after a jury has determined that he is guilty beyond a reasonable doubt.

Now, ladies and gentlemen, as I told you, this is a very, very important case to both parties. They have waited a long time to get this case up for trial. And now they are in front of you, an independent fact-finding body who will listen to the evidence, ultimately determine what you believe to be the facts, apply the law, and resolve the dispute that exists between the State of South Carolina and Mr. Ard.

After opening statements are made, ladies and gentlemen, the State will go forward with the presentation of its evidence. And I assume most of its evidence will come in by way of testimony from witnesses who will be put under oath, get in the witness box right there in front of your jury box and tell you what information they have about this case. They've seen something, heard something, tasted something, felt something, smelled something; they have some knowledge from one of their senses that gives

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them some factual basis to tell you what it is they know about the case.

Now we could hear from what we call an expert witness. That's a person who has specialized knowledge, skill, training in some particular field and can offer an opinion in his or her areas of expertise. Generally expert witnesses are people like physicians or engineers, people of that nature. And they can assist you, the triers of fact, in understanding some matter in controversy. Fact witnesses don't give opinions. They tell you what factual knowledge they have.

Other types of evidence that could be introduced in this case could be things like documents, photographs, things of that nature. That type of evidence will actually be given an exhibit number and will go with you to the jury room in the course of your deliberations so that you can review it and examine it during your deliberations.

Testimony, ladies and gentlemen, will go with you in your memory. So it is absolutely essential that you pay close attention to what's being said here in the courtroom.

If you can't understand somebody, if you can't hear somebody, let me know in some way and we'll make sure that witness or that lawyer or me, or whoever it is, speaks up

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or speaks more clearly so that you can hear what is being said here in the courtroom.

A third type of evidence that could come in is what we call a stipulation. And that's where the parties stipulate or agree as to some fact or some matter. If there is a stipulation the lawyers will tell me and I will tell you and you are to accept that fact as though it had been proven here in the courtroom.

Now after the State has put up whatever evidence the State wishes to offer, the Defendant is given an opportunity to offer any evidence the defense wishes to offer. But the Defendant does not have to put up evidence. The Defendant has no burden in this case. They don't have to do anything. It's all upon the State of South Carolina. So if the defense puts up evidence, I assume that most of it would be similar to the State's evidence and that is testimony from witnesses.

When both sides have completed the presentation of their evidence, ladies and gentlemen, the lawyers are given another opportunity to speak with you. And this is what we call a closing statement or a closing argument. And it is a little different from the opening in that the closing is a chance for the lawyers to review and recap with you what they believe the evidence showed in the course of the presentation and the trial. It is the

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chance for them to emphasize to you what they hope you will consider and discuss in the course of your deliberations. It is an opportunity for the lawyers to attempt to convince or persuade you as to why you should ultimately return a verdict for their respective client.

When both sides have completed their closing arguments, then I will charge you or instruct you as to the law. You will then retire to the jury room, begin your deliberations, determine what you believe to be the facts in the case, apply the law and ultimately render your verdicts in this case.

Now, ladies and gentlemen, as I told you, you are the fact finders in this case. You're the sole fact finders and nobody else will participate in that process but you.

My responsibility is a little different from yours. Mine is twofold. One, I'm sort of the referee in this trial. In most structured events we have rules. And we have rules for the trial of the case. We have rules of evidence and rules of procedure, and it's my responsibility to see that those rules are complied with. My other responsibility is to charge you or instruct you as to the law.

Now these lawyers have a responsibility in this case and that is that they are advocates for their

respective clients. I want you to pay close attention to what the lawyers say during the course of the trial. But understand this: What the lawyers tell you is not evidence. They are advocates for their clients. It's their responsibility to put forth everything they think that they should put in front of you that will assist their clients in this matter. So pay close attention but understand what they tell you is not evidence and it's not to be considered by you as evidence.

Now, ladies and gentlemen, this case, I anticipate, will go several days. I don't think it's going to go all week but it will probably get to the middle of the week. I anticipate that we will begin every day at 9:30 in the morning and hopefully we'll conclude each day by no later than 5:30.

We understand you have lives outside of this courtroom and you need to attend to those responsibilities as well. But as I told you, it's important and we want to make sure that both sides get a full opportunity in this matter.

I think with that said I'll now call on the solicitor. Ms. Garfield, are you ready to proceed?

MS. GARFIELD: Yes, Your Honor.

THE COURT: Would you please, ma'am.

MS. GARFIELD: May it please the Court.

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THE COURT: Yes, ma'am.

MS. GARFIELD: There are so many things that make the City of Columbia truly a wonderful place. And one of those treasures is the entertainment district known as Five Points. It has been a venue for years and years to people of all ages where celebrations have been held for birthdays, graduations, engagements, reunions of all sorts.

But on July 28 of last year, Stewart Ard, the Defendant in this case, went to Five Points to create nightmares for several individuals.

On that particular day, the incident location is Group Therapy Restaurant and Tavern. It's a business that's been there since the late '70s. It is on Green Street right across the street from the Five Points Post Office. It's a place that used to be the home of Group Therapy Chili Cook-off that raised thousands and thousands of dollars for charities in our community.

On that particular day the owner of Group Therapy, Scott Flemming, who's here in the courtroom, was enjoying a meal with his wife and some friends at a nearby business parlor called Nicky's, a fairly new establishment in the Five Points area.

When he concluded his meal he left his friends and family to go to his bar which he owned to check on a new

employee by the name of Jesse Patterson. Jesse Patterson had been there about a month and on that particular evening he was working the door as the doorman. His responsibility, to check identifications of patrons who arrived at the establishment.

As the two of them were talking, Scott learned from Jesse that there had been an incident just a few moments earlier where four individuals had been kicked out of the establishment for causing a ruckus, being a bit too rowdy. Not exactly ground-breaking news for a place that serves alcohol.

At any rate shortly thereafter, Benjamin Geno, who will be one of the individuals who had been kicked out, approached the two individuals at the door in front of Group Therapy. At that time Benjamin Geno swung at Jesse Patterson and behind him was Stewart Ard armed with a knife where he began, multiple times, stabbing Jesse Patterson and then Scott Flemming.

At that time Stewart Ard then ran back towards where his car was parked across from the Post Office. Two individuals, Gabe McDaniel and Joe Molino, who were bouncers at the bar beside Group Therapy and saw the commotion, began to chase Stewart Ard in the hopes of either apprehending this person who had committed these violent acts or getting any information that they could

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provide to law enforcement in capturing them.

Stewart Ard turned to the two of them and tried to stab them as well. Fortunately he did not succeed. Stewart Ard got into the car with the three other individuals that had been kicked out of the establishment and fled the area while Jesse Patterson lay on the floor in Group Therapy bleeding in pain and trying to breathe.

Ladies and gentlemen of the jury, I am Dolly Garfield and I'm a prosecutor here in Richland County. Seated at the table with me to my left is Luck Campbell a Senior Assistant Solicitor, and to my right, Assistant Solicitor Ronnie Shalabi. We are prosecutors for the State of South Carolina. Our client is the people of the State of South Carolina.

Just as you probably see crime shows on TV, CSI, and there are so many numerous ones of them, we deal with a lot of the same issues that you see on television on a daily basis. But those particular TV shows are very different from what you'll experience in this courtroom because this courtroom is real. You will hear from real witnesses, not paid actors with fictitious scripts. And you'll hear from real victims who were injured, and one particularly who fought for his life.

Ladies and gentlemen, Stewart Ard is charged with one count of attempted murder, three counts of assault and

battery in the second degree, and carrying a concealed weapon. We will prove to you these charges through witness testimony.

As the Judge instructed, the burden is on the State of South Carolina. And that is a burden that in this courtroom we welcome, and we promise to deliver to you. We will prove to you by calling several witnesses to the stand to include employees of Group Therapy Restaurant and Tavern, patrons, the people that were with Stewart Ard in the evening in question, and medical personnel, and law enforcement witnesses.

Ladies and gentlemen, today Stewart Ard sits before you presumed innocent. And that's the way it should be. That's what great about the United States of America.

Everyone in this courtroom has a job to do, as Judge Barber introduced to you several members of the courtroom staff. I also submit to you that you have an important job. It will be your job to listen to all of the evidence. Listen carefully. And at the conclusion of all of the evidence and after closing arguments, I submit that you will have no problem rendering a verdict finding Stewart Ard guilty of these heinous and unspeakable acts.

You will want to send Stewart Ard a message that we do not wish to violate and harm the people of Five Points who just want to create happy memories. He is presumed

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innocent but as each witness takes the stand and each piece of evidence is introduced, I submit that a little bit of that guilt (verbatim) will go away.

Presume he is wearing a cloak innocence around him and as each person takes the stand, a piece of that cloak will be ripped and at the end will bare him the guilty man that he is.

Thank you.

THE COURT: Ms. Zmroczek?

MS. ZMROCZEK: Thank you, Your Honor. May it please the Court.

Who is this? It's Packman, because when you flip it over you have the other half.

Your job is to be the deciders of fact. There's a great question of fact that needs to be answered. You may be familiar with bullies on the playground. And these bullies will tell you their side of the story and they'll tell you what they want you to hear and they'll show you what they want you to see so you don't look at them.

My name is Aimee Zmroczek. This trial is not about me. It's not about Mr. Dawtin. It's about Stewart Ard. Stewart Ard, sitting here at the table, his family right behind him. And it's about four people. Let me write those names down for you.

I'm going to make your job a little bit easier.

Stewart Ard is guilty of assault and battery second degree against Scott Flemming. He'll tell that you right now. This will make your job a little easier.

The difference in facts lies with Joe Molino and, most importantly, with Jesse. You notice assault and battery second degree. The legislature spent a long time and the Judge will read you the facts -- no, the Judge will read you the law. You apply the facts.

But assault and battery second degree implies that there are other degrees. And, there are. And we submit to you at the end of this trial the evidence will show that he's also guilty of assault and battery second degree on Jesse. And he's guilty of assault and battery third degree on Joe and Gabe. He's not running away from what he did. He's asking you to listen to those witnesses and to carefully look at the evidence, that law enforcement that testified did their job. They filled out their reports, they made their charges, they made their case based on what those witnesses will tell you.

So who becomes the most important people in this case to prove the evidence beyond a reasonable doubt to prove that they didn't encourage it, that they didn't bully?

Listen carefully to the testimony of those witnesses. Look closely at the evidence that the State

CAREY SHEALY - DIRECT BY GARFIELD

provides you. I submit when this evidence is all in front of you, you'll see who the real playground bully was. And it's at that point that you will come to the correct fact finding, that he is guilty of these charges. Thank you.

THE COURT: Madam Solicitor, are you ready to call your first witness?

MS. GARFIELD: Thank you, Your Honor. The State calls Carey Shealy.

CAREY WILLIAM SHEALY, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

THE BAILIFF: Watch your step, please.

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Mr. Shealy, if you'll state your full name for the record.

A. Carey William Shealy.

Q. Where do you live?

A. Circle.

Q. Is that here in Columbia?

A. Yes.

Q. And where are you employed?

A. Statewide Security Systems.

Q. Share with the jury a little bit about what Statewide Security Systems is.
A. Well, we've been in business over 30 years and we do do security systems and we're known for, you know, camera systems. We do them all over the state, hundreds of cameras all over the city.
Q. Is this residential solely or also businesses?
A. It's everything; business, homes.
Q. Do you have a contract with the City of Columbia?
A. We have a contract with the Five Points Association, Main Street Association, other associations, homeowners associations, et cetera.
Q. So you're a private business?
A. Yes.
Q. Specifically what kind of contract do you have with the Five Points Association?
A. Well, we install cameras like we do for our other customers. We maintain service on them. Whenever they have an incident, they call -- the police calls us. We get subpoenaed for video. We go and search the video and provide that to whoever requested it.
Q. Did you receive that type of request last July?
A. Yes.
Q. And specifically did it involve an assault at Group Therapy Restaurant and Tavern?

CAREY SHEALY - DIRECT BY GARFIELD

A. Right.
Q. And did you provide such video to law enforcement?
A. Yes.
Q. Have you reviewed that video in an effort to get ready for court today?
A. Yes, I looked at the video. I think I'm actually the one that made the original video. So I remember it very well.
Q. Sorry for interrupting. Have you reviewed videos that would be on this zip drive?
A. Yes.
Q. And the zip drive, Your Honor, I'm looking in reference to State's Exhibit Number 20.

Have you had an opportunity to review all of that video?
A. Yes.
Q. And can you describe the nature of those videos?
A. Well, you're going to see, basically, basically a person getting out of a car parked over by the Post Office. And the, I guess, the victim, the Defendant or -- excuse me, Scott, who was standing by the door. As soon as he turns from the door, a guy comes up and stabs him. And you see two other guys that are with him. And then after they do that, turns around and goes back back in the direction they came.

And so the cameras that are right there on the building capture all of that.

Q. From your security video system, did you actually retrieve the videos?

A. Yes.

Q. And did you edit them in any way?

A. No.

Q. And you've reviewed this in effort for court?

A. Yes.

Q. And it's the same video that you provided last July?

A. Yes.

MS. GARFIELD: Your Honor, at this time I'd like to introduce State's Exhibit Number 20.

MS. ZMROCZEK: Subject to my previous objection.

THE COURT: So admitted over the objection.

MS. GARFIELD: Beg the Court's indulgence.

(State's Exhibit No. 20, zip drive containing videos, received into evidence.)

MS. GARFIELD: Thank you, Mr. Shealy. Please answer any questions Ms. Zmroczek has for you.

THE WITNESS: Okay.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Mr. Shealy, how many cameras are depicted on this

CAREY SHEALY - CROSS BY ZMROCZEK

zip drive right here?
A. I believe there are seven or eight.
Q. Seven or eight?
A. Uh-huh.
Q. How many cameras actually captured the entire event that evening?
A. All the cameras on that video?
Q. All the cameras on this video.
A. Right. In other words, the camera -- there was one on the inside looking at, outside the door where he came up. There's also a couple of other cameras on the inside showing the person coming in and out. And then there's cameras on the outside, showing him walking back and forth.
Q. In fact, you have eight cameras inside of Group Therapy; correct?
A. Yes, ma'am.
Q. Are all eight cameras depicted on that zip drive?
A. No.
Q. How many of the cameras on the inside are depicted on that zip drive?
A. I believe two or three -- two, I think.
Q. Who made the decision to only present two or three to the police?
A. That would have been me.

Q. That would have been you?
A. Yes.
Q. And does that capture the entire evening or at least the entire time period that Mr. Ard was there?
A. It captures, for example, when I got there of course the incident's already happened. And I'm coming trying to figure out what happened. I look at the video and I see when it starts, when the person got out of the car and walked over and they stabbed somebody and they left.

So that was the main video I guess you would say. So from start to finish, if you will, for that.

And then there was, I guess they were in there earlier inside. So I made a video, a short video showing them inside. But it wasn't there the whole time. It might have been there.

Q. So it doesn't show any problems that occurred between the parties or amongst the parties --
A. I didn't --
Q. -- before?
A. I didn't see that.
Q. I'm sorry?
A. I didn't see that. I didn't look through the whole night of course, but --
Q. But you were the only one who got to make that

decision; right?
A. Well, of course when I give the video to the police, if there was any further reason for anybody wanting more video they could have asked. We could have gone back and looked to see if there's more video.
Q. But they ask didn't for it, did they?
A. No.
Q. And you're a private owner so you're not subject to the Freedom of Information Act; right?
A. Yes, ma'am.
Q. In fact, you and the Five Points Association specifically wrote that into your contract, didn't you?
A. They made that their agreement, yes.
Q. So that it wouldn't be subject to people to just ask to see; correct?
A. Well, they could subpoena it, I'm sure. We've been subpoenaed before.
Q. After a case has been brought?
A. At any time.
Q. And, how many -- how long do you keep those?
A. Well, the video records usually for three to four weeks. So if somebody called me two months after anything, you know, I'm not going to have that.
Q. Not going to have it even if it's subpoenaed?
A. Yeah, even if it's subpoenaed.

CAREY SHEALY - CROSS BY ZMROCZEK

Q. You stated that there were cameras outside that captured what you figured was the event; correct?
A. Yes, ma'am.
Q. How many cameras are located on the outside of Group Therapy?
A. Grill Teriyaki has eight cameras inside.
Q. Grill Teriyaki or Group Therapy?
A. Well, both actually. Grill Teriyaki has eight and Group Therapy has eight.
Q. Okay.
A. Both looking at the same kind of areas.
Q. And just in case the jury doesn't spend as much time at Five Points as we do, would it be safe to say this is Group Therapy and the Post Office is here and Grill Teriyaki is right here?
A. Uh-huh.
Q. And this is Harden Street?
A. Yeah, that's right.
Q. This is Harden Street. And which street is this?
A. Green Street.
Q. And so the cameras that are depicted on here, do they show a frontal view of what happened or just a side view?
A. We have a view looking this way. The camera's usually both ways, straight ahead. And then you have a

CAREY SHEALY - CROSS BY ZMROCZEK

camera at the door over here where you're talking about.
Q. Right here?
A. Yeah. There's cameras on Grill Teriyaki. They're a farther distance, of course. They're across the street.
Q. And what do these cameras show?
A. They look at the front of, you know, Harden Street, the side of Green Street and the back towards the Post Office.
Q. So essentially they look at the front door of Group Therapy?
A. There's one camera that points in that direction, yes.
Q. That camera wasn't provided to us, was it?
A. No.
Q. You said you don't edit the cameras?
A. That's right.
Q. But in essence you edit as far as the time. You cut down what you think is important, correct?
A. Well, again, for example in this particular case, you want to see what happened, okay. Here's what happened. I see them pull up. I see them walk in. I see them leave. That's beginning to end to me.

Now we could have gone an hour before, an hour after. We didn't for those reasons, but if they had wanted more we certainly would have gone back and looked

CAREY SHEALY - CROSS BY ZMROCZEK

for it but that's the way we do it.
Q. And you would agree with me that had we gone back an hour or 30 minutes, that it could have shown the full story, correct?
A. Well, I don't know what the full story is other than what the video would show. But I can tell you all we made the video of is what, what we have, what shows. Well we could have went, sure, and went back as long as you wanted to, as long as you needed to.
Q. I guess that's my point is that we don't know, right? We won't be able to know?
A. No.
Q. How much are you paid for these cameras?
A. We charge a monthly fee for our service and setup fee.
Q. You charge a monthly fee?
A. Uh-huh.
Q. And there actually has been discussion about requesting the cameras to be monitored at certain prime times for lack of a better word, right?
A. Sure.
Q. Have you had -- has that been done?
A. We've monitored cameras live like on New Years Eve. Not all of the cameras, obviously. Very few of them because you have to put them online, but we have a few on

CAREY SHEALY - CROSS BY ZMROCZEK

special occasions. We don't routinely.
Q. But not this evening?
A. No.
Q. But you would agree with me that the cameras, at least the little snippets that we have, would depict an accurate reflection of what was said, correct -- or, what was done, correct?
A. Yes.
Q. And there's no audio?
A. No.
Q. And some of the cameras are in color and some are in black and white. Explain to the jury why that is.
A. Cameras, some of them have an auto setting where they automatically switch from day to night, switch to color. Others depending on the lighting, you know, you would set it to be just color or black and white. It depends on the camera.
Q. And that can change or alter a little bit of what is seen on the camera as well, correct?
A. Well, it couldn't alter the video but, you know, obviously lighting affects -- just like in here, the lighting affects what you see.
Q. And then if there are impediments in the way, such as doors, then you obviously can only see -- if you just go down the side building, I think you said that you got a

view that comes this way, correct?
A. Yeah. When he come walking down the side, you see that. And then when Mr. Scott steps away from the door then you see from the inside.
Q. But you can't see what happens on the other side of the door, can you?
A. No. You can see -- yeah, no, you can't.
Q. Okay. Beg the Court's indulgence.
(Pause.)
Are there plans to put up more cameras?
A. Yes.
Q. It's true that you put up cameras in places that have a high incidence of problems, correct?
A. Well, we have customers, commercial customers, regular customers that put them up. I wouldn't necessarily say it's a high-crime area.
Q. Okay. Let's bring us back to Five Points.
A. Okay. Sure. Sure.
Q. There are a few areas of Five Points that you would consider or that Five Points Association would consider more dangerous than others, correct?
A. Well, I don't speak for them but there obviously are more areas you have more trouble than other areas in Five Points, that's true.
Q. And it's true that you have a lot more cameras

CAREY SHEALY - REDIRECT BY GARFIELD

located in and around Group Therapy, correct?
A. Well, around that area. Not just Group Therapy.
MS. ZMROCZEK: Thank you.
THE COURT: Anything, Ms. Garfield?
MS. GARFIELD: Briefly, Judge.

REDIRECT EXAMINATION

BY MS. GARFIELD:
Q. Mr. Shealy, defense counsel asked you some questions about videos that were not provided to law enforcement concerning this particular incident.
A. Sure.
Q. Did you provide video of the closer angles?
A. Yes. Uh-huh.
Q. So the ones that were not provided were the ones more far away?
A. Right.
Q. And she asked you about the cameras that are not monitored. I believe she means manpower, a person, somebody watching them 24-7?
A. That's right.
Q. But they are recording?
A. Yes, that's the main thing.
Q. And the last question she was asking you about these cameras being in the area of Group Therapy. Is there another particular -- are there other establishments

near Group Therapy that are problems for Five Points area or formerly were?

A. There's areas in there that are, yeah.

Q. And close by the Group Therapy?

A. Yes.

Q. Especially around the Summer Blush here?

A. Absolutely.

MS. GARFIELD: Thank you.

MS. ZMROCZEK: I just have one follow-up question.

THE WITNESS: Sure.

RECROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. So the information, the very limited information that you provided the police depicts the incident. And no one else gets a chance to ask you to see what else happened that night. After three weeks that opportunity is gone, correct?

A. Anyone could ask, you know, certainly, but after three weeks there's nothing. Three or four weeks, typically.

MS. ZMROCZEK: Thank you.

THE WITNESS: You're welcome.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you. Appreciate it.

MS. GARFIELD: May Mr. Shealy be excused?

BRETT BABCOCK - DIRECT BY GARFIELD

THE COURT: He may. Call your next witness.

MS. GARFIELD: Thank you, Your Honor. The State calls Brett Babcock.

BRETT BABCOCK, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Can you please state your name for the record?

A. Brett Babcock.

Q. Mr. Babcock, were are you from?

A. New Jersey.

Q. What brought you to Columbia, South Carolina?

A. I attend USC.

Q. I'm going to ask you to direct your questions (verbatim) this way.

A. Sorry.

Q. You attend the University of South Carolina?

A. Yes, ma'am.

Q. Did you go straight to USC from high school?

A. No, ma'am.

Q. What did you do in between?

A. I joined the Marine Corps.

Q. How long were you with the Marine Corps?

A. I did four years active duty and three and a half years Reserves.
Q. And specifically, what were your duties in the Marine Corps?
A. I was what's called a snipper.
Q. And when did you come to Columbia for, to obtain an education from USC?
A. Two years ago.
Q. And last summer, where were you working?
A. Group Therapy.
Q. And are you still employed there?
A. Yes, ma'am.
Q. Specifically what was your duties with Group Therapy Restaurant and Tavern?
A. At that time I was the door guy.
Q. Were you working the door that night?
A. I was working inside as the bouncer inside the club, not the front door, ma'am.
Q. Okay.
(State's Exhibit No. 21, drawing, marked for identification.)
BY MS. GARFIELD:
Q. Before I show the jury, Brett, do you recognize State's Exhibit Number 21 for ID purposes?
A. Yes, ma'am.

BRETT BABCOCK - DIRECT BY GARFIELD

Q. And what does this reflect?
A. Our bar.
Q. Is it a picture of a bar?
A. It's the interior of how our bar is minus where we go out to the deck. There's the sketch for it over here.
Q. Is it a drawing?
A. Yes, ma'am.
Q. Is it to scale?
A. Yes, ma'am.

MS. GARFIELD: Your Honor, at this time I'd like to introduce State's 21 into evidence.

MS. ZMROCZEK: Without objection.

THE COURT: So admitted.

(State's Exhibit No. 21, drawing, received into evidence.)

MS. GARFIELD: Your Honor, with the Court's permission, can I ask Mr. Babcock to step down?

THE COURT: You may. Mr. Babcock, if you'll get on the other side of that diagram so you can speak back towards the court reporter.

THE WITNESS: Yes, sir.

BY MS. GARFIELD:

Q. Brett, I'm going to hand you this marker and if you can just show -- give an illustration to the jury the description of the bar's layout.

BRETT BABCOCK - DIRECT BY GARFIELD

A. All right. So this is our main entrance right here on Green Street. You come in. This is our front bar area and then you come back, you have a pool table and some tables.

This doorway leads to a back room which is closed off which is where the manager is and, like, our liquor is stored and stuff like that. This door a little bit from it is what leads to a patio area where we have another outside bar, right over here.

And then this is our back bar. We keep this door closed which is on Harden Street. So that way we only have people coming in and out of this entrance and the other entrance that's on the deck bar over here.

Q. Why do you keep the door on Harden Street closed?

A. It's just easier for us to keep our numbers in count because we're only allowed to have so many people in the bar at any given time, otherwise it's illegal for us and we need to make sure that our counts are on point at all times. And it's a lot easier to do two doors than it is to do three.

Q. Brett, where were you positioned on July 28?

A. At this night I was floating out in the back patio area because it's usually our busy spots because people can smoke outside because there's no cover and you're allowed to.

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Q. And if you were to -- okay. Go ahead and take the stand.
A. (Complying.)
Q. Now when you are working, Mr. Babcock, are you allowed to partake of any alcohol?
A. No, ma'am.
Q. And are you allowed to carry any type of weapon on yourself?
A. No, ma'am.
Q. And so were you drinking at all that night?
A. No, ma'am.
Q. And did you have the occasion to come into contact with the Defendant --
A. Yes, ma'am.
Q. -- Stewart Ard? Please describe to the jury what you first noticed about him.
A. There was a group of four individuals in the bar. They had caught my attention based on their attitude and behaviors, their kinesthetics, if you will, of what they were portraying.

So I kept my eye on them, you know. They had thrown their hat down and stuff like that. I didn't do anything at that point because, you know, drunk people will be drunk. You got to give them some leeway.

Then the smallest of the group of four punched the

wall at which point you are done in my opinion.

So I walked over to them. I asked him very calmly, I go, "Excuse me, sir. You can't be hitting walls. I'm going to have to ask you to leave." At this point in time he actually did start to leave and then the other of the group, they got in my face and put their hands on me in which case I just, you know, I don't like people touching me. I don't touch you, you don't touch me.

And I asked all of them to leave. And then a lot of things were said. I don't really remember specifically what. They were just running their mouths

And then my other bartender, Derrick, and my other bouncer, Ryan, came down. And so there was three of us and then three of them or four of them and, at which point they -- we escorted them out the bar.

Q. And, would you characterize them as being loud?

A. Yes.

Q. Were they rowdy?

A. Yes, ma'am.

Q. And did they make any threats towards you?

A. It was a long time ago. I mean, I don't really remember off the top of my head.

Q. Would it help you to refresh your memory if you reviewed your statement that you gave back then?

A. Yes, ma'am.

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

THE COURT: Yes, ma'am.

BY MS. GARFIELD:

Q. (Document handed to the witness.) Just take a moment to review that.

A. (Complying.) That's right. Okay.

Q. Okay?

A. Yeah. They did because I wrote it down. They told me they didn't -- I didn't know who I was messing with and stuff like that so...

Q. And did they subsequently leave the establishment?

A. Well, we ended up walking them back out the front. After -- like, there was a lot of us there and they didn't want anything to do with it. They still ended up pushing me. And then once we got back outside, they ended up pushing us again, a couple -- me and the other bouncer there, and then they walked off and came back later, 20 minutes later and stabbed Jesse.

Q. When they left, did they say anything to you?

A. At that point I needed to get back inside the bar because there has to be somebody inside the bar if there's any more confrontations or anything else.

So after I escorted them outside I only stuck around for a minute or two before I proceeded to go back

to my post.
Q. Is this the first patron you've had to escort out?
A. No, ma'am.
Q. And on this particular evening, did you see the incident where Jesse and Scott get stabbed?
A. I did not see that.
Q. Where were you at that time?
A. I was back at my post in the back.
Q. And you're familiar that there is video inside and outside of Group Therapy; is that right?
A. Yes, ma'am.
Q. And have you had an opportunity to review some of the videos from that night?
A. I have.
Q. Specifically have you reviewed a video in that back area where you're referring to?
A. Yes, ma'am.
Q. And when you say "back area," it's actually an outside area?
A. Yes, ma'am. It's the deck bar we call it, ma'am.
MS. GARFIELD: Your Honor, with the Court's permission give us a moment to bring the video around and then I'm going to have Mr. Babcock review one of the videos.
MS. ZMROCZEK: Your Honor, may we approach while

BRETT BABCOCK - DIRECT BY GARFIELD

she's setting that up?

(Pause.)

MS. GARFIELD: I'm going to ask my co-counsel here to bring up the video because I technologically just can't do it.

(Pause.)

BY MS. GARFIELD:

Q. Mr. Babcock -- can you see it, Mr. Babcock?

A. Yes, ma'am.

Q. And are you familiar with this video?

A. Yes, ma'am.

Q. And why don't you come down so you can point out things on the video?

A. (Complying.)

Q. Can you show the jury where the individuals are that you were having problems with?

A. Give me one second.

THE COURT: You need to speak up, please.

THE WITNESS: I'm sorry, sir. Give me one second. I just got to see them again when I find them. (Pause.)

It's all these guys down here in the bottom.

BY MS. GARFIELD:

Q. Speak up.

A. It's all the gentlemen down in the bottom left. I just had to make sure.

Q. What were you viewing at this time?
A. This is where the Defendant is putting his hands on me and I told him not to touch me.
Q. And can you identify the Defendant in this video?
A. Right there. He's out of the picture right now, but right there.
Q. And he looks different than he does today; is that correct?
A. Yes, ma'am.
Q. How is he different?
A. He had -- he was completely shaved at the time and now he obviously has a full head of hair.
Q. Who are these individuals?
A. This is Derrick, our general manager now but at the time he was a bartender. And this is Ryan, another bouncer with me that works with me.
Q. And the individual that you were having the altercation with at this point, he's with the Defendant?
A. Yeah. Yes, ma'am.
Q. Now at this time, are you escorting them through the bar?
A. Yeah, we walked them out.
MS. GARFIELD: Mr. Shalabi, I'm going to ask you to rewind it to where the argument begins.
MR. SHALABI: (Complying.)

BRETT BABCOCK - DIRECT BY GARFIELD

BY MS. GARFIELD:

Q. And you've reviewed this video previously?

A. Yes, ma'am.

Q. Is that the individual you were asking to leave?

A. Yes, ma'am. That's the one that hit the wall originally.

Q. And what do you observe about the Defendant as far as his hands in his pockets?

A. He pulls -- or he starts to pull a knife after he's standing here touching me.

Q. And that's with what hand?

A. His right hand. And you can see it, it's about to be on the screen right here. See it right there in his hand?

Q. Okay. Thank you.

A. (Returns to witness stand.)

Q. Now you say you did not see the incident where Jesse actually gets hurt or Scott gets hurt?

A. No, ma'am.

Q. Did you come into contact with Jesse at any point?

A. As soon as I found out there was a stabbing, I came out front and proceeded to take care of Jesse who was on his hands and knees bleeding out of his back.

Q. When you say "take care of Jesse," explain to the jury what precautions you took.

A. In the Military you're trained for first aid and other things such as that. So I checked, and I wanted to see what the wound exactly looked like. So I wiped it off. I grabbed my ID card out of my pack because I saw that there was a -- it was in his lungs. So I stuck that over the top of his wound at the time so I could hold pressure with the towel because it's better to stop a collapsed lung or it could collapse a lung if you have that extra pressure seal around it. So that's what I did. I just cleaned his wound for the blood and stopped and waited for the paramedics to get there. And then I just grabbed my stuff back at the end when the ambulance got there.

Q. And you were there with him until the ambulance arrived?

A. Yes, ma'am. I helped them carry him into the ambulance.

Q. Did you notice anything about Scott?

A. I did not see Scott except he was holding his forearm. I was mainly worried about Jesse because he had a pretty severe wound and there was a lot of blood.

Q. Was he in pain?

A. Yes, ma'am.

Q. Was his breathing normal?

A. No, ma'am.

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Q. Can you describe it for the jury?
A. It was very ragged. And he was clearly in shock, what it looked like to me.
Q. Had you ever seen any of these individuals that you've escorted out of the bar before?
A. Prior to that night, no, ma'am.
MS. GARFIELD: Beg the Court's indulgence.
(Pause.)
Q. The individual that you saw that night pull a knife out of his pocket, do you see him in the courtroom?
A. He's sitting right there.
Q. Can you just a describe him for the record?
A. At the time or right now?
Q. Right now.
A. He's wearing a blue button-down shirt with curly hair. He looks to be in his 40s, low 40s.
Q. May the record reflect --
THE COURT: He's identified the Defendant.
MS. GARFIELD: Thank you. Thank you, Mr. Babcock. Please answer any questions defense counsel may have for you.
THE COURT: Ladies and gentlemen, we're going to take a little break. I'm going to let you step back to the jury room. Please do not discuss the case when you're back there. We'll bring you back in about 10 to 15

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minutes.

Mr. Babcock, keep your seat, please.

THE WITNESS: Okay.

(Jury exits courtroom at 3:31 P.M.)

THE COURT: All right. Mr. Babcock, you can step down. Don't discuss your testimony while we're on break and we'll take about a 15-minute break.

THE WITNESS: Yes, Your Honor.

THE COURT: What do y'all need to go?

MS. GARFIELD: I just gave it to her.

(Break taken at 3:33 P.M. At 3:46 P.M., the trial resumed:)

THE COURT: Ms. Garfield, do you think you can struggle along without Luck for a few minutes?

MS. GARFIELD: I'll try my best, Your Honor.

THE COURT: Let's bring the jury in.

THE BAILIFF: Yes, Your Honor.

MS. ZMROCZEK: And my client.

THE COURT: Don't bring the jury. They're bringing him. You can come back up. Don't bring the jury in.

(Witness returns to witness chair, Defendant enters courtroom.

THE COURT: All right. Now we can bring them.

(Jury enters courtroom at 3:47 P.M.)

BRETT BABCOCK - CROSS BY ZMROCZEK

THE BAILIFF: Jury's seated, Your Honor.

THE COURT: All right. Thank you. You're going to do this?

MS. ZMROCZEK: Yes, Your Honor. Thank you.

THE COURT: If you would, please, ma'am.

MS. ZMROCZEK: If it please the Court.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Mr. Babcock, if you don't mind stepping down. And again, keep your voice up so that the court reporter can hear you.

A. Yes, ma'am.

Q. And I'm going to show you -- I'm going to put up here and obviously these are not permanent. I'd like for you to point out on your drawing or under your rendition on the board. I know it's not to scale and everything and that's okay. Would you put where all the cameras were located?

A. All right. Right here. One here. There's one back here.

Q. I'll get it.

A. Thank you. That's one right here. These ones are, like, there's one in our office.

Q. Make sure you speak up.

A. Sorry. There's one in the manager's office too.

And then there's one that, like, sees the whole back area too.

Q. So we'll leave those over there.

Now the camera that -- the view that we were just watching, the little portion, which camera was that?

A. This one right here?

Q. Number five, or where it's marked number five.

A. Yes, ma'am.

Q. And, where did -- it wasn't Mr. Ard that punched the wall, was it?

A. No, ma'am.

Q. It was --

A. The smaller, short gentleman, the smallest of the group.

Q. And he was the one that had the hat on?

A. I don't remember what he was wearing, ma'am, but if you show me the video again I can tell you.

Q. Did they all have hats or just the one?

A. Just the one.

Q. And the one that -- and he's the one that punched the wall?

A. Yes, ma'am.

Q. And where did he punch the wall?

A. It's right here, like, that spot right there.

Q. We don't get to see that on the video?

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A. We cannot see that, ma'am.
Q. All right. Have a seat for me.
A. Yes, ma'am.
Q. Ms. Garfield asked you if as a bouncer you're allowed to consume alcohol, correct?
A. Yes, ma'am.
Q. And you're not, correct?
A. Yes, ma'am.
Q. You're also not allowed to consume marijuana or cocaine, are you?
A. Yes, ma'am -- no, ma'am, we're not allowed to consume --
(Laughter.)
Q. Okay. So you're not allowed --
A. No, ma'am.
Q. -- to have marijuana or cocaine?
A. Yes.
Q. You would agree that later in the evening when everybody is drunk and you've been babysitting people all night that tensions can get a little high, can't they?
A. Tensions can get high; yes, ma'am.
Q. And how long were you in the Marines? Are you still in the Marines?
A. I am not anymore, ma'am.
Q. How long were you there?

A. I was four years active duty and three, three and a half Reserves.
Q. So close to eight years?
A. Yes, ma'am.
Q. And, but now you're still working at Group Therapy?
A. Yes, ma'am.
Q. Were you working on June 14th, just last Saturday?
A. I'm positive I was.
Q. You're positive you were?
A. I'm pretty sure, yeah. I don't take many nights off, ma'am.
Q. You know Jesse Patterson, don't you?
A. Yes, ma'am.
Q. How do you know him besides work?
A. He used to be my roommate, ma'am.
Q. Okay. He also was at Group Therapy last Saturday, wasn't he?
A. Yes, ma'am. I think so. If that's the same day we're talking about, but he was there recently. I don't remember which day it was, ma'am.
Q. And you showed on the video the little glimpse that we saw where Stewart Ard took the knife out of his pocket?
A. Yes, ma'am.
Q. But he didn't display it actually, did he?
A. No, ma'am.

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Q. In fact, you didn't even see it that night, did you?
A. I did not, ma'am.
Q. You did not see it that night?
A. I did not see it until the video.
Q. That was something that was pointed out to you later?
A. Yes, ma'am.
Q. And, in fact, as we watched the video, Geno was still arguing with you after Stewart had left, just like you asked him to, correct?
A. Well, I had asked the littlest one to leave first, ma'am, and then the other three got in my face and the little guy, like, I never saw him again. He was just (makes sound) poof, like, then.

And the only reason I had a problem with them was because they touched me. I don't like being touched. Don't touch me. And I asked them not to touch me and they needed to all leave the bar.

Q. After they left, though, after you asked them to leave, rightfully so, Mr. Ard left. He followed your command, didn't he?
A. It looked like he argued with me for a minute and then he followed my command.
Q. And then it looked like he actually grabbed Geno,

the guy that continued to argue with you, and pulled him out of the bar; isn't that correct?
A. In the video it appears to be that way, ma'am.
Q. And then you said there was an altercation when you got outside?
A. It was just a quick push.
Q. A quick push?
A. Yeah, a push. Whatever you want to call it.
Q. But Mr. Ard was not involved in that at all, was he?
A. I actually don't remember which one of them pushed me.
Q. But there's video that shows this, right?
A. I have no idea, ma'am.
Q. Okay. You haven't reviewed that video?
A. I reviewed this video and that was the one that was pertaining to me, ma'am.
Q. And, you kept saying "They told me that they didn't know who they were messing with." I'm sure there were heated words, right, between -- I think you had a group of people and they had a group of people, right?
A. Well, no, it was just me at first, ma'am. I was the only one. And they were the only ones that were becoming aggressive to me. And I was standing my ground and obviously when they touched me I told them not to

BRETT BABCOCK - CROSS BY ZMROCZEK

touch me. And that was, like, the extent of my aggression back to them is, like, just yelling at them not to touch me.

Q. Of course.

A. And then at that point probably a minute or two, whatever it was, I don't know, my other bouncer and -- or bartender, I'm sorry, came over at which point they didn't really want anything to do with, you know -- only three -- they didn't want anything to do with a three-on-three confrontation when it was, you know, a three-on-one or four-on-one before that.

Q. Certainly. And boys tend to get in fights and you didn't want that situation to escalate, right?

A. Yes, ma'am.

Q. And in fact was it you that slapped the drink out of Geno's hand or was that one of the other bartenders?

A. I never slapped a drink out of anybody's hand, ma'am.

Q. It was another. You just know you did not do that.

A. No, ma'am. I've never seen that.

Q. And you would agree that people make bad decisions when they're angry?

A. That usually seems to be the way of things.

Q. Short tempers usually end up with words getting said or actions happening --

A. Yes, ma'am.
Q. -- that you regret or that other people regret?
A. Yes, ma'am.
Q. And that's safe to say that that happens more often than not when you're the only sober person or you're one of the few sober people in the bar, correct?
A. I'm paid to keep a cool head, ma'am.
Q. I want to talk just briefly -- you talked about your military and your medical training. Did you -- you didn't diagnose Jesse with a collapsed lung, did you?
A. I at no point did anything like that. I just did what I thought was best to help him out, ma'am. That's it.
Q. And you stopped the bleeding and the ambulance got there pretty quick, didn't they?
A. Yeah. I mean, it wasn't too long at all.
Q. Did you have an occasion to see -- were y'all still roommates at that time?
A. Yes, ma'am.
Q. And the answer was yes?
A. Yes, ma'am.
Q. Did you visit him in the hospital?
A. Yes, ma'am. Yes, ma'am.
Q. He was about ready to go after a few days, wasn't he?

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A. Yeah, I think so. I don't know. He just -- nobody likes hospitals. Right, ma'am.
Q. Do you recall that incident that happened last Saturday with Jesse?
A. I was working behind the bar, ma'am. So, no, I did not. I did not have any witness to it at all, ma'am.
MS. ZMROCZEK: Beg the Court's indulgence.
(Pause.)
Q. Mr. Babcock, is it possible that you or one of the other bartenders would respond in an aggressive way or with with aggressive words if somebody said, "You don't know who you're messing with"?
Is it possible that you would scream back just to get somebody out of the bar?
A. Is it possible? Yes, ma'am.
MS. ZMROCZEK: Thank you. I meant to take these off. Thank you, Judge.

REDIRECT EXAMINATION

BY MS. GARFIELD:

Q. Mr. Babcock, I'm going to go back to State's Exhibit Number 21. You were asked to put some sticky notes to reflect where the cameras are inside Group Therapy. A couple of them you placed where -- and I'm going to be focusing, for the record, below the area of the diagram. What cameras would those have been facing?

A. Well, the deck bar obviously has a camera that faces the register and there's obviously another one that faces the whole outside area so you can see what's going on in the area.
Q. And that would be the one that captured the video that we showed earlier?
A. (Nods head.)
Q. And I believe there was also a video -- I mean, a sticky placed in this area?
A. It's -- yes, because there's a back bar too, but I mean, that was irrelevant to this.
Q. And to your knowledge did the defendants ever go into that back bar?
A. No, ma'am.
MS. GARFIELD: Thank you, Mr. Babcock. I have nothing further.
THE COURT: Anything?
MS. ZMROCZEK: I just have one more question.

RECROSS-EXAMINATION

BY MS. ZMROCZEK:
Q. You said to your knowledge they did not go into the back bar, but if it were reflected on the video then we would be able to know for sure, right?
A. Yes, ma'am.
MS. ZMROCZEK: Thank you.

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THE COURT: Thank you, sir. You may step down.

MS. GARFIELD: Your Honor, may Mr. Babcock be excused?

MS. ZMROCZEK: Without objection.

THE COURT: You're free to leave. Thank you.

THE WITNESS: Thank you, Your Honor.

MS. CAMPBELL: May it please the Court. The State calls Ryan Kinard.

RYAN KINARD, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

THE WITNESS: My name's Ryan Kinard.

DIRECT EXAMINATION

BY MS. CAMPBELL:

Q. How old are you?

A. Twenty-two.

Q. And where are you from?

A. Clover, South Carolina.

Q. Clover, South Carolina?

A. (Nods head.)

Q. And how did you come to be here in the Columbia area?

A. Me and my brother got a place together down here. I had enough money to put a down payment on a house,

figured I'd come down here and help him out. I started working at Five Points just like him.
Q. And so how long have you been living here in Columbia?
A. I lived here for seven, eight months.
Q. Seven or eight months?
A. (Nods head.)
Q. And prior to moving to Columbia, did you use to frequent down here or work down here?
A. No.
Q. Once you came here, where did you get a job?
A. At Group Therapy.
Q. And what was your job at Group Therapy?
A. Door guy.
Q. When did you actually start working there?
A. I worked with Scott or Derrick was the bartender and Palmer. Those are my bouncers.
Q. And on a typical night, what did your duties include?
A. Checking identifications, making sure if they're too drunk to come in the bar; basically keeping bad guys out and good guys in.
Q. Is there a certain number count y'all need to keep up with and everything to make sure not too many people get in there?

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A. Yes, ma'am.
Q. Do you ever coordinate between -- or how many entrances are there typically open for the Group Therapy?
A. That one, and when I first started that back door. But they ended up closing that back door so it was easier for them.
Q. On the night when all of this happened, where was the -- only one door open that night to come in and out of?
A. Uh-huh.
Q. And which door was that?
A. The front door that Jesse was on.
Q. That night, what area of the bar were you working on?
A. I was patrolling by the pool table and right there just in front of, on the back end of the front bar and Brett was on the deck.
Q. And you say "Brett," who is that Brett? Is that who just testified?
A. Yes.
Q. And that night, did something catch your attention that you had to go and help Brett out?
A. Yeah, there was --
Q. Can you tell the jury about that?
A. All right. Well, sitting in my seat where I can

see everything, see down the bar and Jesse. All I had to do was turn my head and see Brett. While I was sitting there looking around, just trying to scope that area, I seen those the guys jumping around, whooping and hollering, whatever. It's a bar. That's what happens.

I looked back and looked again, I realized he was talking to Brett. And that's whenever I walked and approached him and asked him what was going on. And what he said, "This guy's about to get his ass beat."

Q. Let me back up a little bit. That night were you drinking anything?

A. No, not allowed to drink.

Q. Were you allowed to carry weapons?

A. No.

Q. That night did you have a weapon?

A. No.

Q. And was anybody in the bar supposed to have weapon on them?

A. No, not at all.

Q. You said that you looked over and you saw Brett having some words or something with someone?

A. Uh-huh.

Q. And you noticed some people being a little bit rowdy?

A. Uh-huh.

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Q. Had you ever seen those people before?
A. No.
Q. Could you tell how many of them were together in the group?
A. Yeah, when I walked up it was all four of them standing there.
Q. Four of them?
A. Standing there talking.
Q. And when you walked up and they were talking, who were they talking to?
A. Brett and Derrick.
Q. And what was their demeanor like as a group?
A. Just a very -- very fighty, ready to see what's up.
Q. And were they saying anything?
A. Oh, yeah. Talking.
Q. Do you remember anything they were saying?
A. I remember them saying -- they threatened Brett saying that --

MS. ZMROCZEK: Your Honor, I'm going to object to hearsay. They keep saying they. I'm confused.

THE COURT: Let's identify who's saying what.

MS. CAMPBELL: It would also be res gestae.

Q. Okay. Do you remember any members of the group saying anything?
A. I don't remember exact words from each single

person but, yeah, it was the shorter guy who was originally getting kicked out.
Q. Uh-huh.
A. And the gentleman sitting over there talking about how they're about to fight Brett.
Q. And what was the shorter guy saying?
MS. ZMROCZEK: Objection, Your Honor.
THE WITNESS: "Y'all going to kick me out --
THE COURT: Sustained.
Ms. CAMPBELL: May we approach?
THE COURT: No, ma'am.
BY MS. CAMPBELL:
Q. Was he -- what was his demeanor like? Can you describe that?
A. Aggressive.
Q. And as far as the Defendant who you identified as sitting over here, what specifically was he saying?
A. When I first walked up he was the one that said, "He's about to get his ass beat." And I'm like, "No, he's not. It's time for y'all to leave."
Q. And when you said "He's about to get his ass beat," who was he referring to?
A. Brett.
Q. And that was this person here?
A. Yes.

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Q. Seated at this table?
A. Yes, ma'am.
Q. Back then when he was in the bar that night, did he look different?
A. Yeah, he had a shaved head.
Q. A what head?
A. A shaved head. He had real short hair.
Q. And those were his words?
A. Uh-huh.
Q. What happened next that you remember?
A. I remember them -- or Brett was telling them, you know "Don't touch me, don't touch me," this and that. I'm like, "It's time for y'all to leave."

"We ain't got to touch you as long as you start moving toward the door," you know, "It's time to go."

Q. And at this point your whole goal is what?
A. Get them outside the bar so that they're not bothering the rest of our patrons that come in there all the time.
Q. And eventually did they comply?
A. Yes.
Q. Do you remember the Defendant saying anything else while he was in the bar prior to leaving?
A. He might have said stuff under his breath but he was walking toward the front of the door.

Q. And you're familiar with the layout?
A. Yes.
Q. If I show you State's Exhibit Number 20 -- Your Honor, may the witness step down? Thank you.
Just so we're all on the same page. The front entrance, the one that was open that night, do you see it there on the diagram?
A. Yes, ma'am.
Q. And where is it?
A. It's right here.
THE COURT: You need to speak up a little bit.
THE WITNESS: Oh. It's right here where the arrow goes, right in front of Green Street.
BY MS. CAMPBELL:
Q. Right there on Green Street?
A. Yes, ma'am.
Q. And that was the only entrance open to the outside that night?
A. Yes, ma'am.
Q. And you mentioned initially when you saw some people being rowdy and that Brett went over to confront them, which area of the bar was that taking place in?
A. Where Brett was was right here beside the front door. And where I was sitting whenever I was watching my area was right here.

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Q. So were they -- what area is this?
A. This would be the area where the back or the bar on the --
Q. The deck?
A. Yeah, the deck.
Q. The deck area. Were they out on the deck area at that point or were they inside?
A. They were on the deck.
Q. And you were seated next to this door?
A. Uh-huh.
Q. So you were able to go out to the outer area?
A. Yes.
Q. And is that where people a lot of times go to smoke and things like that?
A. Yes, to smoke. It's an open area.
Q. And there are cameras out there too?
A. Uh-huh.
THE COURT: You need to say yes or no.
THE WITNESS: Yes, yes.
BY MS. CAMPBELL:
Q. I'm sorry, Your Honor. There were cameras out there too?
A. Yes.
Q. And when you went out there, that's when you first saw the confrontation with the four people and Brett?

A. Yes.
Q. And at that point that's when you heard him say what?
A. That's when -- he was going to get his ass beat.
MS. ZMROCZEK: Objection, Your Honor. I believe she's asking the same question over again.
THE COURT: Overruled.
MS. CAMPBELL: Thank you, Your Honor.
Q. I'm sorry. What did you say?
A. That Brett was about to get his ass beat.
Q. And at that point did anyone else come out there and assist y'all in escorting these people out?
A. No. At that point Derrick was standing there.
Q. Derrick was there?
A. Brett was there and I was there.
Q. And it was the four of them?
A. Yes.
Q. So when you escorted them out, which area did you escort them to? How did they leave the bar that night?
A. They left through the front. Right here. Down this way and walked out through the front entrance
Q. And at that point once they were outside, did you keep -- did you see them anymore right then and there at that moment?
A. Yes. Whenever they got to the outside doors they

turned around and started yelling about, "We'll be back, don't worry about that." You know, "Y'all going to get y'all's." "We're going to be back," and hollering and, you know. We're like, "All right, you got to go. You can't be in front of the bar. It's time to leave."

And one of them come and got in my face and said something to me and then pushed me into Jesse and whenever we come back, we're like, "It's really time to go because we're about to call the cops right now. Talking to my bartender telling him it's time to call the cops." And that's when they ended up walking off.

Q. When you were saying, "It's time to call the cops," were they within hearing distance?

A. Oh, yeah.

Q. And at that point that's when they elected to leave at that point?

A. Uh-huh, yes.

Q. You said that you ran into Jesse there at the entrance; is that correct? You actually fell back onto him?

A. Yeah, got pushed back into him.

Q. And who is Jesse?

A. Jesse is the victim.

Q. And at that point what was his job that night?

A. At that point he was the front door guy. He was

going to make sure they weren't going to come back in. And at that Pacific (sic) moment it was, you know, let's keep them from going back in the bar. And --

Q. And once they heard you saying "Call the cops," which way did they walk? Could you tell?

A. Down -- or they walked towards Harden Street.

Q. Towards Harden Street?

A. Yeah. So this way.

Q. Okay. And at that point did you think the whole thing had been diffused?

A. I thought it was over, you know.

Q. Did y'all ever call the cops at that point?

A. No.

Q. Okay. Go back to the stand.

A. (Complying.)

Q. Once they left from where y'all could see them from the front of the bar, did everybody go back in the bar as far as the bouncers and the bartenders and everybody?

A. Well, Jesse was closer. He had to stay at the front door.

Q. He was still at the front door?

A. Yes. Brett went back and, like I said, he couldn't leave all these other customers that were in the bar by themselves because once something starts, you know, everybody starts talking about it, something else could

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start. So we had to have at least one person in the bar and that was Brett. I was standing out front for a little bit with Jesse, you know, and I went back to make sure Brett was calmed down. I walked back there and he said, "Yes, I'm good." That's when I seen Jesse getting pulled in, blood everywhere, all over his shirt. You know, first thing I did, I didn't go outside and see where the guys were or nothing, I strolled over to him and grabbed for a bar towel to stop the bleeding.

Q. So you --

A. Sorry.

Q. Are you a little nervous today?

A. I just --

Q. You talk fast like I do.

A. Whatever.

Q. You said that you went back into the bar?

A. Yeah.

Q. And so you left Jesse at the front door?

A. Yes.

Q. And once you got back in the bar and been in there for a period of time, you then turned around and you saw them carrying Jesse in?

A. Yes.

Q. Exactly where were they carrying Jesse in from?

A. From where he was -- or from outside.

Q. And who was carrying him in, could you tell?
A. Yes.
Q. Who was that?
A. Alex.
Q. Who?
A. Alex. Right there (pointing).
Q. And you mentioned blood. Could you tell who was bleeding when Jesse was being carried in?
A. Yes.
Q. And who was bleeding?
A. It was Jesse.
Q. Was he saying anything at that point?
A. Yeah, "He stabbed me, he stabbed me." And I, you know, he's in a whole lot of stress. And he's, like, "I feel like I'm going to bleed out. He stabbed me."

I'm, "Dude, you're not going to die." Just trying to calm him down. So I was putting pressure, I said -- Brett come over there. He's like, "I got to see it. I got to see it." And I know he was in the Marines so I was like, "Look at it." He looked at it, pulled his ID out, stopped it, which was a good idea. I didn't do that. You know, I'm not in the Marines.

Q. And at that point, were you and Brett both trying to help him?
A. Yes.

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Q. And was he able to -- was he standing up or how was he at that point?
A. He was crouched down, head on the ground, blood just flowing out of his side.
Q. And you said that you tried to stop the blood. Why were you trying to stop the blood?
A. Because it was a big old knife wound in my buddy's side. I had to stop the bleeding.
Q. Or?
A. Or he would die right there in the middle of Group Therapy.
Q. And that's when Brett came over --
A. Uh-huh.
Q. -- and actually was more effective?
A. Yeah, yeah.
Q. Okay. Did anybody call 9-1-1?
A. I did.
Q. And have you had the opportunity to review the 9-1-1 tape?
A. Yes.
Q. And that would be the tape that was recorded on this disk?
A. Yeah.
MS. CAMPBELL: Your Honor, at this time we'd offer into evidence the 9-1-1 tape.

MS. ZMROCZEK: Without objection, Your Honor.

THE COURT: So admitted.

(State's Exhibit No. 22, 9-1-1 recording, received into evidence.)

BY MS. CAMPBELL:

Q. Does this accurately reflect the 9-1-1 call you made that night?

A. Yes.

MS. CAMPBELL: Your Honor, we ask permission to publish.

THE COURT: Yes.

MS. CAMPBELL: Thank you.

(9-1-1 call played for the jury.)

BY MS. CAMPBELL:

Q. And that was the 9-1-1 call that night?

A. Yes, ma'am.

Q. And shortly thereafter did EMS respond?

A. Yes, ma'am.

Q. And the police?

A. Uh-huh. Yes, ma'am.

Q. And when the police got there and EMS got there, were any of the individuals that had been there earlier that night still there?

A. As far as the four guys?

Q. Yeah.

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A. No.
Q. Specifically, was the Defendant still there?
A. No, no.
Q. And did you actually witness the stabbing itself?
A. No.
Q. Were there cameras -- you were aware there were cameras in Group Therapy?
A. Yes.
Q. And do some of those cameras reflect certain things you testified about?
A. Yes.
MS. CAMPBELL: Your Honor, I'd ask permission to publish those parts of the video.
THE COURT: Is this different from what's already been published?
MS. CAMPBELL: Yes, sir.
Q. The video that was shown just a minute ago with Brett, you actually are seen in that video as well?
A. Yes.
Q. And does it accurately reflect what you were talking about?
A. Yes.
Q. There's just no audio on it?
A. Yes, ma'am.
MS. ZMROCZEK: Your Honor, may we approach

briefly?

(Off-the-record discussion.)

MS. CAMPBELL: Your Honor, may the witness step down?

THE COURT: He may.

MS. CAMPBELL: Thank you. Can y'all see?

THE COURT: Get on that side of the screen and talk back towards the court reporter if you would, please.

BY MS. CAMPBELL:

Q. This goes pretty quickly so if you need to back up at that point in time, just let me know.

What does this show?

A. Us escorting them out the front of Group Therapy.

Q. And where are you in this?

A. Right there.

Q. Who are the people in front of you?

A. The four guys including the Defendant.

Q. Okay. Can we back that up one more time? (Pause.)

Can you tell which one is the Defendant?

A. That tall guy.

Q. The tallest one?

A. Yeah, the tallest one out of the group.

Q. And then at that point at the end of the bar, what do you see?

A. At the end of the bar?

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Q. At the end.
A. Whenever they walk out and they turn around, start --
Q. And that's when the conversation took place that you already related to the jury?
A. Uh-huh. Yes, ma'am.
Q. And is it at that point when you start saying, "Call 9-1-1," or "Call the police?"
A. Yeah. "Y'all going to cause me to call."
Q. What's this angle before we start it?
A. This is the front entrance. Angle's the door guy.
Q. So before we saw going down the bar, and this is where they ended up going out?
A. Yes. This is the end.
Q. Okay. Is that one of the group?
A. Yeah. And see --
Q. Are these two part of the group?
A. Yes.
Q. And who is that?
A. That would be the Defendant.
Q. And who are those people?
A. That's me and Brett.
Q. And what's going on right now?
A. This is us trying to get them to leave the front of the bar where they had turned around and started just

talking crap, you know.
Q. Who got shoved there?
A. Me.
Q. And who shoved you?
A. I believe it was the, one of the shorter guys that shoved me.
Q. And at this point, what's going on?
A. They're a little bit farther down the street and still talking, you know, just making sure they get all the way out and all the way down the street.
Q. What's going on now?
A. I believe they're about halfway down the street. They're just slowly but surely walking away.
Q. Is that Brett that just walked back in?
A. Yes.
Q. And is that you?
A. Yes.
Q. And who's that in the hat?
A. That's Jesse.
Q. With the hat on backwards?
A. Yes, ma'am.
Q. What's Brett explaining to you there?
A. About what had happened before I had got there.
Q. Okay. And at this point do you think it's all over?

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A. Yeah. I mean, you know.
Q. Where are y'all going?
A. Back to the back to check on the rest of the bar.
Q. And where is Jesse at this point?
A. Jesse is out front with all the patrons.
Q. Does that say "staff" on his shirt?
A. Yes, ma'am.
Q. And Jesse's first interaction with that group was as they were being escorted out?
A. Yes.
Q. So nothing had happened inside that had anything to do with him?
A. He didn't know nothing about it.
Q. And what area does this show before it starts?
A. This is showing the exact area, just from a different angle, just an outside camera.
Q. That is what doorway?
A. This is at the front door.
Q. This is the front door. So this is the outside versus what we just saw was the inside view?
A. (Nods head.)
Q. Okay. And can you see Jesse right there?
A. Yes. Top right.
Q. And are those the people we're talking about?
A. Yes.

Q. And do you see the Defendant right there?
A. Yes, ma'am.
Q. What's going on at this point?
A. They was just making threats. Talking about, we're not about it, you know.
Q. Are they still arguing? Now they're walking away?
A. Yeah. I believe they started walking off.
Q. And who is this right here in the T-shirt, kind of brownish T-shirt?
A. The one right there talking to Jesse right now?
Q. Uh-huh.
A. That's Scott. That's the owner of the bar.
Q. The owner of the bar?
A. Uh-huh.
Q. And then y'all go back in. And I believe Scott and Jesse stayed at the front door?
A. Yes.
Q. And, again, Jesse didn't participate in any --
A. Altercation inside, no.
Q. No, no. His only other action would have been maybe check their IDs as they come in?
A. Uh-huh.
Q. And at that point are they gone?
A. Yeah. Yes, ma'am. At this point they walked down the street, turned the corner. I don't know where they

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went.
Q. Okay. You can go ahead back to the stand.
A. (Complying.)
Q. And that night, was that the first night you have ever had any interaction with any of those people?
A. Yes.
Q. And the person that you saw, the tall one with the bald head that said those things to you that you told the jury about --
A. Yes.
Q. -- do you see him in the courtroom?
A. Yes, ma'am
Q. Has his appearance changed?
A. Yes. He has longer hair.
Q. He has hair now?
A. Yes.
Q. But that's the person that was with the group and the one that made the threats?
A. Yes, ma'am.
MS. CAMPBELL: Beg the Court's indulgence.
(Attorneys conferring.)
Thank you. I don't have anything further.
THE COURT: All right. Counsel?
MS. ZMROCZEK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. I'm sorry. I didn't catch your name.

A. Ryan.

Q. Rod?

A. Ryan.

Q. Ryan. I'm sorry. Ryan, did you write a statement that evening?

A. Yes.

Q. You wrote a statement for the police?

A. Yes, ma'am.

Q. Okay. I want to go back and ask you a couple of questions about some of the videos, if you don't mind. Now you stated that the Defendant said he was going to bet your ass or Brett's ass?

A. Brett's ass, yeah. He said, "He's about to get his ass beat." When I walked out there, that was one of the first things I heard.

Q. And that video would have been which one?

A. That would have been the one that Brett was up here talking.

Q. Right.

A. It would've been the one when they was out there on the deck.

Q. Okay. So that would have been reflected if you're

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talking to him there?
A. Yeah.
Q. Okay. And, when you were escorting everybody out, Mr. Ard, Stewart, was actually the first one leading the way, the first one out of the bar, wasn't he, of the group?
A. No. He was not the first one out of the bar. I think he was third. He had -- the guy in the gray shirt was right behind him.
Q. But he had to pull his -- he went -- actually went out and then came back and pulled his friend out, right?
A. Yeah, "Let's walk out."
Q. To take him out of the bar; right?
A. Uh-huh.
Q. I'm sorry. You have to say yes or no.
A. Yes, yes.
Q. Okay. All right. Pause it here for me. So you're actually -- you actually threw a punch, right?
A. No, I did not throw a punch. I pushed him back.
Q. Let's back it up a little. Will you come down and speak loud and point out which one of these --
A. Which one I am?
Q. Yes.
A. I believe this is me right here. I have a black hat on.

Q. Okay. You have a black... Okay. So this is as -- they haven't come out of the bar, correct?
A. Correct. Not yet.
Q. That's the Defendant, and that's Geno, right? And he's pushing him away, right? And that's you in the hat, right?
A. Yep.
Q. Okay. And then Mr. Ard doesn't push or shove anybody, does he?
A. No.
Q. Someone pushes you and then what do you do right there?
A. I went to push him back to get him back to -- they were right there at the doorway.
Q. But Mr. Ard's still not involved in any of that altercation, is he?
A. No.
Q. In fact, he's walking away, right, helping his friends out?
A. At this moment right here, but you see him turning back around. And he goes back, approaches, and starts yelling, "Don't worry, you're going to get yours."
Q. Okay. So he starts yelling?
A. Yeah. He's over here talking, just like all four of them were. Right here is where he's talking to me and

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Brett.
Q. He is? Or Geno is?
A. He is. Right here. Tall bald guy.
Q. And this right here is actually Scott Flemming, right?
A. Yes.
Q. So he was actually there, he witnessed the whole thing, right?
A. Yeah. Of them being out there. He did not witness what was inside.
Q. Right. He didn't witness what was inside but he was outside?
A. Yes.
Q. Okay. Go back to the inside view, please.
That's one of the short guys leaving and they're friends, right?
A. Uh-huh.
Q. You have to say yes or no.
A. Yes.
Q. Okay. And that's actually Stewart pushing him out the bar, correct?
A. Yes.
Q. And which one is you?
A. That's me in the hat.
Q. You're in the hat. And Brett who testified earlier

is standing next to you, right?
A. Yes, ma'am.
Q. Okay. Do you see what falls right here on the ground, that she just --
A. I do not.
Q. Can you rewind it a little for me?
MR. SHALABI: Yeah.
MS. ZMROCZEK: That's good.
Q. Okay. And I'm directing your attention to right here in front of the door.
A. Uh-huh.
Q. Back up. Sorry.
MR. SHALABI: No problem.
BY MS. ZMROCZEK:
Q. That's good. Right there you are and Brett. And I want to draw your attention to right about where your feet are. A shoving match occurs and then right there an item falls on the ground, would you agree with me, and then she kicks it?
A. Yes.
Q. Okay. You can have a seat for me.
A. (Complying.)
Q. It got pretty heated that night, right?
A. Yes, ma'am.
Q. It's a common occurrence to throw people out of the

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bar, correct?
A. Really at Group Therapy, it's not that bad. There is not -- it's not ordinary. Few and far between we have to ask somebody to leave.
Q. And the reason that they don't want you as a bouncer or a bartender to ingest substances like marijuana and cocaine is because that can affect how you react in a situation, can't it?
A. I'm going to say so, yes.
Q. And they want you thinking with a clear head while you're protecting the patrons of the bar; isn't that right?
A. Yes, ma'am.
MS. ZMROCZEK: Those are all the questions I have.
THE COURT: Anything?
MS. CAMPBELL: No, sir.
THE COURT: All right. Thank you, sir. You may step down.
MR. SHALABI: The State calls Alexander Cromer.
ALEXANDER DONYPHAN CROMER, having been duly sworn, was examined and testified as follows:
THE CLERK: Please have a seat. State your full name for the record.

DIRECT EXAMINATION

BY MR. SHALABI:

Q. State your name for the record.

A. Alexander Donyphan Cromer.

Q. Can I call you Alex?

A. Yes, sir

Q. Where are you from?

A. Columbia, South Carolina.

Q. You lived here your entire life?

A. A couple months in Maryland but otherwise straight back.

Q. I want to draw your attention to July 28, 2013. Do you recall that night?

A. The night of the incident, yes.

Q. Where were you that night?

A. Standing at the front door for the majority of the night. I'm a bit of an information junky, if you will. I like to wander the bar. I don't drink but I like to people watch.

Q. You don't drink alcohol?

A. (Shakes head.)

Q. But you're at a bar?

A. Every night.

Q. Is Group Therapy that kind of place?

A. I stand there and people watch every night.

ALEXANDER CROMER - DIRECT BY SHALABI

Q. Do you -- you say you're standing outside the bar. Do you observe anything unusual?
A. The first unusual thing that I noticed was a blue car pulling into a parking spot directly in front of the tanning salon right next to Group Therapy. It was the fashion in which it pulled in that got my attention.
Q. You said it was a blue car?
A. I think it was blue. Was it red? I'm red-orange colorblind and sometimes colors just slip.
Q. So you see a blue or red car pull into where?
A. The parking spot directly in front of the tanning bed (verbatim).
Q. Was that unusual?
A. It was the fashion. It pulled in very hastily and people don't typically pull into those parking spots with such speed.
Q. Did you see anyone get out of the car?
A. No. I saw it pull in and I said, "Well, I'm going go inside get a ginger ale." I didn't stare at it when it pulled into the spot, but I went and got a ginger ale. That's what I drink, ginger ale and lime.
Q. So you went inside?
A. (Nods head.)
THE COURT: You need to answer. Don't shake your head. The court reporter can't --

THE WITNESS: Oh, I'm sorry.
THE COURT: -- so you need to say yes or no.
THE WITNESS: Yes, sir.
BY MR. SHALABI:
Q. So you went inside to get a ginger ale?
A. Yes, sir.
Q. Without any alcohol in it?
A. Yes, sir.
Q. And what happened after that?
A. As I was waiting to get my drink, I heard the fear of man. I heard him scream. I heard Jesse scream and I turned and he had been struck.
Q. Did you know by what?
A. At first, no. But, he crumbled so I knew it wasn't just a punch. Like, I heard him scream and I turned and I saw him crumble, and I tried to catch him to pull him inside at that point.
Q. And how long were you with Jesse?
A. Seconds. I immediately started trying to alert other people around me of what was going on.
Q. Okay. So after you pulled Jesse into the bar, what did you do next?
A. Ran to find a manager.
Q. And where was that?
A. At the far end of the bar.

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Q. Okay. And did you find a manager?
A. Yes, I did.
Q. Who was that?
A. I believe it was Brian Bundy at the time but -- yeah, it was Bundy.
Q. Okay. So after you told Brian, did you stay in the bar?
A. Yeah. They were -- they wanted to keep people out, but they didn't want to just send the people within the bar out into what could very well be somebody just flailing around with a knife.
Q. Did you not at any point exit Group Therapy and look outside?
A. I did.
Q. And when did you do that?
A. I did it in order to close the front door. I poked my head outside to see if there was anything still going on. I just wanted to remove Jesse from the situation because I knew he was in danger. So I was trying to get him inside, close the door. I didn't notice that Scott was cut, but I saw him, trying to get him to come inside as well.
(State's Exhibit No. 23, chart, marked for identification.)
BY MR. SHALABI:

ALEXANDER CROMER - DIRECT BY SHALABI

Q. I'm showing you what's been marked for identification as State's Exhibit 23. What is this?
A. Well, the very center of the picture is the alley right between Group Therapy and Ultra-Tan.
Q. Is this the bar you were at that night?
A. Yes.
Q. Does this picture substantially reflect the way it looked on that night?
A. More cars and more people but that's --
Q. As far as structures, buildings, the same thing?
A. Yes, sir.
MR. SHALABI: Your Honor, at this time the State would like to admit State's Exhibit 23 into evidence.
MS. ZMROCZEK: Without objection.
THE COURT: So admitted.
(State's Exhibit No. 23, chart, received into evidence.)
MR. SHALABI: Your Honor, may I ask the witness to step down?
THE COURT: You may.
BY MR. SHALABI:
Q. So where were you standing when the car pulled up?
A. Directly in front of the front door.
Q. And where did the car -- which spot did the car pull up to?

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A. I believe it was this one, or this one. It was one of the two because they pulled straight in. There was no turn as they pulled into the parking spot. So I know it was one of those two spots.
Q. Okay. So they pull in at this point. Which door did you enter into?
A. This one.
Q. To go back into the bar?
A. Yes.
Q. Okay. And when he stepped back out -- you said you shut the door, where did you -- which door did you come out of?
A. This one. There was a wedge holding -- a wood block holding the door open. I had to kick it out in order to get the door closed.
Q. Did you see anyone running towards the car?
A. I didn't see them running towards the car but I did see Gabe and Joe heading down that direction because if they --
Q. From which direction? Show it the jury.
A. They came from this direction this way because they worked at the establishment next door.
Q. Why were they running that way?
A. Group Therapy and Pour House are a family of people. We were just looking out for each other.

Q. So they heard something?
A. They saw people running from Group Therapy down the street.
Q. Okay.
A. Which is an unusual occurrence. People don't run out of a bar.
Q. Did you see them interact with those individuals that ran to the car?
A. No, I didn't.
Q. You can take a seat.
A. (Complying.)
Q. Did you -- did you see the Defendant there?
A. Yes, but I didn't know he was problematic at the time. As I said, I only saw the car pull up and I saw him in the car but I didn't -- nothing -- I didn't know that he had been ejected from the bar previously so nothing clicked in my mind.
Q. Is that person you saw in this courtroom today?
A. Yes, sir.
Q. And could you tell the jury what he looks like, where he is in the courtroom?
A. Blue shirt, curly hair. Right there.
MR. SHALABI: Let the record reflect that the witness identified the Defendant.
THE COURT: It does.

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BY MR. SHALABI:
Q. Did you see him with a weapon?
A. I didn't see a weapon at all.
Q. Now do you look a little different than you did back then?
A. Yes.
Q. How so?
A. I got a hair cut.
Q. How long was your hair?
A. Beyond shoulder length.
Q. Okay.
THE COURT: All right.
MR. SHALABI: No further questions.
THE COURT: Ms. Zmroczek?

CROSS-EXAMINATION

BY MS. ZMROCZEK:
Q. You people watch every night at Group Therapy?
A. Yes, ma'am.
Q. Every single night?
A. Rarely do I have an occasion that I miss.
Q. Did you miss last Saturday night?
A. I went home early because I had a previous engagement to attend.
Q. You stated that you didn't see Mr. Ard, Stewart, as problematic; right?

A. I saw the car drive up in a hasty fashion. That was unusual. But I hadn't been alerted to him being ejected prior to that incident.
Q. And just so I'm hearing your testimony right, you pulled Jesse back into the bar?
A. He crumbled and wherever he may -- wherever he was standing or crouching or crumbled, I scooped him and pulled him inside.
Q. And then you didn't go chasing after them?
A. I didn't chase after anybody, no. I immediately tried to get more help.
Q. And that evening at Group Therapy you had on a white T-shirt, long hair?
A. Red shorts and a black hat.
Q. And, you were actually inside when Geno, or Benjamin Geno, the person who hit Jesse, actually hit him, right? So you didn't see any of that?
A. We were maybe four feet apart. My back was to him though.
Q. And, you would agree that they were arguing back and forth about, "Give me my watch?"
A. No.
Q. You didn't?
A. Never heard a word about a watch.
Q. Never heard anything?

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A. Nope. Also I don't work there, though.

MS. ZMROCZEK: That's all the questions I have.

THE COURT: Anything further?

MR. SHALABI: No, Your Honor.

THE COURT: Thank you, sir. You may step down. Call your next witness.

MS. GARFIELD: Judge, we have a matter of law to take up outside of the presence of the jury before our next witness.

THE COURT: Ladies and gentlemen, I'll let you step back to the jury room. Please don't discuss the case while you're there and we'll be with you in just a few minutes.

(Jury exits courtroom at 4:46 P.M.)

MS. GARFIELD: Your Honor, our next witness is Jesse Patterson. I just wanted to make sure that we're in agreement as far as impeachment information. I don't believe he has convictions. I don't believe there's anything that Ms. Zmroczek can impeach him with.

She also been alluding to an incident that occurred a couple weeks ago and asking witnesses if they're familiar with June 14th. I don't understand how that's relevant. I wanted to bring this all to the Court's attention before we put him on the stand.

THE COURT: Well, is there something in the record

you think -- background, you think? What is that?

MS. ZMROCZEK: I think, Your Honor, it goes to show --

THE COURT: What is his record that you think is --

MS. ZMROCZEK: Oh no, not in his record, Your Honor. In his medical records.

Your Honor, that evening when he goes to the hospital he tests positive for cocaine and marijuana. And that's what I will be asking him about, impeaching him.

MS. GARFIELD: Your Honor, there's nothing to indicate that he had ingested cocaine or marijuana that day. Metabolites stay in your body 30 days for marijuana and 72 hours for cocaine. I don't know how that's relevant to this case at hand.

THE COURT: Well, I don't understand -- tell me how that has something to do with this case.

MS. ZMROCZEK: Because, Your Honor, it all goes to his behavior. And what was said and not -- when the other witnesses come in --

THE COURT: Well, is this a self-defense case? You just got up and admitted that your client did all four of those things.

MS. ZMROCZEK: Right, right. No, no. It's not a self-defense case, Your Honor, but it is -- it is -- to get a full understanding of what happened that evening,

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the way that the picture is painted is that these people were just obnoxious, they didn't do -- I mean, they were just horrible and they were thrown out.

But, Your Honor, the behavior, which I know you can't see because you're looking at the back of the television, displays that there was aggression between the bartenders, bouncers and the, and the patrons, all of them, all four of them including the Defendant.

THE COURT: What does that -- you've come in here and admitted your client did certain things of which he can get three years in prison for -- what do we have up there?

MS. ZMROCZEK: Three-six-nine.

MS. GARFIELD: Six years and 60 days.

THE COURT: I mean, so there's nothing justifiable about what you're saying at this point in time. I mean, you're really talking about what the injuries were as opposed to why he might have done what he did; right? Your basic argument is, hey, well probably on the attempted murder there's no malice aforethought and --

MS. ZMROCZEK: That's my --

THE COURT: -- then as you work your way down, you know, there's not great bodily injury, but that doesn't have anything to do with whether one of them had marijuana in their system or whether there was an argument.

Apparently there was some sort of confrontation and four people left and four people came back. Or do y'all deny that?

MS. ZMROCZEK: No, we don't deny that, Your Honor. And I think you hit it right on the head. It's a confrontation. And the state of mind of what was said and what --

THE COURT: I don't think that has anything to do with this case, the state of mind. Whose state of mind?

MS. ZMROCZEK: It goes to explain how this was an altercation and not just an attack. And that's I think why it falls directly within the assault and battery.

THE COURT: You've admitted it's an attack with minor injuries.

MS. ZMROCZEK: Correct.

THE COURT: So I don't understand. Are you going to be able to show that he was smoking marijuana that night and under the influence of alcohol or marijuana? I mean, under the influence of cocaine.

MS. ZMROCZEK: I think that's a question for the medical doctor.

THE COURT: The medical doctor?

MS. ZMROCZEK: But it also goes to his truthfulness, Your Honor, because --

THE COURT: So you got a medical doctor that's

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going to testify that he had smoked marijuana that night?

MS. ZMROCZEK: No, Your Honor. I think they have medical doctors that put the medical records into question. And he also is asked about it at the hospital and they make a big deal about how bouncers aren't supposed to drink and they're supposed to be pure of -- and clear-headed. And that's not the case here, Your Honor.

THE COURT: So that might be -- if he was doing it, that might be a fire-able offense. But that doesn't -- you're not telling me that because he was smoking marijuana your client was justified in sticking him with a knife.

MS. ZMROCZEK: No, Your Honor, but what I am telling you is because he was smoking marijuana and/or high on cocaine that he was aggressive towards my client and that's why my client fought back.

THE COURT: Which gave your client justification of coming and stabbing him --

MS. ZMROCZEK: Certainly --

THE COURT: -- then he wouldn't be guilty of assault and battery?

MS. ZMROCZEK: Certainly not justification, but explanation.

THE COURT: I don't see the relevance.

What happened last Saturday night that we're talking about?

MS. ZMROCZEK: Your Honor, last Saturday night at Group Therapy Jesse somehow ended up with a big cut on his head and had to go to the hospital. Your Honor, it shows a pattern of ingesting either alcohol or drugs and getting hurt.

THE COURT: We're not going into that.

MS. ZMROCZEK: And I think --

THE COURT: If you have something to show that Mr. Patterson was under the influence that night, that might be something -- of alcohol or drugs. You got testimony from somebody that says that, then maybe.

MS. ZMROCZEK: Okay.

THE COURT: But just to speculate that because he tested for marijuana which could have been three weeks earlier, it's not sufficient.

MS. ZMROCZEK: Okay.

THE COURT: And what happened last Saturday night has nothing to do with this.

MS. ZMROCZEK: All right.

THE COURT: Now, who's the next witness?

MS. GARFIELD: Mr. Patterson.

THE COURT: All right. Let's bring in the jury. How long is Mr. Patterson going to take?

MS. GARFIELD: Thirty, 45 minutes.

THE COURT: You don't want to do your EMS people?

MS. CAMPBELL: We can.

THE COURT: Get them out of here. That way -- we probably won't finish with Patterson today.

MS. GARFIELD: Okay.

THE COURT: How many you got?

MS. GARFIELD: Just one for today.

THE COURT: You got anybody else after EMS?

MS. CAMPBELL: The 9-1-1 call.

MS. GARFIELD: We got another short witness.

THE COURT: Let's do it. Let's bring them in. We'll do Mr. Patterson tomorrow.

(Jury enters courtroom at 4:54 P.M.)

THE COURT: All right. Madam Solicitor?

MS. GARFIELD: Thank you, Your Honor. The State calls Kaitlyn Griffin.

KAITLYN ELIZABETH GRIFFIN, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

THE WITNESS: Kaitlyn Elizabeth Griffin.

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Ms. Griffin, where are you employed?

A. Richland County EMS.
Q. And can you explain to the jury your employment with EMS? What exactly do you do?
A. I'm a paramedic. I've been with Richland County for about four and a half years. At the time I was on night shift. And when someone calls 9-1-1 if it's a medical reason we'll respond.
Q. I'm going to ask that you pull that microphone up to you a little bit. You're soft spoken.
Ms. Griffin, were you working back on July 28 of last year?
A. Yes, ma'am.
Q. And you were working the night shift?
A. Yes, ma'am.
Q. Did you get a call to respond to a Five Points area venue, Group Therapy Bar?
A. Yes, ma'am.
Q. And what was the nature of the call you received?
A. It came out as a stabbing.
Q. As a stabbing?
A. Yes.
Q. And when you arrived, what did you observe?
A. Well, when we got dispatched from the stabbing, at the time we didn't know how many people were stabbed. And it was me and my partner and also the supervisor responded

KAITLYN GRIFFIN - DIRECT BY GARFIELD

in an SUV just in case I needed a backup. And my supervisor went inside because one gentleman was coming out towards us that had been stabbed and me and my partner greeted him and my supervisor went in because they said somebody else was stabbed that was inside.

Q. What's the name of your partner?

A. It's Michael Menger.

Q. What's the name of your supervisor?

A. It's Sergeant Steve Tackett.

Q. And when you came in contact with the individual standing outside that had been stabbed, what was his name? Would it help you to have your report?

A. Yes.

Q. (Document handed to the witness.) Just take a second to review that.

A. (Complying.) It was Scott Flemming.

Q. And what did you observe or can you tell the jury the nature of the injuries that you treated regarding Mr. Flemming?

A. He had, he had a stabbing to the left lower chest and also to the left arm.

Q. And what did you do in the course of your business of treating Mr. Flemming?

A. We have a policy that anything to the chest, abdomen, or back we put an adhesive addressing on.

Q. Would you explain what that means to the jury?
A. It's a Vaseline gauge and basically we put it on and tape it on three sides. And it's just in case any major organs, but especially the lungs, get hit. Because air can become trapped. And when we tape it on three sides we can call -- we can do what's called burping where we can lift the one side up, because air can become trapped, to release the air to help the person breathe if the lung is actually hit.
Q. That's what you did to Mr. Flemming?
A. Yes, we did that, just to the one that was to his core. The other one, I believe we just put a regular bandage on, onto his arm.
Q. And did you also have anything to do with any treatment to the other individual that was inside?
A. I did not. When he came out my supervisor and, I believe, one of the workers from Group Therapy helped my supervisor carry him out. He was already on the board. And he already had the dressings, the Vaseline gauge. He already had those on his wounds to his back.
Q. Were you familiar with the nature of his injuries?
A. Yes. My supervisor told me exactly what he saw and then when we got to Richland they took the Vaseline gauze off and I also saw there.
Q. Can you share with the jury the nature of the

KAITLYN GRIFFIN - DIRECT BY GARFIELD

injuries?
A. Yes.
Q. I'm sorry. What's the name of that second patient?
A. That was Jesse Patterson.
Q. Please share with the jury the nature of Mr. Patterson's injuries.
A. Okay. He had a stabbing to the left upper shoulder blade. And he also had a stabbing to the left side of his back, just by his lower ribs. And that one was, I estimated probably about a three-inch opening. And he also was complaining of arm pain. He had his arm up in the air and he couldn't put his arm down.
Q. That arm pain, was that significant to you?
A. Yes.
Q. And can you explain to the jury why?
A. Just the way he was stabbed, I don't know if he -- if there was trauma to the actual arm or if he had hit a nerve. But just the fact that he couldn't move that arm up and down at all.
Q. And, would you have characterized Mr. Patterson's injuries as life threatening?
A. Yes. We consider anything to the core, anything to the core and to the head life threatening.
Q. And did you transport Mr. Patterson and Mr. Flemming to Richland Hospital -- Palmetto Health

Richland?
A. Yes, to the trauma center.
Q. And they were transported in the same ambulance?
A. Yes.
Q. And once you got to the hospital, did you continue to participate in their care?
A. Once I filled the doctors in and the nurses on what I observed and the injuries that I saw and gave them an update of what I actually did, then we actually leave and go available to take other calls.
Q. To take other calls for other injuries?
A. Yeah, other 9-1-1 calls.
MS. GARFIELD: Beg the Court's indulgence.
(Pause.)
Thank you, Ms. Griffin. Please answer any questions the defense counsel may have.
MS. ZMROCZEK: I have no questions.
THE COURT: Thank you, ma'am. You may step down.
MS. GARFIELD: Your Honor, may Ms. Griffin be excused?
THE COURT: She may. Thank you, ma'am.
MS. CAMPBELL: The State calls Courtney Walker.
COURTNEY WALKER, having been duly sworn, was examined and testified as follows:
THE CLERK: Please have a seat. State your full

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name for the record.

THE WITNESS: Courtney Walker.

DIRECT EXAMINATION

BY MS. CAMPBELL:

Q. Ms. Walker, how old are you?

A. I am 24.

Q. And are you currently employed?

A. Yes, ma'am.

Q. What do you do for a living?

A. I'm a test administrator at Prometric Testing.

Q. At what kind of testing?

A. Prometric Testing. That's the name of the company.

Q. And how long have you been employed there?

A. Since last October.

Q. I want to turn your attention back to last summer. Were you living here in the Columbia area?

A. Yes, ma'am.

Q. And were you from Columbia?

A. Yes, ma'am. I'm from West Columbia.

Q. And last summer were you attending school or through school or what was going on with you?

A. I graduated last August.

Q. Okay. So you were actually in summer school?

A. Yes, ma'am.

Q. And I want to turn your attention back to the night

when this occurred at Group Therapy. Were you actually at Group Therapy that evening?

A. Yes, ma'am. I was with my friends.

Q. And, when say you were with your friends, who were you with that night?

A. I was with some of my friends that I met in college. They were out drinking, and I'm not a drinker so I was just there.

Q. You're not a drinker?

A. No, ma'am.

Q. But you were out because --

A. They were out there just having one or two beers.

Q. They're the ones that wanted to go?

A. Uh-huh. Yes, ma'am.

Q. So you all were actually inside the bar that night?

A. Yes, ma'am.

Q. Tell the jury what you actually observed that night when you were in the bar sometime after midnight.

A. My friend Kalyx and I were sitting on the bench closest to the front door.

Q. To the front door?

A. Yes, ma'am.

Q. That's the door on which street?

A. I believe that is Green Street, yes.

COURTNEY WALKER - DIRECT BY CAMPBELL

Q. Green Street? Okay.
A. Yes, ma'am. And we noticed a loud commotion. We didn't really know what was going on. And then I got -- the guy who was working the door came in and fell on the floor and said, "Someone call 9-1-1." And he said, "He stabbed me, he stabbed me".
Q. You heard him say "He stabbed me"?
A. Yes. So my friend kind of went to the floor to, like, check on him, I guess. And I got up and walked outside so I could call 9-1-1.
Q. And at that point you were actually inside when you saw him come in, right?
A. Yes, ma'am.
Q. When he fell on the floor?
A. Yes, ma'am.
Q. And did you notice anything about him that indicated any type of injuries when he came inside?
A. He was bleeding.
Q. You said your friend went over and tried to help him?
A. She went down to him at eye level. I left. She -- at first she was trying to hold me back, but then he said "Call 9-1-1. He stabbed me." So she dropped down to the floor to him and then I walked outside to call 9-1-1.
Q. And by the time you got outside, could you see any

of the attackers or anybody that had done that?
A. No, ma'am.
Q. Once you were outside -- why did you go outside to call 9-1-1?
A. So that the operator would be able to hear me and so I could keep calm.
Q. So you could keep calm?
A. Yes, ma'am.
Q. Once you were outside, did you make a 9-1-1 call?
A. Yes, ma'am, I did.
Q. And have you had an opportunity to listen to that call?
A. Yes, ma'am, I have.
Q. I show you this disk. You've actually reviewed the 9-1-1 tape and it accurately reflects the phone call you made that night?
A. Yes, ma'am.
(State's Exhibit No. 24, 9-1-1 call, marked for identification.)
MS. CAMPBELL: Your Honor, at this time we'd offer State's Exhibit 24 into evidence.
MS. ZMROCZEK: Without objection, Your Honor.
THE COURT: So admitted.
MS. CAMPBELL: Permission to publish?
THE COURT: You may.

COURTNEY WALKER - DIRECT BY CAMPBELL

(9-1-1 call, State's Exhibit No. 24, played for the jury and received into evidence.)

BY MS. CAMPBELL:

Q. And you mentioned there on the 9-1-1 tape that you're trying to wave someone over?

A. Yes, ma'am. When I was outside the bar, I saw police, you know. They just patrol Five Points. And they were coming down the street. So I ran over to them and tried to get them to come over.

Q. You were trying to get them into the bar?

A. Yes, ma'am, to let them know what happened.

Q. And the man -- the guy at the door that was working at the door, he was the one that got stabbed?

A. Yes, ma'am.

Q. Did you know him before that night?

A. No, ma'am, I didn't.

Q. When you said that he came in, you mentioned that you saw blood?

A. Yes, ma'am.

Q. And where did you see blood coming from?

A. From him. I couldn't see exactly where it was coming from. It was on the floor.

Q. On the floor?

A. Yeah. He had fell on the floor.

Q. And, would you characterize it as a good bit of

blood?
A. Yes, ma'am.
Q. And what was his condition as he was on the floor?
MS. ZMROCZEK: Objection, Your Honor. Speculation.
MS. CAMPBELL: What she observed.
THE COURT: Well, I think she can testify to what she observed.
MS. CAMPBELL: Thank you, Your Honor.
Q. Go ahead. I'm sorry.
A. He looked to be in pretty bad good condition, and in a lot of pain.
Q. That night when you saw him and everything, what did you do?
A. I got up and I went outside and I called 9-1-1.
Q. And once you were outside, did you do anything about the situation to comfort yourself?
A. I just, I was just taking deep breaths because I was really, really nervous. And my friends were freaking out, so I was just trying to stay calm. I was the only sober one, so I just tried to stay really calm.
Q. And at some point did you say a prayer?
A. Yes, ma'am, I did.
Q. Who were you saying a prayer for?
A. For Jesse.
THE COURT: All right. Anything?

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MS. CAMPBELL: I have no further questions.

MS. ZMROCZEK: I have no questions, Your Honor.

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

All right. Ladies and gentlemen, we're going to recess for the evening so I'm going to ask that you not discuss the case with each other or anyone else when you're gone tonight. Don't do any investigating. Don't get on your computer. Don't ride by Five Points and check things out.

We will start tomorrow morning at 9:30. So, y'all have a nice evening, and we will see you at that time.

(Jury exits courtroom at 5:10 P.M.)

THE COURT: All right. Anything we need to take up? You'll be ready in the morning?

MS. GARFIELD: Yes, sir.

MS. ZMROCZEK: Your Honor, would you like us to get here a little early to -- if they have any exhibits. I don't know if they're going to have -- if he's testifying they may have some pictures that show the wounds and Your Honor may want to address that just we don't have to make the jury wait.

MS. GARFIELD: We can do that right now.

THE COURT: I'll be here whenever you want me to. How many pictures of the injuries?

MS. CAMPBELL: Mr. Flemming, we have four and only have one from Mr. Patterson.

THE COURT: Mr. Flemming had the cut arm?

MS. GARFIELD: Yes, sir. Mr. Patterson was taken straight to surgery and only able to get one.

THE COURT: All right. Y'all bring them in the back. I'll take a look at them.

END OF DAY'S PROCEEDINGS: 5:11 P.M.

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ON TUESDAY, JUNE 24, 2014 AT 9:34 A.M.:

THE COURT: All right. Solicitor, ready to go forward?

MS. GARFIELD: Yes, sir.

THE COURT: Are y'all ready?

MS. ZMROCZEK: Yes, Your Honor.

THE COURT: All right. Let's bring us a jury in if we could, Mr. Talbert.

(Jury enters courtroom at 9:35 A.M.)

THE COURT: Good morning, ladies and gentlemen. Nice to see you this morning.

Before we turn this over to the attorneys, let me ask you a couple questions if I could.

First of all: Has anybody approached you about this case, discussed it with you at all since we left yesterday?

(No response.)

THE COURT: Have you had any conversation with anybody, including each other or someone else since we left the courthouse yesterday?

THE JURY (COLLECTIVELY): No.

THE COURT: Anybody done their own investigation or made any inquiry on a computer or otherwise since we left?

THE JURY (COLLECTIVELY): No.

THE COURT: All right. As you recall when we finished yesterday afternoon, the State's in the process of putting up its evidence in the case in chief. And so I assume they're ready to proceed.

Ms. Garfield, are you ready to go?

MS. GARFIELD: Yes, sir. Thank you, Your Honor. May it please the Court.

The State will call Officer Theodore MacLaughlin.

THEODORE MacLAUGHLIN, having been duly sworn, was examined and testified as follows:

THE CLERK: State your full name for the record.

THE WITNESS: Theodore MacLaughlin, City of Columbia Police Department.

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Officer MacLaughlin, how long have you been employed with the Columbia Police Department?

A. Three years now.

Q. And before you were employed with the police department, what did you do?

A. I was an Aiken County Deputy for eight years. Before that I worked for Batesburg-Leesville.

Q. Any military experience?

A. Yes. I have 23 years in the United States Army.

Q. And what was your duty with the Army?

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A. I'm currently a sergeant first class over at the 321st Infantry as a drill sergeant.
Q. Officer MacLaughlin, with your employment with the Columbia Police Department, what are your duties?
A. I patrol the Five Points Area.
Q. And that's primarily the district that you are assigned to?
A. Yes.
Q. Were you -- when you patrol it, what all do you do?
A. We patrol the area to ensure that the citizens that go down to Five Points are safe.
Q. And were these your duties back in July of last year?
A. Yes, they were.
Q. Were you working on the night of -- or the early-morning hours of July 28th of last year?
A. Yes, I was.
Q. And did you have an occasion to be flagged down to the Group Therapy Restaurant and Tavern?
A. Yes, I was.
Q. Can you explain to the jury what caused you to be flagged down?
A. There was a disturbance at Group Therapy. And the owner or one of the bar staff came out and told us that there was a stabbing inside.

Q. Were you flagged down by a patron or did you get a call?
A. Flagged down by a patron.
Q. And did you then in turn go to the Group Therapy?
A. Yes, I did.
Q. And were you alone?
A. No, there was other officers with me.
Q. And did you go inside?
A. Yes, I did.
Q. And when you went inside, what was the scene like?
A. It was awful loud inside. People were hollering for this and that. I observed Jesse laying on the floor and I could hear him wheezing from the door.
Q. And did you -- do you have any medical experience?
A. Yes, I was a US Army Medic. I also worked for Richland County EMS.
Q. And how long did you do that?
A. I become a medic in 1985 and my EMS, my certificates ended in to 2001.
Q. And when you went over to Jesse, did you observe his wounds?
A. I didn't observe the wounds but -- because he still had a shirt on at that time, but he did have blood coming down his shirt. And they were holding their hands over his back, right under his arm.

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Q. When you say they, who was they?
A. Bar staff.
Q. And based on your experience, what did you think about his wounds when you first saw them?
A. I believe he had a collapsed lung due to the wheezing.
Q. And in your experience, would you characterize a collapsed lung as life threatening?
A. Yes, I would.
Q. Did you have any contact with the bar owner, Scott Flemming?
A. Just a brief contact with him before he was transported.
Q. And did you observe him to have injuries as well?
A. He had blood running down his arm.
Q. And were you able to find out what had happened?
A. Not right away. I was too busy working the scene.
Q. Did Jesse tell you anything that had happened?
A. When I went in, I bent down to him. It wasn't initially, but I bent down to him before he got taken away. He said that he had took from two or three people out of bar earlier and that they had came back and attacked him.
Q. Was there a description given?
A. Yes. He said that the man was bald headed with a

lime green shirt, shorts, tattoos.
Q. Officer MacLaughlin, did you do anything to try to assist Jesse?
A. No, at that time I didn't. There was too many people working on him at that time.
Q. Did EMS shortly arrive?
A. Yes.
Q. And did you remain on the scene while EMS treated Jesse Patterson and Scott Flemming?
A. Yes.
Q. And what were you doing inside the bar? Was the scene being secured?
A. Yes. I was securing the scene, keeping people from walking in the blood.
Q. And what about the other patrons in the bar, what happened to them?
A. We made them go out the back door.
Q. Did you assist in any interviews of any witnesses?
A. No, I didn't.
Q. And that is pretty much the extent of your involvement in this case?
A. Yes.
MS. GARFIELD: Thank you, Officer. Please answer any questions the defense counsel has.
MS. ZMROCZEK: No questions.

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THE COURT: All right. Thank you, Officer. You may step down. Any objection to him leaving?

MS. GARFIELD: He may be excused.

THE COURT: You may -- you're free to leave. Thank you.

MS. GARFIELD: The State calls Officer Stephen Tackett.

STEPHEN MICHAEL TACKETT, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

THE WITNESS: Stephen Michael Tackett, Richland County EMS.

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Mr. Tackett, how long have you been employed with EMS?

A. Thirteen years.

Q. And what are your duties with EMS?

A. Currently act as a corporal which is a crew chief. I supervise about six individuals underneath me.

Q. One of the people you supervise, is that Kaitlyn?

A. At the time, yes.

Q. Oh. At the time?

A. Yes, ma'am.

Q. At the time of this incident?
A. Yes.
Q. Do you actually respond to calls for emergency help?
A. Yes, ma'am.
Q. And what kind of calls do you respond to?
A. Gunshots, stabbings, car entrapments.
Q. Do you respond to all calls or just specifically those?
A. At the time just specifically those.
Q. And those were your duties back in July of last year?
A. Yes, ma'am. That's correct.
Q. On July 28th, of last year in the early-morning hours, did you have an occasion to respond to Group Therapy Restaurant and Tavern?
A. Yes, ma'am.
Q. And can you just explain to the jury what you observed upon arriving at that scene?
A. Yes, ma'am. Pulled up to Group Therapy about 30 seconds to a minute before the ambulance pulled up and quick response vehicle. I got out of the vehicle, was directed to a 40-ish-year-old gentleman. Observed the stab wound to his left arm as well as his left chest. He was able to talk to me. So I sent him to the ambulance.

STEPHEN TACKETT - DIRECT BY GARFIELD

He had told me upon my arrival that there was another gentleman inside the bar that was much worse off. As soon as the ambulance arrived, I directed the gentleman to go to the ambulance to seek aid from the other paramedic arriving on the scene.

Upon entering the bar, noticed a large amount of blood on the floor and a gentleman on his knees with two large cuts in his shirt. I removed his shirt, noticed two large lacerations, stab wounds, to the back. One was to the left upper rear shoulder, and the other was to the lower lateral posterior or -- excuse me, back rib cage area.

Q. And what did you do as your course of action upon observing these injuries?

A. Placed an occlusive dressing on both of the stab wounds. Placed him in full spinal precaution, put a collar on his neck, put him on a hard board just in case he had a spinal injury that no further damage would have been done to that. The occlusive dressings are dressings that we use in case there is a chest wound, it prevents it from becoming a tension pneumothorax.

Q. Mr. Tackett, were there other members or other people in Group Therapy assisting Jesse when you arrived?

A. Yes, ma'am. There was one or two people. I believe they were bar staff, I'm not sure, but they knew

the gentleman by name. And they were trying to hold pressure on his stab wounds.

Q. Did you consider these -- when you first arrived and observed the injuries, did you consider them life threatening?

A. Absolutely.

Q. To Mr. Patterson?

A. Yes, ma'am. To both victims.

Q. To both victims?

A. Yes, ma'am.

Q. And did you -- what was your next course of action?

A. After I paged the 22-year-old gentleman that was in the bar, got him on the spine board, got the cohesive dressings on him, me and one of the bar staff carried him out to the ambulance, loaded him into the ambulance. And that's when the crew left with both victims and took them to the hospital.

Q. Did you notice anything odd about Mr. Patterson's arm?

A. Is that the younger gentleman?

Q. That's the younger one. Yes, sir.

A. Yes, ma'am. He was complaining of severe pain to where he was unable to move his arm.

Q. And did -- at that time were you able to ascertain why?

STEPHEN TACKETT - CROSS BY ZMROCZEK

A. No, ma'am. We weren't sure if it was due to a nerve or something like that, but his injuries to his back were severe enough we considered them life threatening that his -- the severe pain to his arm was the least of our concerns.

Q. Did you travel to the hospital?

A. No, ma'am.

Q. And is that the end of your involvement in the care of Mr. Patterson and Mr. Flemming?

A. Yes, ma'am.

MS. GARFIELD: Beg the Court's indulgence.

(Pause.)

Thank you, Mr. Tackett. Please answer any questions defense counsel has.

THE WITNESS: Yes, ma'am.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Good morning.

A. Good morning.

Q. I just have a few questions. I think you said you treated both of them as life threatening --

A. Yes, ma'am.

Q. -- at that time, right?

A. Yes, ma'am.

Q. And in fact you assigned what you call trauma

scores --
A. Yes, ma'am.
Q. -- to them? Do you recall what the trauma scores were?
A. In reviewing the paperwork that Ms. Marshall did, they both had revised trauma scores of 12.
Q. They both had the same trauma scores of 12?
A. Yes, ma'am.
Q. And how are the trauma scores rated?
A. From zero to 12.
Q. And what's zero being?
A. Zero is dead.
Q. Is what?
A. Dead.
Q. Zero is dead?
A. Yes.
Q. And what is the highest?
A. Twelve.
MS. ZMROCZEK: Thank you. I have no further questions.
THE COURT: Anything?
MS. GARFIELD: Nothing further, Judge.
THE COURT: Thank you, sir. You may step down and you are free to leave.
THE WITNESS: Thank you.

DAVID FORD - DIRECT BY GARFIELD

MS. GARFIELD: The State calls Dr. David Ford.

DAVID THOMAS FORD, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Doctor, if you'll state your full name for the record.

A. David Thomas Ford.

Q. And, Dr. Ford, where are you employed?

A. At Palmetto Health Richland.

Q. And what are your duties at Palmetto Health Richland?

A. I teach resident physicians and medical students and we run the emergency department.

Q. And what is your prior background? If you'll just give the jury your background information.

A. I'm board certified in emergency medicine and hyperbaric medicine. And I'm an associate professor of clinical surgery with the University of South Carolina School of Medicine.

Q. And where did you attend school?

A. At Albany Medical College in New York.

Q. And how long have you been employed with Palmetto

Health Richland?

A. Twenty-one years.

MS. GARFIELD: Your Honor, at this time we'd like to introduce Dr. Ford as an expert in emergency room medicine.

MS. ZMROCZEK: Without objection.

THE COURT: Ladies and gentlemen, I told you yesterday, if scientific, technical, or other specialized knowledge will assist you the triers of facts in understanding any matter that may be in controversy or any fact that is in issue, and a witness can be qualified as an expert by virtue of his or her knowledge, skill, experience, training, or education, and as such can offer opinions in his or her areas of expertise.

I'm going to find the doctor to be qualified as an expert in the field of -- trauma medicine?

MS. GARFIELD: Emergency medicine.

THE COURT: -- emergency medicine. As such he can offer opinions in this field. I tell you, you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses who testify in this trial.

MS. GARFIELD: Thank you.

Q. Doctor, you were working in the early-morning hours of July 28th of last year?

DAVID FORD - DIRECT BY GARFIELD

A. That is correct.
Q. And you had the occasion to treat both Scott Flemming in the emergency room?
A. I did.
Q. And as well as, I believe, there was another patient there, Jesse Patterson?
A. Yes, there was. I treated Scott Flemming.
Q. Can you just sort of outline for the jury what the scene would be like when these two individuals arrived by the emergency -- by the ambulance.
A. Yeah. The first word that we got that this patient was going to be coming is when emergency medical service called ahead on the radio and said that they were bringing a trauma 9-1-1 patient.

And trauma 9-1-1 is the highest level of trauma designation to get us geared up so that I can get my team ready for a patient that's very sick. There's a trauma 8-1-1 which is one step below that which is less potential severity. 9-1-1 is the highest potential severity. So I got my team in our resuscitation bay which is like a miniature operating room scenario with everything that we need in there in order to save somebody's life.

So I was in there, my resident was in there, my emergency nurse team is in there as well, and we're standing around the stretcher waiting for this patient to

be brought in by ambulance.

The patient arrived and right away I noticed bleeding from the left anterior chest and also from his arm --

Q. Now I'm going to stop you.

A. -- from laceration.

Q. You're describing Scott Flemming at this time?

A. That is correct.

Q. Was the 9-1-1 call or the 9-1-1 classification, was that applied to both patients?

A. Both patients were trauma 9-1-1s, but Mr. Flemming was my patient that I was going to be taking care of.

Q. Okay. Thank you. Please proceed.

A. And so at that point in time we begin to work on Mr. Flemming. One of my nurses starts an IV in his arm and hangs normal saline so that we can start to replace any blood that's lost.

One of my residents is now evaluating the patient, listening to their lungs. And we have sort of a scale that we go on. First we make sure their airway is intact. If it's not, we fix it. Then we make sure their breathing is intact. And if not, we fix it. And then we make sure their circulation is being fixed.

That's because that's the order in which -- that things will kill you quickest. So we call it ABC, airway,

DAVID FORD - DIRECT BY GARFIELD

breathing, circulation. So we're doing the ABC stuff right off the bat.

Another resident is doing ultrasound checking to see if there's any evidence of injury. And the big thing is with a laceration to the left anterior chest wall, underneath that is the heart and the lungs. So he's doing ultrasound to look and see if there's any evidence of bleeding or bad damage to the heart or lungs.

The heart can get stabbed. The lung can get stabbed and punctured. And that's how you get a collapsed lung is from getting punctured, and in a penetrating trauma situation like this. So that resident is looking for those sorts of injuries in that case.

Q. What was your next course of action after doing all of those?

A. After?

Q. ABC.

A. Yeah. After doing airway, breathing, circulation, then the D stands for deficit. So we do a neurologic examination and determine if there's any damage to the motor nerves or the sensory nerves of the person's body.

And then the E stands for exposure. Then we take all their clothes off, check the front of them, we flip them over and check the back. I teach that if you don't roll the patient over and check their back you've only

seen 50 percent of the patient.

And then the F stands for Folley standard tubes if needed. You start doing internal exams on the patient if there's evidence of damage to things like the abdomen and such.

Q. So while you're doing this checklist A through F, explain to the jury what your findings were.

A. We found that -- the primary thing that we were concerned with on him was the stab wound to the left anterior chest. And as I mentioned, the real concern there is that the heart lies under that, and the lungs lie under that. Is the person going to die in the next five minutes from the stab wound to the left anterior chest. And so we were concerned that it's a potentially life-threatening wound to the left anterior chest in my opinion.

So I addressed -- after making sure that airway and breathing and circulation were being taken care of, I addressed looking at that wound first with ultrasound. So what we did is we ultrasounded the patient's heart and thankfully there wasn't any evidence of bleeding around the heart. And we ultrasounded the patient's lungs and we were concerned that there might have been a punctured lung. On the ultrasound it was a little bit difficult to see because of the bleeding from the laceration in that

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area, so we decided we needed to go further.

We ordered a chest x-ray and while we were resuscitating, in other words, trying to bolster the patient, we did a chest X-ray on the patient. And the X-ray thankfully did not show a collapsed lung on that side.

So the next step after that was we continued to give intravenous fluid and check him out to make sure that nothing else is injured because I've seen patients that have been injured and the obvious things jump out of you, the chest wound, the arm wound that we're cleaning and working on, and then you rotate them over and spread their butt cheeks apart and you find there's an injury there.

So I tell my residents don't let your guard down until you check every inch of the patient from the top of their heads to the soles of their feet. So we're continuing to check this patient all over from head to toe.

At that point Dr. Reeves, his trauma team assisted us and I believe they did some further exploration.

Q. What kind of doctor is Dr. Reeves?

A. He's a trauma surgeon.

Q. And he's in there as well?

A. Yeah, initially his team is there and so emergency medicine and trauma surgery are working side by side on

the patient. And I believe Dr. Reeves specifically explored the chest wound to the left anterior chest as well as the arm wound.

Q. Explain to the jury what kind of procedure goes into doing those kind of checks to the arm and the heart?

A. Well, the first thing you need to do is alleviate the patient's pain. You've got to use some sort of pain relief. What we'll usually use in a trauma scenario is lidocaine. You don't want to be giving this person a whole lot of morphine or demerol because that can drop their blood pressure and in trauma that can be really dangerous. So lidocaine is taken.

The wounds are infiltrated. That's when you put the needle under the skin and puff up the skin with the lidocaine to make the pain receptors go numb in that area. It's still going to be uncomfortable for the patient. And then actually what you do is you take your finger and you probe inside to see how deep. It tells you what structures are injured.

Q. This lidocaine, is that considered a local anesthesia?

A. It is. Yeah. It's similar to what happens at the dentist office if she or he does it right, numbs you up before drilling and working on your teeth.

Q. And during the course of this procedure, what was

DAVID FORD - DIRECT BY GARFIELD

your -- what kind of treatment did you elect to do on Mr. Flemming after you went through this checklist?

A. After going through the checklist we elected to do the local exploration to the cervical. Local exploration. And it was Dr. Reeves' team actually that did that.

Q. That did the local exploration. Okay. And then after that exploration, what did you do to Mr. Flemming?

A. Well in a patient like this, that had -- that was -- that had potentially life-threatening injuries when you first saw them, even with the local exploration we don't discharge them right away. We want to make sure nothing crops up a little bit later.

So there's a period of observation that's needed. So we kept him in the emergency department and observed him. I can't give you an exact amount of time. You'll have to look that up in the record. I don't remember, it's a year later now. But he was observed for a period of time afterwards in the emergency department to make sure that no life-threatening injuries cropped up afterwards.

And indeed during that period of observation he remained stable. And that's what we're looking for. Three hours later, two hours later, does he start to drop his blood pressure 120 over 60 to 90 over 50, 80 over 30,

70 over 20. I've seen that happen in a patient that really looked good up front so we call it tincture of time, watching them for a period of time to make sure that nothing jumps out later on that's life threatening.

So we watch them and observe them for a period of time.

Q. This observation period, you're not talking about minutes?

A. No. Hours.

Q. Hours. Did he -- did you -- did you administer any staples or stitches or anything like that to Mr. Flemming?

A. I believe Dr. Reeves after full exploration of the chest wound and the arm wound did staple the wounds closed.

Q. And what is going on with the other patient that came in during all of this time?

A. He's also being worked on at the same time. This happens quite often and we're used to doing two things at the same time. We'll split our team up and just do what needs to be done.

Q. And who is treating the other patient which is identified as Jesse Patterson?

A. I believe that was the remainder of the trauma team. I do not know the extent of the injuries on the

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other patient.
Q. The trauma team to include Dr. Reeves?
A. That's correct. Dr. Reeves is the attending so he's the captain of the ship for the trauma team, just like I'm the captain of the ship for the emergency team.
Q. And, Doctor, I believe you testified it's your expert opinion within a reasonable degree of medical certainty that the wounds sustained by Scott Flemming were life threatening?
A. That is correct.
MS. GARFIELD: Beg the Court's indulgence.
(Pause.)
Dr. Ford, thank you. Please answer any questions defense counsel may have.

CROSS-EXAMINATION

BY MS. ZMROCZEK:
Q. Doctor, I just want to make sure I heard you correctly that the wounds sustained by Scott Flemming were life threatening?
A. That is correct.
Q. And I believe you -- after you see a patient, you do all of the protective care, you write kind of a closing or a follow-up of what happened, right?
A. Indeed. That is correct.
Q. And if I'm reading this correctly, if you need to

review your notes let me know, but it states he believes that he was -- the object he was attacked with was either a box knife or a very small knife?

A. Yeah. My resident is the physician that dictated that note, Bart Douglas, and he did dictate that.

Q. And you have to sign off on that to make sure it's correct?

A. Yes. Yep.

Q. And in general appearance you noted: He is alert, oriented, and in no apparent distress or your resident noted that?

A. Yeah, and that's a neurologic evaluation. That he's alert and able to talk to us. Oriented, that he's able to say where he is. And in no apparent distress means at that point in time that his blood pressure isn't 70 over 30 and going down the tank.

Q. Certainly. And I think that was noted under general appearance, right?

A. Yes, ma'am.

Q. That's where y'all placed that. And, so your final diagnosis was a laceration to the left anterior chest and a laceration to the left elbow, right?

A. Yes. Left arm and left anterior chest.

Q. And although I'd like to pretend I went to medical school because I have watched a lot of Doogie Howser when

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was growing up but --
A. Yes, I did too.
Q. -- laceration means cut, right?
A. And the reason we use the term laceration is that when we're seeing him as a physician we don't know what caused it. So we don't say --
Q. Stab wound?
A. Yeah. Rather describe what the skin looks like in front of us.
Q. Right. You take the emotion out of it and you simply describe what it is, a laceration?
A. Yes.
Q. Which is a cut. Thank you.
A. Yes, ma'am.
THE COURT: Anything further?
MS. GARFIELD: No, sir.
THE COURT: All right. Thank you, Doctor. You may step down and you are free to leave.
MS. CAMPBELL: May it please the Court.
THE COURT: Yes.
MS. CAMPBELL: The State calls Dr. Reeves.
JEREMY REEVES, having been duly sworn, was examined and testified as follows:
THE CLERK: Please have a seat. State your full name for the Court.

DIRECT EXAMINATION

BY MS. CAMPBELL:

Q. If you will, state your name.

A. Jeremy Reeves.

Q. And, Dr. Reeves, where are you employed?

A. Palmetto Health Richland.

Q. And what do you do there, sir?

A. Trauma surgery.

Q. Can you tell this jury a little bit about your education and your training in the field of trauma surgery?

A. Sure. I went to medical school at Ross University School of Medicine. I did a general surgery residency at Palmetto Health Richland, a surgical critical care fellowship at Palmetto Richland and I've been employed as a trauma surgeon for the last three years at Richland.

Q. And when you said that you did different residencies, are you currently a trauma surgeon?

A. Yes, I'm double boarded in general surgery and surgery critical care.

Q. So you are actually board certified in both general surgery and critical care?

A. Yes.

Q. And you actually are an attending physician at Richland Memorial --

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A. Correct.
Q. -- is that correct? As a trauma surgeon?
A. Correct.
MS. CAMPBELL: Your Honor, at this time we'd offer him as an expert in critical care and trauma surgery.
MS. ZMROCZEK: No objection.
THE COURT: Again, ladies and gentlemen of the jury, as I've explained to you, scientific, medical or other specialized knowledge will assist you in understanding any evidence or any matters that may be in controversy, then a witness can be qualified as an expert by virtue of his knowledge, skill, experience, training, or education and may offer opinions in his or her areas of expertise.
I find the doctor to be qualified as an expert in the field of surgery and trauma surgery and as such he can offer opinions, and you are to give his testimony such weight and credibility as you deem appropriate.
Proceed.
MS. CAMPBELL: Thank you, Your Honor. May it please the Court.
Q. Doctor, I want to turn your attention back to the early-morning hours of July 28th of last year. Were you on call that night?
A. Yes.

Q. And did you receive a call to respond to the emergency room for a certain --
A. Yes.
Q. -- emergency?
A. 9-1-1 trauma.
Q. And when you say a 9-1-1 trauma, can you explain to the jury what that means to you?
A. Sure. As Dr. Ford alluded to earlier, 9-1-1 trauma is alert-tier criteria where the trauma surgery team gets involved with a patient as well as the emergency medical services.

We have two alert tiers, a 9-1-1 and an 8-1-1. A 9-1-1 is obviously higher. These are the highest level alerts and folks with the potential for significant life-threatening injuries.

Q. And --
A. It's based on a set of criteria that we use to determine which one is which.
Q. And specifically for purposes of this hearing here today, I want to focus on Jesse Patterson who became your patient that night; is that correct?
A. Yes.
Q. You also, I believe, treated the other patient but Mr. Patterson's injuries were more severe. Would that be correct?

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A. Yes.
Q. Once you got to the emergency room that night and made contact with Dr. Ford and his team, what, if anything, did you assess about Mr. Patterson?
A. Well, Dr. Ford's team had again initially performed the ABCs which is essentially examining the patient's airway, making sure that there's nothing life threatening that's going to cause the patient to go perhaps into respiratory arrest.

I noted that he was awake, alert. His Glascow coma score which is a score we use to give us someone's life capacity was 15 which is the highest it can be. So he was talking. Obviously when we rolled the patient over he had what appeared to be two lacerations to his back, left upper and left middle back.
Q. When you say lacerations to the back, basically for people like me that don't do medicine, that just means a cut?
A. Yes.
Q. And were the lacerations in your opinion significant?
A. Yes. When you look at a laceration you have no idea how deep it is. You just know that the skin is cut. So, again, potentially, you know, you're trying to assess how deep things are. You're trying to assess the wound.

That's my job. I get involved to determine how deep this was and is it life threatening.

Q. And at that point when you first made contact with him, I believe he had already been characterized as a 9-1-1 trauma?

A. That's correct.

Q. And did he qualify as a 9-1-1 trauma in more ways than just one?

A. He did. Based on our information in the medical records here, he was stabbed in the torso which automatically makes you 9-1-1 alert as well as blood pressure less than 90 systolic the top number of the blood pressure.

Q. And what does that mean to you?

A. Well 120 over 80 is, you know, a normal blood pressure for folks. Anything less than 90 is considered an alert criteria and his was.

Q. And anything less than 90, that means that his blood pressure was 90 over what?

A. It was 90 over palp which means they really weren't able to hear the second sound, so it was quite low.

Q. And you mentioned that trauma to the torso, stab wound to the torso automatically -- and why is that, Doctor, what --

A. Any penetrating injury to the head, neck or torso

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is potentially life threatening until proven otherwise --
Q. And why is that?
A. -- thus is the criteria for alerts.
Q. Is there specific organs that can be stabbed that can cause severe problems?
A. Sure.
Q. And can you explain that to the jury?
A. Sure. Anything that has to do with the airway, anything that has to do with the heart or great vessels, the aorta, et cetera.
Q. And the lungs would be included in that?
A. Sure. Absolutely.
Q. When you first came in contact with him, can you tell the jury a little bit about your assessment and what you did at that point?
A. Sure. When I got involved, again, we examined his wounds. Felt they were pretty deep at this point, deep enough to warrant an exploration of the wound. At some point during my exam air began to leak out of his chest, bubbling out of his chest. I knew automatically his lung was injured.

At that time we went ahead and put a chest tube into his left chest. That's a cylindrical tube used to drain air or blood or both to prevent collapsing of the lung and/or the chest on either side of filling up with

blood which would potentially be life threatening.
Q. And what type of injury did he have to his lung?
A. He had a laceration to his lung which is a cut.
Q. A cut. So the stab wound was deep enough to actually penetrate the lung?
A. Correct.
Q. And is that significant in your assessment?
A. Absolutely. Absolutely.
Q. Did you take any further steps in order to treat this young man that night?
A. Yes. He was given IV fluid, resuscitation. And we further assessed him with a CT of the chest, abdomen, and his pelvis to elucidate any other potential wounds and/or injuries at the time and further assess our treatment for him.
Q. The chest tube that you put in, was that necessary in order to save his life?
A. Yes, it was necessary.
Q. And, did he require hospitalization as a result of his wounds?
A. He did, yes.
Q. And before I forget, did he also have a secondary wound as well?
A. He did.
Q. And can you describe that to the jury?

JEREMY REEVES - DIRECT BY CAMPBELL

A. Sure. It was stab wound to his left upper back near his shoulder area. It did not appear to penetrate into his lung, but it did penetrate into his chest wall near the area of his lung. And he did have blood in his chest or around that edge of his chest where his lung touches the chest wall. So it was, again, deep enough to go to the chest wall where the lung is. It just did not lacerate the lung itself.

Q. So the more significant wound was the one you described to the back?

A. Yeah.

Q. And the other one was secondary?

A. The other one was present, yes. He had two.

Q. And potentially life threatening as well?

A. Yes.

Q. Did he also have an issue with his arm?

A. Yes, he had a left shoulder dislocation.

Q. And what is that?

A. The ball and socket joint of the shoulder. The ball is essentially out of the socket, if you will. So it essentially renders the arm non-functional. It has to be relocated. And that was done by Dr. Ford and his team.

Q. They took steps to actually put the socket back where it was supposed to be?

A. Correct, correct.
Q. These wounds and his situation that night, would he have been in considerable pain?
A. Yes. I mean, you know, that's -- pain is a subjective finding --
Q. Uh-huh.
A. -- but certainly these injuries could produce pain, yes.
Q. That night this young man was able to get help pretty quickly. Did that aid in your ability to get him the -- render him --
A. Anytime somebody is brought to us quickly, that certainly is a positive factor in their recovery or treatment.
Q. He was hospitalized as a result of these wounds?
A. He was, yes.
Q. And when was he actually discharged from the hospital?
A. I believe he was discharged on 8-1-2014 (verbatim).
Q. August the 1st?
A. Yes.
Q. And then a few days later did he then return back to the hospital?
A. He did. I was not present for that but I was told about it. He told that he had pain and felt quote-

JEREMY REEVES - DIRECT BY CAMPBELL

unquote bubbling near his injury site which is not relatively uncommon after someone sustains a wound to their lung, their chest wall.

Q. But with the right treatment and everything he was able to recover from his wounds?

A. As far as I know, yes.

Q. Because of the care he got?

A. I think you can say that, sure.

Q. Stab wounds to the chest are potentially life threatening because of what you've already explained to the jury?

A. Yes. The heart, the lungs, the great vessels have a significant amount of blood that goes to them and any injury to them with blood leaking out of them can cause potentially life-threatening injury and/or air that leaks out of the lung itself.

When air leaks out of the lung it fills up the chest potentially, and if that happens it begins to push other organs, including the heart, to the other side. It's called tension pneumothorax or tension collapsed lung. And when that happens the blood returning to the heart is minimized and essentially the patient can't pump enough blood to the remainder of the body and they can potentially fail.

Q. But Mr. Patterson was able to get treatment?

A. Correct, yes. That's what the chest tube was for.
Q. The wound to -- that caused the injury to the lung, were there certain X-rays or CTs that were taken that night?
A. Yes, he got both. He got a chest X-ray, he got a CT of the chest.
Q. And specifically would those X-rays aid in explaining the wound and how deep it was to this jury?
A. Absolutely, absolutely.
Q. State's Exhibit 26, I believe that shows two of those X-rays from that night?
A. Yes.

MS. CAMPBELL: Your Honor, at this time, we'd offer State's Exhibit 26 into evidence.

MS. ZMROCZEK: Your Honor, I've never seen them.

THE COURT: Ladies and gentlemen, let me let you step back to the jury room, please. Don't discuss the case while you're there, please.

(Jury exits courtroom at 10:14 A.M.)

THE COURT: All right. Ms. Campbell, what's the deal?

MS. CAMPBELL: Your Honor, it's my understanding in talking with Ms. Garfield that she met with defense counsel and at that point she said that she was getting the X-rays, that she did not have them yet and that if she

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wanted to see them they would be available.

THE COURT: I don't know what that means. She was going to get them and they weren't available. If she wanted to see them, how could she see them if they weren't available?

MS. CAMPBELL: Once we got them they would be available like any other evidence.

MS. GARFIELD: They had been subpoenaed. We just did not pick them up yet. And I let Ms. Zmroczek know we would be using them.

THE COURT: Do you object to them being admitted?

MS. ZMROCZEK: I mean, I'd like to see them. I think they're potentially inflammatory. I don't see what -- I mean, his testimony is what it is. I don't --

THE COURT: Are you objecting to their being admitted because you haven't had an opportunity to review them?

MS. ZMROCZEK: Yes, Your Honor.

THE COURT: Your objection is sustained.

MS. CAMPBELL: Your Honor, can we give her the opportunity to review them?

THE COURT: I'm not going to stop the trial for her to try to go find a box or something like that.

MS. CAMPBELL: We have it. We can put it up right here.

THE COURT: We're just moving forward. We're not going to -- all right. Bring the jury in, please.

(Jury enters courtroom at 10:17 A.M.)

THE COURT: All right. Madam Solicitor?

MS. CAMPBELL: Thank you.

Q. Doctor, the wound that's demonstrated on those X-rays that we've been referring to, that was a penetrating wound to the lung area?

A. Yes.

Q. How close did that actually come to Jesse Patterson's heart?

A. A matter of an inch and a half or two inches at the most. Trajectory was towards the heart but, yes.

Q. And, Doctor, in your opinion, stab wounds, are those life threatening?

A. Yes, potentially life threatening without therapy, yes.

THE COURT: All right. Are you going to object?

MS. CAMPBELL: That's all I have.

THE COURT: Proceed please, ma'am.

MS. ZMROCZEK: Thank you.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Good morning, Doctor.

A. Good morning.

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JEREMY REEVES - CROSS BY ZMROCZEK

Q. You said that he, he being Jesse, received several X-rays and CT scans; is that correct?
A. That's correct.
Q. What's a pneumo -- pneumothorax -- you know, I'm probably not pronouncing that --
A. It's a collapsed lung.
Q. Was there any finding of a collapsed lung on those X-rays or CT scans? Would it help you to review? I'm not trying to test you.
A. No. Sure. I mean, would you like for me to review them?
Q. If you need to. If you can recall.
A. No. Sure. We didn't get a chest X-ray prior to putting the chest tube in because we don't routinely do that in emergency because it doesn't matter whether the lung is down or up. A stab wound to the chest with the air leaking out of the chest is a pneumothorax by definition. So a chest X-ray would be a moot point.

And he got a chest X-ray after that was done. It did not show evidence of a pneumothorax which it should not have because he had a chest tube.
Q. And, it also showed a normal-sized heart and unremarkable metatastal (verbatim) contours. What does that mean?
A. That means his heart and his great vessels around

the heart and lungs were of normal size and caliber for someone his age and size.

Q. And so if there would have been trauma that would have been noted?

A. If he had injury to the great vessels or heart then more than likely it would have been seen on the CT scan, correct.

Q. Okay. And, so the impression that they put was a left thoracostomy tube in place without pneumothorax or other definite acute finding appreciated. So and I just want to make sure I'm understanding this correctly.

You as a trauma surgeon absolutely did your job and took care of the problem immediately. And then when the X-rays and everything, all the testing was done, everything was fine, not fine, but okay with him. He wasn't life threatened?

A. I think the CT scan impression by the radiologist who reads these was that, yes, there was a thoracostomy tube in place. There was a pulmonary or lung laceration and injury with bleeding or blood in the chest but, correct, no injury to the heart or great vessels.

Q. And I believe you said the lower lung pulmonary laceration and hemorrhage with adjacent more superficial stab wounds noted at the left posterior chest?

A. So, he was describing both wounds.

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Q. Both wounds?
A. Correct.
Q. And after that the tube was removed?
A. Well after several days, correct.
Q. After several days the tube was removed. And, his follow-up, they did another CT scan, correct, just to make sure that there was no collapsing of the lung at that point?
A. I wasn't present for that. I'm not sure.
Q. Okay. And they continued to do CT scans and X-rays while he was in there just to follow up to make sure there were no developing problems; correct?
A. Yeah, we usually get one CT scan initially and then the injury to the lung and/or chest is followed up with routine chest X-rays.
Q. And as the attending trauma physician, do you follow up with those?
A. It depends. I may be on call one night, see a patient at two in the morning, go home the next day and not see them again because they're on my partner's rounding rotation or something like that. So I believe in his case I did see him again though.
Q. But you did do the discharge on him, correct?
A. I was present the day he was discharged, yes.
Q. Did you --

A. I think I signed the discharge summary that the residents took.
Q. Okay. And so on the discharge diagnosis you have him as assault stab wound to the left back and shoulder, left shoulder dislocation and then some other things. But those are the main, those were the first three and main issues; correct?
A. I'd have to look at the record again.
Q. (Document handed to the witness.)
A. Thanks. Yes, there are six diagnoses.
Q. And you don't need to go through all six.
A. Okay. The first being assault, the second being stab wound, third being shoulder dislocation, fourth being hemopneumothorax.
Q. And you can stop there. And I guess -- I'm not guessing. I'm reading on the -- also the day that he was evaluated, he was also evaluated by your team, the trauma surgery team on discharge after demonstrating a negative check date for reoccurrence of this hemopneumothorax and he was -- I'm sorry. I can't read this. Is it -- does that mean his shoulder was back in place?
A. The printer obviously didn't work very well there. Are you talking about this sentence here?
Q. Yeah.
A. It says: Patient was asymptomatic at the time and

JEREMY REEVES - CROSS BY ZMROCZEK

discharged home.

Q. Okay. Thank you.

Did y'all have any conversations with the police or anyone to let them know of their injuries?

A. I don't routinely do that.

Q. That's not part of y'all's job?

A. No.

Q. If they reported that they were non life threatening, they would have gotten that from somewhere else?

A. Usually -- I do not speak to law enforcement unless asked to specifically.

MS. ZMROCZEK: Thank you, Your Honor.

THE COURT: Ms. Campbell, anything?

MS. CAMPBELL: No, sir.

THE COURT: Thank you, Doctor. You may step down.

MS. CAMPBELL: Your Honor, may he be excused?

THE COURT: Yes, ma'am. You're free to leave, Doctor.

THE WITNESS: Thank you.

MS. GARFIELD: The State calls Jesse Patterson.

JESSE PATTERSON, having been duly sworn, was examined and testified as follows:

THE CLERK: Have a seat and state your full name for the record.

THE WITNESS: Jesse Patterson.

MS. GARFIELD: Beg the Court's indulgence.

(Pause.)

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Jesse, where do you live?

A. Columbia.

Q. And have you always lived in Columbia?

A. For the past 14 years.

Q. Are you nervous today?

A. Uh-huh.

THE COURT: I need you to say yes or no.

THE WITNESS: Yes. Sorry.

BY MS. GARFIELD:

Q. Where did you go to high school?

A. Blythewood.

Q. And did you continue any education past high school?

A. I've been in and out of college. I've gone on through three different degrees; electrical engineering, criminal justice and business management.

Q. Are you currently enrolled in school?

A. No, ma'am.

Q. Are you currently working?

A. Yes, ma'am.

JESSE PATTERSON - DIRECT BY GARFIELD

Q. Where are you working?
A. I work for a company called Concept Unlimited, Incorporated. I am the -- I do shipping fabrications and coordinate logistics.
Q. Were you working there last summer?
A. No, ma'am.
Q. Where were you working last summer?
A. I was a bouncer at Group Therapy.
Q. When did you start working at Group Therapy?
A. Sometime in June.
Q. And what were your duties at Group Therapy?
A. I was a bouncer, and I checked IDs and grabbing anything the bartenders needed, if there was a problem try to sort it out and just fix it before it turned into something bigger.
Q. Had you had any previous experience working in bars?
A. Yes, ma'am.
Q. Where?
A. I had bartended at the Sharky's Rib House.
Q. Where is Sharky's?
A. Down Harden Street from Group Therapy.
Q. And is that in the City of Columbia?
A. Yes, ma'am.
Q. Is that Richland County?

A. Yes, ma'am.
Q. Were you working the night of July 27th and into the early morning hours of July 28th?
A. Yes, ma'am.
Q. And what was your job at Group Therapy on that night?
A. I was -- that night I got stationed to the front door so I was checking IDs and just to keep an ear out for the walkie-talking in case something was going on inside.
Q. And were -- what time do you think you came on duty that night?
A. We usually started our shift, for the secondary bouncers they come in at ten.
Q. Were you a secondary bouncer?
A. Yes, ma'am.
Q. So you had been at work since ten o'clock?
A. Uh-huh.
Q. Roughly?
A. Uh-huh.
Q. And was your duty the whole night to be at the front door?
A. Yes, ma'am.
Q. And you said you were listening for the walkie-talkie. Is that something you had on you?
A. Yeah. We would usually clip them on our pockets.

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Now since everything happened, they've actually got ear pieces. So you don't -- it's a lot easier to get to. It's quicker. You can just talk instead of, you know, reaching for something and pulling it to your head and clicking buttons and whatever else.

Q. I want to just go through the course of the night concerning the Defendant and his friends. Do you recall the Defendant and his friends arriving at Group Therapy?

A. I, I mean, you see so many people come into a bar in one night, you don't really pinpoint a face. You might remember somebody if they were to say something to you or if something happened, but outside of that if they're in and out of the bar you don't really pay too much attention to them.

Q. So with that explanation, Jesse, are you saying there was nothing about them to caused you to remember them in any way?

A. Not really, no.

Q. Since then, have you viewed the video when they entered Group Therapy?

A. Yes, ma'am.

Q. So you don't remember them arriving. Do you remember them being asked to leave?

A. I wasn't back there when they were asked to leave. All I know is I was at the front door and I heard yelling

coming up behind me because my back was faced to it so I could continue to check IDs. And I heard yelling and cussing and I turned around and I see them getting escorted out by my bouncers.

Q. Okay. Before I continue on, I'm going to ask you a couple questions about your employment at Group Therapy. Are you allowed to consume alcoholic beverages while you're working?

A. No.

Q. And are you allowed to arm yourself with any type of weapon?

A. No.

Q. Do you check every single person's identification that enters the bar?

A. Yeah, for the most unless it's somebody that's clearly of age or that, you know, been in there multiple times throughout the night.

Q. That you're familiar with being of age?

A. Yes, ma'am.

Q. All right. So back to them being escorted out. Can you just describe for the jury what you recall at the scene during that process?

A. I just, I heard them coming up behind me. And I was standing there. I was eating a piece of pizza and checking people's IDs. And I heard them coming up, so I

JESSE PATTERSON - DIRECT BY GARFIELD

just stepped out of the way. I didn't realize how many people there were at first until I saw them go down and there was four of them. But at the same time, you know, they were yelling and cussing and whatever else but my other bouncers, they were talking. So I just kind of stayed off to the side just in case something happened. I kept to myself about it.

Q. You weren't part of the ejecting of these people?

A. I didn't find out what was going on until after they had left the bar.

Q. Did anyone get shoved in the process of this?

A. Yes, ma'am.

Q. And who was that?

A. That was Ryan.

Q. Ryan Kinard?

A. Yes, ma'am.

Q. And that's who testified yesterday?

A. Yes, ma'am.

Q. And did they quietly leave the establishment?

A. Not at all.

Q. And explain to the jury what you saw.

A. Well, they got them out front and I was off to the side eating my piece of pizza. And, you know, I wasn't expecting anything. A lot of times people they'll yell threats at you, stuff like that, because a bouncer, you --

I mean, it happens. It's part of the job. But you don't really -- people never really take it that far.

And so, they're sitting there and I specifically remember Ard, Stewart Ard, "Dude, I'm going to fuck you up." You know, I'll get mine. "Don't worry about that, I'm not scared of you. Y'all are a bunch of bitches and staff shitters."

Geno Smith, I believe that's his name, Geno, he was --

Q. Is that the person that was with the Defendant?

A. Yes, ma'am.

Q. Are you referring to Benjamin Geno?

A. I don't know his name. I believe so.

Q. Okay.

A. He was getting held back by the other two, just screaming to the point where he had -- his face is blood red. He got veins shooting out of his neck. "I'm going to fuck you up. I'm going to get you, I'm going to get you."

And Stewart Ard is just, you know, nodding up, following stuff, putting his own words in, pretty much agreeing with him.

They left the bar finally. They walked around the corner of Pour House down towards where the saloon was down Harden Street and I'm not sure exactly how, you know,

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how much longer it was after that but they came back a second time.

And my bouncer had told me, "Hey these guys are, you know, they're kind of wild. Just keep an eye out." I was like, "okay," you know, "I'll be fine". I didn't -- yeah, they were saying a lot of stuff but, like I say, you hear a lot of things as a bouncer when you piss somebody off. I didn't think much about that.

But they come back a second time and it's the same situation. They came halfway down the sidewalk. Geno is still being held back, screaming at the top of his lungs. He -- Ard is, you know, staring and threats and "Let's go."

And I kept my head straight. I put my hands down at my side just because I know not to provoke somebody especially when I'm the only person against, you know, three or four people, not to make them mad. So I just kept doing my job. I ignored them and eventually they left after the second time.

And then the third time they came to the bar I was standing out front and I was talking --

Q. I'm going to stop you right there.

A. Yes, ma'am. Uh-huh.

Q. Can you describe what Stewart Ard looked like that night?

A. Tall, older looking, bald headed, green shirt, skinny guy.
Q. Had you ever seen him before?
A. No, ma'am.
Q. Had you ever seen any of these individuals before?
A. No, ma'am.
Q. Do you know if they had frequented Group Therapy?
A. I had never seen them and usually, you know, if there's regulars coming into the bar, you know their face.
Q. And you just mentioned that they came back yet a third time. Did they come back by foot?
A. No. The third time they pulled up into a parking spot in front of the tanning salon.
Q. Did you see them pull up?
A. I didn't. I was in the middle of a conversation with Scott, the owner.
Q. Scott Flemming?
A. Yes, ma'am.
Q. All right. Go ahead and just describe to the jury what happened next.
A. We were just talking, not even about them, just about the night in general. I mean, it was not uncommon. And I hear almost from behind me, "I'm going to fuck him up. I'm going to get him."
And I turned around and I saw him and Geno Benjamin

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both come walking at me. And I put my hands up. And I was, like, "I'm tired. Y'all chill out," because I even told them the first time, "Y'all need to go. Nobody needs to get arrested. Like, I got my people and you got your people. Separate. Nobody goes to jail. Nobody gets in trouble. Call it a night."

They came walking up on me and I was just, "Hey y'all, like, I'm tired of this. Y'all stop." And with no hesitation Benjamin just swings on me. The second he gets up to me, just swings on me, starts trying to hit me.

And then he steps back for one second and I see him step in front of me and I put my hands up and told him to stop. And the next thing know I'm on the ground laying in a puddle of blood, not knowing what's going on.

I knew I got stabbed how bad it hurt. It was a lot more than just a punch to the ribs. And, I mean, that was it. He hid behind a guy while he was trying to fight me, then snuck up behind him and stabbed me.

Q. At that time, Jesse, were you bleeding?

A. Yes.

Q. Were you able to breathe?

A. Not very well. I even -- I very, very firmly remember telling people I thought I was going to die.

Q. Were you in pain?

A. Very much.

Q. Do you remember going to the hospital?
A. For the most part, yes.
Q. I'm going to show you what's been marked as State's Exhibit Number Eight. Do you recognize this photograph?
A. Yes.
Q. Can you tell me what this is a picture of, Jesse?
A. That's a picture of my back and shoulder after they stabbed me, before they put the staples in it.
MS. GARFIELD: Your Honor, may I publish this to the jury?
THE COURT: Has it been introduced?
MS. GARFIELD: I'm sorry. I'd like to move State's Exhibit Number Eight.
MS. ZMROCZEK: Without objection.
THE COURT: So admitted.
MS. GARFIELD: Thank you.
(State's Exhibit No. 8, photograph, was received into evidence.)
BY MS. GARFIELD:
Q. Jesse, what kind of treatment did you get at the hospital?
A. They put the chest tube in me. They had to put my shoulder back into place. They were giving me medications for my pain. I had to stay there for a couple of days with the chest tube in me, just X-rays, checkups, and

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just -- I was getting checked on every, it was probably every 20, 30 minutes to make sure I was okay.

I had a couple instances where while they had the chest tube in me, my lungs would shrink around it and I couldn't breathe. When I woke up in the morning I literally could not breathe and I'd have to hit the emergency button and the nurses would come in and they'd try to ask me what was wrong and I couldn't even talk to them because I didn't have any air in my lungs to speak.

Q. Was that hard to walk?

A. Yeah. They, they told me I wasn't going to be walking for, you know, like, a week or so. And, I mean, the whole, the whole couple days I was in there if I had to use the bathroom I was wiggling for five minutes to pee in a cup. I couldn't shower. I couldn't do anything, you know. Anything, any needs that I had to ring a button and wait on somebody to come in the room. They wouldn't let me get out of the bed.

Q. And you were discharged five days later?

A. I'm not sure exactly how long it was. I, I know I was really persistent on getting out of the hospital. I didn't want to be in there. So, I mean, even after the first day I was, "Let me go home." Second day, "Let me go home." Third day, "Let me go home." It was not a place I really wanted to be in.

Q. Do you still have any complications?
A. Yeah. I -- actually just about two months ago, I was -- simple stuff. I was swimming and dislocated my shoulder just from the resistance pushing against it. You know, pulling on a T-shirt it can hurt. Raising my arm too high. I had an instance where I was sleeping and I rolled over and that dislocated my shoulder.

Pretty much anything that has to do with my left shoulder I can't do. I used to train cross-fit, you know, working out. I can't do that anymore. I mean, I'm just not capable of doing it.

It's never really stopped hurting since it happened.

Q. Do you see the person in the courtroom that stabbed you that night?
A. Yes, ma'am.
Q. And can you point him out for the record?
A. Right there in the blue shirt with the curly hair.

MS. GARFIELD: Your Honor, may the record reflect he's identified the Defendant?

THE COURT: You're indicating at the defense table there?

THE WITNESS: Yes, sir.

THE COURT: All right. The record reflects --

BY MS. GARFIELD:

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Q. Does he look --

THE COURT: -- he identified Mr. Ard.

BY MS. GARFIELD:

Q. Does he look different?

A. He's got hair now but outside of that, no.

Q. Jesse, have you reviewed the video from the night in question?

A. I have.

Q. Several different angles?

A. Yes, ma'am.

MS. GARFIELD: Beg the Court's indulgence?

(Pause.)

Your Honor, may the witness step off the witness stand?

THE COURT: You may. Mr. Patterson, if you'll get on the other side of the screen so when you talk you talk back to the court reporter.

THE WITNESS: Yes, sir.

BY MS. GARFIELD:

Q. Jesse, you've indicated that you don't recall them coming into the bar; is that correct?

A. Yes, ma'am.

THE COURT: You need to speak up now, Mr. Patterson. We all got to be able to hear you.

THE WITNESS: Yes, sir.

BY MS. GARFIELD:
Q. Have you reviewed the video here of individuals coming in?
A. Yes, ma'am.
Q. And you're familiar with that video?
A. Yes, ma'am.
Q. At this time, I'm going to ask my co-counsel to assist me in playing that video.
This is on State's Exhibit Number 20 that is already in evidence.
Before we push play, can you -- I want to give you this marker to help. Can you show the jury where you are located in the video?
A. I'm sitting right there at the door.
Q. Okay. Thank you. And who is that individual?
A. That's Benjamin. That's the guy that initially swung on me whenever everything happened. That was the guy driving the car. That's Ard. And that kid, I mean, he really didn't have too to much do. That was the guy that Brett asked to leave but, I mean, he was the only one that really cooperated with everybody.
Q. Is he finishing up a cigarette before he enters the establishment?
A. Yes, ma'am.
Q. At this point there's nothing that causes you

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concern or even any reason to remember these people?
A. No, ma'am. I mean, they walked in, just a couple guys going into a bar to have some drinks. I didn't really think anything of it.
Q. It seemed like a happy crowd?
A. Yeah, I mean, they were talking.
Q. Have you also -- and I know, Jesse, this is going to be hard for you. Well, before I get to the actual incident.
Do you recall reviewing the video when the individuals are actually asked to leave?
A. I do.
Q. At that time -- if you'll play the video.
Now at that time, where are you located? Are these individuals leaving?
A. That's me right there eating my pizza.
Q. And is this the Defendant and his friends leaving?
A. Yes, ma'am.
Q. And what's going on outside, outside the camera view?
A. Like I said, they were sitting there. These guys, they're yelling threats to my bouncers and stuff. I was just standing off to the side in case it got physical. And that's when they pushed Ryan. And I ended up having to get involved also because there was four of them and

only three of us.
Q. But was anyone injured at that time?
A. No, ma'am.
Q. And what's going on?
A. Right now?
Q. Outside. Yes, sir.
A. They're just backing down the sidewalk, yelling at us, screaming. Benjamin was, you know, just going crazy is the only word I can think of for it. It pretty much got to the point where it was just me and Ard talking, you know, "Hey, you need to calm down and get your people," you know, whatever. He's still kind of making those threats at me but they're leaving.
Q. I see some people who just left earlier, Jesse, appeared to be dancing. Is there music being played in Group Therapy?
A. At this point, yes, ma'am.
Q. Now what do you recall what these people are talking about? I believe that's Brett Babcock and Ryan Kinard?
A. Yeah. Actually what happened, and he just gave me a quick little rundown, "Hey, these guys were --
MS. ZMROCZEK: Your Honor, I object to hearsay.
THE COURT: Sustained.
THE WITNESS: He was -- he was giving me a quick

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little rundown of what happened.
BY MS. GARFIELD:
Q. Don't say what they actually said.
A. Oh, no. He was just -- I mean, he just --
Q. Just telling you what had happened?
A. Yeah. This guy was punching a wall. He was going to --
Q. Don't tell what they said. Just, he was giving you a rundown?
A. Oh. I'm sorry. I'm sorry. He was just telling me what happened and then, I mean, that's I guess really all I can say about it.
Q. Okay. Have you seen another angle of this incident from the outside?
A. I believe so.
Q. At this time I'm going to ask my co-counsel to queue that up.
Now is this outside of Group Therapy?
A. Yes, ma'am.
Q. And, the door that we see, would that be the entrance into Group Therapy?
A. Yes, ma'am.
Q. Now it's covered up, but there was a barstool. Is that where you had previously been sitting?
A. Yes, ma'am.

Q. Okay. Now who is the person in the red shirt?
A. Right there?
Q. Yes, sir.
A. That's Scott.
Q. And when you say Scott, are you referring to Scott Flemming?
A. Yes, ma'am.
Q. And he's the owner of this establishment?
A. Yes, ma'am.
Q. I believe it looks like you're giving someone some directions of some sort or talking to some other patrons; is that correct?
A. Yeah. I mean, there's a million people a night just coming in and out.
Q. The person right there with the khaki pants and, I guess that's a white shirt, is he an employee?
A. No, ma'am. He was just somebody hanging out.
Q. You see a lot of different kinds of people in Five Points, don't you, Jesse?
A. Yes, ma'am.
Q. Are these the individuals being asked to leave?
A. Yes, it is.
Q. That is them, including Stewart Ard?
A. Yes, ma'am.
Q. Now, are y'all just telling them to leave and go

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on?
A. Yeah. That's all it was. We were just telling them to go before the cops got called. And nobody needed to get in any trouble. There didn't need to be any fights.
And as you can see, they didn't just walk away.
Q. Now ultimately they did walk off?
A. Yes, ma'am.
Q. Did you think that was it for the night?
A. I mean, I assumed so. That's normally -- if anything ever did happen, that's usually how it was.
Q. And you have reviewed the video of when you were hurt?
A. Yes, ma'am.
Q. I'm going to ask Mr. Shalabi to queue that up.
I believe you have some from inside and some from outside?
A. Yes, ma'am.
Q. Would you agree with me there's two videos from the outside area? One from far away, one from close up?
A. Yes, ma'am.
Q. I'm going to ask Mr. Shalabi to show the one from far away first.
Now, you see in the upper right-hand corner, is that the door to Group Therapy?

A. Yes, ma'am.
Q. And leaning against that door, who is that?
A. That's Scott Flemming, the owner. And then that's Alex Cromer, one of the guys that was up here yesterday.
Q. Mr. Cromer's hair was much longer at that time, right?
A. Yes, ma'am.
Q. And where were you?
A. I was standing right there on the other side of the door.
Q. To give perspective just for the jury as far as Five Points is concerned, across the street -- what is located across the street?
A. Directly across there's Grill Teriyaki and then to the left of that there's a Post Office.
Q. And if you walked out of Group Therapy and went to the left, what is that?
A. There's a tanning salon and then Nicky's Pizzeria.
Q. Is that Mr. Geno?
A. Yes, it is.
Q. I'm going to ask you to just to rewind back to when we first see Mr. Geno. Hit pause right there. Oh sorry. Rewind it just a little bit.
Do you see Mr. Ard's hand at that time?
A. Yes, ma'am.

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Q. And where is his hand?
A. In his pocket.
Q. All right. Go ahead and continue.
Do you see him run away?
A. Yes, ma'am.
Q. And who is that person running away?
A. It's Benjamin.
Q. Who are these individuals running?
A. That's Gabe and Joe, the bouncers at Pour House.
Q. And that's Alex Cromer?
A. Yes, ma'am.
Q. Who is this individual?
A. That's Moffatt Bradley. He's one of our regulars. He was in there every night.
Q. What's he armed himself with?
A. Oh, that's his walking cane.
Q. Where are you at this time, Jesse?
A. I was laying on the floor trying to figure out what just happened to me.
Q. Let's go to the video that's closer to the door. You've reviewed that video as well, correct?
A. Yes, ma'am.
Q. This is the same scene but closer?
A. Yes, ma'am.
Q. Again, this is Scott Flemming?

A. Uh-huh. Yes.
Q. And you're closer to the door?
A. Yes.
Q. Go ahead and play that, Mr. Shalabi.
What just caused them to look?
A. Them yelling down the sidewalk how they were about to fuck somebody up.
Q. Who is that in the red hat?
A. Gabe.
Q. Gabe is a bouncer from next door?
A. Yes, ma'am.
Q. I believe that's Courtney going to call 9-1-1?
A. I don't know.
Q. You didn't know her?
A. No, ma'am.
Q. And who is that individual in the red hat to the left?
A. That's Jeff.
Q. And he's the other bouncer from Pour House?
A. Yes, ma'am.
Q. And Pour House is located where?
A. If you walk out of the bar, out of the door of Group Therapy that's off of Green Street, it's to the right. The bar right next door to us.
Q. Is it on the corner of Green and Harden?

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A. Yes, ma'am.
Q. Is it still in business?
A. No, ma'am.
Q. You also reviewed video from inside?
A. Yes, ma'am.
Q. And that would be from a camera that's placed inside of Group Therapy?
A. Yes, ma'am.
Q. And the angle towards the door?
A. Uh-huh.
Q. The same angle from when they first entered the establishment; correct?
A. Yes, ma'am.
Q. Again, Jesse, where are you?
A. Right there.
Q. What's Scott picking up; do you know?
A. I have no idea.
Q. And who is that with the phone?
A. That's Ryan.
Q. Ryan also called 9-1-1?
A. Yes, ma'am.
Q. And -- you were in the far left corner?
A. Yes, ma'am. You can actually -- you can see my shoes right there.
Q. Who is the person closest to the screen putting his

glasses back on?
A. That's Scott.
Q. Scott Flemming?
A. Yes, ma'am.
Q. Is that you hunched over, Jesse?
A. Yes, it is.
Q. Why are you in that position?
A. Actually, I mean, I couldn't move. I realized what was going on and I was laying on my back. And I just kind of started thinking, I got stabbed in the back. I don't really think I should lay on it. So I got up on my hands and knees. And I couldn't stand up. I couldn't move my arm. That was really the only position I could get myself into.
Q. Who that is walking in?
A. That's Sergeant MacLaughlin.
Q. Thank you, Jesse. If you'd take your seat.
A. (Complying.)
Q. Jesse, when you were laying on the floor in Group Therapy, were you in fear for your life?
A. I was.
MS. GARFIELD: Thank you, Mr. Patterson. Please answer any questions defense counsel has.
THE COURT: All right. We're going to take a break before we go to cross-examination.

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Ladies and gentlemen, I'm going to take about a 15-minute break. Let you step back to the jury room. Please don't discuss the case while you're back there. We'll bring you back and resume cross-examination in just a little bit.

(Jury exits courtroom at 11:01 A.M.)

THE COURT: All right. Mr. Patterson, you may step down but don't discuss your testimony while we're on break. Okay?

THE WITNESS: Yes, sir.

MS. CAMPBELL: Could I take up one thing up?

During the course of that testimony when the video was being shown, the defense counsel chose to sit right next to the forelady of the jury. And her pad, she had it angled so that the juror next to her was looking directly at it. I don't know what's on that piece of paper. I'm not saying anything is, however the juror, the forelady or the person in that seat looked over at it several times because of how she held it for her to see. We would just ask that she -- what she just put on the bottom --

MS. ZMROCZEK: I have three.

MS. CAMPBELL: It's that page right there.

MS. ZMROCZEK: This page? It's got a bunch of writing on it. I mean, it's a Facebook page. I wasn't showing it to anybody to read it. Your Honor, I mean, in

fact the bailiff, you know, I asked to sit in the back and he said, "You can sit here."

MS. CAMPBELL: I'm not taking dispute in where she sat. I'm taking dispute in what she showed the juror. Just what's on that piece of paper is all I am asking.

THE COURT: I don't know what she showed the juror, if anything.

MS. CAMPBELL: If anything, Your Honor, we don't need to know but if you can review it to make sure it's nothing.

MS. ZMROCZEK: Sure. I mean, I can show you all my papers.

THE COURT: Just keep your papers away from the eyesight of the jury.

MS. ZMROCZEK: Okay.

THE COURT: All right. We'll take a break.

(Break taken at 11:03 A.M. At 11:19 A.M., the trial resumed:)

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

MS. GARFIELD: Your Honor, before we bring the jury in --

THE COURT: Hold on.

MS. GARFIELD: Ms. Zmroczek did provide us some of the materials that she had in her possession. I just

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wanted to take up with the Court one of the pages she had that a juror could potentially see is a Facebook page that she's obviously printed from Jesse Patterson's account where he's referencing the altercation that occurred in Group Therapy earlier this year as in 2014. I would just object that --

THE COURT: What do you want me to do, Ms. Garfield?

MS. GARFIELD: I want to limit her cross-examination. She could not ask about this fight that happened some six months after the incident.

THE COURT: What does that have to do with anything?

MS. ZMROCZEK: Your Honor, I was simply going to inquire as to how tensions rise. Yesterday we had this discussion about how I'm not raising self-defense. I'm absolutely not raising self-defense but, Your Honor, I also have to talk about intent because he's charged with an intent-to-kill crime.

And, this was a fight, Your Honor, that my client was stupid and this was a fight. And bartenders get into fights. Particularly this bartender gets into fights because of things that come out of his mouth and things that come out of other people's mouths.

Your Honor, I think I'm allowed to inquire as to

the situation surrounding this fight as it goes to my client --

THE COURT: Just a second. Has anybody stopped you from asking about the incident that night?

MS. ZMROCZEK: Yeah.

THE COURT: All right. We're not going to stop you from talking about the incident that might.

MS. ZMROCZEK: Okay.

THE COURT: But incidents that happened six months, two years, something like that, that doesn't have anything to do with it.

MS. ZMROCZEK: Okay.

THE COURT: If you want to talk about the general atmosphere in a place, I mean, within limits, I think you might be able to do that.

MS. ZMROCZEK: Okay. It's not that I necessarily plan to ask him, Your Honor. I just had all his papers sitting right there. And I really don't think that anybody can read them. And I wasn't showing them to --

THE COURT: I'm not accusing you of doing that. You might have done something that you shouldn't have done and having them available for somebody that shouldn't be looking at them looking at them.

But if you're sitting over there, turn your papers over or leave them back --

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MS. ZMROCZEK: I will.

THE COURT: Probably would be a good idea not to sit there because you might make notes and you don't want people looking at your notes.

MS. ZMROCZEK: Sure.

THE COURT: We do not have an ideal situation with videos in this courtroom. And, I don't know what she's going to ask. You'll have to deal with it through a proper objection.

MS. GARFIELD: And I didn't know if she was either. I just wanted to have a cautionary ruling not to go into something that happened six months later.

THE COURT: Well, we'll see what the nature of her cross is. All right. Bring the jury out, please.

(Jury enters courtroom at 11:22 A.M.)

THE COURT: All right. Ms. Zmroczek, are you ready to proceed?

MS. ZMROCZEK: Yes, Your Honor. May it please the Court.

THE COURT: If you would, please, ma'am.

MS. ZMROCZEK: Thank you.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Mr. Patterson, it's true that Stewart Ard called the hospital to check on you that night, didn't he?

A. No.
Q. As a bartender and a bouncer, one of your jobs is to make sure that everybody's safe, right?
A. Yes.
Q. And when people get angry and people get heated, words get exchanged, correct?
A. Yes.
Q. You would agree that on the video it shows when they were thrown out the first time that Mr. Ard walked out and when the punches were being thrown back and forth between -- or pushes, however you want to describe them, were being thrown back and forth between the groups, he was not part of that physical altercation, was he?
A. Yes, he was.
Q. So if the video shows him standing there drinking a drink the video would be incorrect?
A. (No response.)
Q. Is that a yes?
A. That's -- what are you asking me?
Q. I'll move on.
You described three incidents amongst the group and the bar, correct?
A. Yes.
Q. So the first incident we saw was on the video when they got thrown out and then there was the altercation,

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right?
A. Yes.
Q. And then the third one was when they came back?
A. Yes.
Q. And you say there was a second one?
A. Yes.
Q. Okay. But we don't have a video of that one, right?
A. No, ma'am.
Q. And, Ms. Garfield asked you about consuming alcohol. Why aren't bartenders allowed to consume alcohol, or bouncers?
A. For incidents like this. If you're intoxicated when something like this happens your word's kind of out the window. I mean, you might not have known what you're talking about.
Q. And they're also not supposed to consume marijuana or cocaine, are they?
A. Not legally, no.
Q. And you would agree that there were words exchanged between Brett and Ryan and yourself with the group, correct?
A. I had -- me, no. Them -- like I said, by the time they got out there, I didn't know what was going on. I was just there trying to help out my other bouncers.

JESSE PATTERSON - CROSS BY ZMROCZEK

Q. So you never told them, you never said any curse words or anything. They were all just cursing at you and you weren't saying anything?
A. I did not say one violent thing that entire night to anybody.
Q. When that first fight happened, Geno Benjamin lost his watch, didn't he? In fact, we saw it come flying in the video, right?
A. So I've been told, right.
Q. And you picked it up?
A. No.
Q. Would it refresh your memory to watch that video again?
A. Yeah. That video I was picking up a piece of pizza I had dropped to stop them from pushing my bouncers.
Q. Didn't pick up anything else?
A. No, that is why I put on the plate, and I threw it in the trash can.
Q. Okay. So, when Geno comes back and he's on that second video when we watched stuff and he was walking really fast, he was saying, "I want my watch, man".
A. No. He was saying, "I'm going to fucking get you." He didn't say anything about a watch. And he immediately jumped on me and started hitting me before he stabbed me.
Q. Geno?

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A. Benjamin. While he was -- there was never anything about a watch from him or Geno or anybody.
Q. Geno Benjamin or Benjamin Geno?
A. What about him?
Q. Okay. When you walked in -- let's go back to the first video when they showed you were checking IDs, right? Remember that?
A. Yeah.
Q. And the four walked in?
A. Yes, ma'am.
Q. And, you didn't check Mr. Benjamin Geno, did you?
A. No, ma'am.
Q. You shook his hand. Y'all do a little shake.
A. As I said, somebody that comes in clearly looks of age, as given in any restaurant or establishment, it's a courtesy thing. When you know they're of age -- he's clearly not some 18-, 19-year-old kid. I figured he was well into his 30s or 40s.
Q. You pointed out Stewart Ard. Remember? You pointed him out. Was he of age clearly?
A. Yes.
Q. Okay. But you checked his ID, right?
A. He already had his ID pulled out to show it to me.
Q. Okay. When you were in the hospital you received good treatment, right?

A. Otherwise I wouldn't be here.
Q. So it's your contention you would have died?
A. I mean, I know I had a hole in my lungs. How would I have lived?
Q. And, were you able to return to work?
A. Not for about two months.
Q. And why did you leave that job?
A. I -- for two months, because I got stabbed and I couldn't work.
Q. Why did you leave eventually? I think you said you have a new job?
A. There was an altercation where I got threatened. I had a shirt ripped off my back. And the kid wouldn't let go of me. So in that case because of what happened I felt threatened and I had to do what I had to do to make sure I was safe. Whether it was, you know, what you should or shouldn't do in a bar or not. I had a kid throw stuff at me across the bar, ripped my shirt off, wouldn't listen to me when I told him multiple times to let me go. And I felt threatened especially because of the situation I had been through, so I did what I felt necessary to get him off me so I knew that I would be okay.
MS. ZMROCZEK: Beg the Court's indulgence.
(Pause.)
Thank you, Mr. Patterson. Those are all the

JESSE PATTERSON - REDIRECT BY GARFIELD

questions I have.

THE COURT: Anything on redirect?

MS. GARFIELD: Beg the Court's indulgence.

(Conferring with co-counsel.)

REDIRECT EXAMINATION

BY MS. GARFIELD:

Q. Jesse, Ms. Zmroczek mentioned three incidents. I believe we can agree the first incident is when that they were first being kicked out?

A. Yes.

Q. And just to clear it up for the jury. What do you mean by the second incident?

A. The second one where they -- I mean, they had already left. They went around the corner of the Pour House. They came back out of nowhere. I was the only person at the door and there were just more yelling and threats.

Q. But really it was, like, they walked up and then came back. They had not actually left your perception or your view at that time?

A. No. They, they left and came back a second time.

Q. But still right there within that time frame, those few minutes?

A. Yes, ma'am.

Q. Okay. I'm going to -- Ms. Zmroczek was referring

to picking up a watch or something of that nature. I'm going to pull the video back out. If you can show for me what you picked up.

A. Yes, ma'am.

MS. GARFIELD: May the witness step down?

THE COURT: Yes, ma'am.

BY MS. GARFIELD:

Q. This is the video from inside of Group Therapy looking out; is that correct?

A. Yes, ma'am.

Q. And here the gentlemen are leaving?

A. You can see the whole time. That's my plate. That's my pizza crust.

Q. Okay. At this time you don't know anything has happened?

A. I had no idea. I thought they just got asked to leave and they were bumping up against me.

Q. I believe you just a took a bite of pizza?

A. Yes, ma'am. You can even see it down to here, I still have it in my hand. And I drop it right there. Right there.

Q. I believe this woman, she just kicks it?

A. Yes, ma'am.

Q. Did you ever see a watch fall?

A. No.

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Q. Did you know anything about a watch?
A. No.
Q. When did you first learn anything about a missing watch involved in this case?
A. When all of this started happening and they apparently needed a reason to come back to the bar.
Q. You found out that night?
A. Oh, no.
Q. When did you find out?
A. Six months, eight months. Months after the fact.
Q. Thank you. Where is the pizza at this time?
A. It's still sitting right there, and my plate's over there. And then I was even mad. I was, like, they made me drop my piece of pizza. And being a bouncer you have to pick your trash up. So it was now or later, I was going to have to pick that up.
Q. That's what you just picked up?
A. Yeah. I picked that up. And I picked my plate up and I balled it up and I threw it in the trash can.
Q. That's what you just threw away?
A. Yes, ma'am.
Q. I'm going to ask my co-counsel to queue up the video from the outside, just briefly.
Just a couple questions. And what is the black thing hanging from your pocket, Jesse?

A. That's my walkie-talkie.
Q. What is that on the ground that's rolling right there?
A. It looks like my walkie-talkie.
Q. That's your walkie-talkie? That patron right there just picked up your walkie-talkie?
A. Yes, ma'am.
Q. Are you familiar with who that patron is?
A. It was one of those guys that wanted to talk and not leave you alone. I have no idea.
Q. He's now returning the walkie-talkie to you?
A. Yes, ma'am.
MS. GARFIELD: Thank you. You can take a seat. Thank you.
THE COURT: Anything, Ms. Zmroczek?
MS. ZMROCZEK: I have nothing further.
THE COURT: All right. Thank you, Mr. Patterson. You may step down.
All right. Call your next witness.
MS. CAMPBELL: The State would call Scott Flemming.
SCOTT FLEMMING, having been duly sworn, was examined and testified as follows:
THE CLERK: Please have a seat. State your full name for the record.
THE WITNESS: Scott Flemming.

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DIRECT EXAMINATION

BY MS. CAMPBELL:

Q. Mr. Flemming, where do you work?

A. Group Therapy.

Q. And what is your position there, sir?

A. I'm the owner.

Q. How long have you been the owner of Group Therapy?

A. For about seven years.

Q. What kind of establishment is Group Therapy?

A. It's a neighborhood tavern.

Q. And what are generally the hours that y'all are open at night?

A. Depending on the day of the week, usually close around two but later on in the weekends we stay open later, like, three, 3:30, four.

Q. At least on a weekend night it would be open until at least until two o'clock in the morning?

A. Yeah.

Q. And do you employ bartenders there?

A. We do.

Q. As well as bouncers?

A. Correct.

Q. And what's the need? Why do you have to have bouncers in your club?

A. It's for when people need assistance on when they

can't make the call themselves and the bartender cuts them off, to help them get a cab, help them out of the bar, make sure they get in a cab safe.

And in a case that there may be an altercation, that they're able to split the people up, get them out of the bar, away from the other customers.

Q. And are your bartender or your bouncers allowed to carry weapons?

A. No.

Q. Are they allowed to imbibe in any -- do you serve alcohol there?

A. We do.

Q. Are they allowed to drink alcohol while they're working?

A. They are not.

Q. Generally on a weekend night -- or let me turn back to July the 28th of last year. How many bouncers did you have in the bar that night; do you remember?

A. Normally on a weekend night -- I can't recall the exact number on that day. There's usually one for each door and then usually one or two inside. Plus the general manager fills in where needed. If one has to go to the restroom or whatever, he'll take over their space.

So that would put us about six, not including the general manager.

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Q. And you also have bartenders?
A. We do.
Q. And that night specifically, were you working?
A. I was not.
Q. What are the policies you have in place as far as conduct within the club as far as when your bouncers are allowed to eject someone?
A. If there's customers trying to cause a fight, or in an altercation, if someone seems intoxicated beyond and the bartender cuts them off, then that's the kind of things. We need to get them home safely.
Q. And your bouncers, before you employ them, do you go over with them generally the type of behavior that is acceptable or not acceptable?
A. Most definitely. Yeah, most definitely.
Q. And is there a way for the bouncers to communicate with each other while in different parts of the bar?
A. Yes, through the walkie-talkies.
Q. How do you decide or that night how were the bouncers set up? Do they have certain areas they patrol or how does that work?
A. Correct, correct. We try to keep someone on each door that's open, and then someone in all the areas so that there's eyes, at least two people can see what's going on in an area.

Q. And is that to ensure the safety of your patrons?
A. That is correct.
Q. Including the ones that are causing problems?
A. Correct.
Q. And as far as the type of force that is necessary to eject someone, what policy do you have in place there?
A. We usually don't need to lay hands on people unless they're being violent. And it's more to protect them and the other customers. And basically all that is is what we call wrapping them up where we put them in an arm bar or arm lock to keep them from swinging and kicking.
Q. And do you have any policy about calling 9-1-1?
A. Yes. If there's injuries or someone that, you know, needs assistance we definitely call 9-1-1.
Q. And your bouncers are told to use that as a backup as well?
A. Correct, correct.
Q. On July the 28th, that evening, what were you doing?
A. I had came down here to the Nickelodeon Theatre, watched the movie with some friends. Went to a fairly new establishment next door to us called Nicky's Pizzeria, had dinner.
And then the folks that I was with were leaving and so I walked over because I saw Jesse on the door and I

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hadn't properly introduced myself to him yet. I just wanted to get to know him a little better. And while doing so I ran into some people that I hadn't seen in a while that were regular customers and got into a conversation with them is why I was actually there as long as I was, so.

Q. And that evening -- so what part of the bar were you actually hanging out? Where was Jesse when you saw him?

A. He was at the front door.

Q. And was that the only door open that night?

A. I believe the back door was open temporarily until business started slowing down.

Q. Okay. And that night though, Jesse was stationed at the front door?

A. That's correct.

Q. And you also -- is it part of the bouncer's duties that they keep up with kind of the number of people inside as they fill up the seats?

A. That's correct, for fire code.

Q. Fire code?

A. Yes.

Q. When you went over and made contact with Jesse, was that at the front door?

A. Correct.

Q. And while there, I believe you indicated you saw some other people you knew as regulars?
A. Correct. Outside the door. I don't believe I ever stepped inside the building.
Q. Okay. And as you were talking to the other people outside of Group Therapy -- right there on Green Street; is that right?
A. Uh-huh. That's correct
Q. -- tell the jury what you observed.
A. As far as?
Q. As anything -- as -- while you were there, what you observed.
A. I saw -- if you're referring to the incident, I saw the gentlemen being ejected. They weren't forcefully, they walked out. Once they were out, they started getting aggressive, shouting, and then pushing. They were trying to start a fight --
Q. Okay.
A. -- once they were outside.
Q. And where were you when that was going on?
A. I was actually standing right beside the door. I try to stay out of these things because the doormen handle these things.
Q. Okay.
A. Go ahead.

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SCOTT FLEMMING - DIRECT BY CAMPBELL

Q. Do you know what had happened inside that caused them --

A. No, I didn't.

Q. -- to ask them to leave?

A. No, I didn't.

Q. So your first encounter with the men with Stewart Ard was outside?

A. Correct.

Q. And at that point who was doing the threats or the yelling?

A. As far as that goes, I mean, there was a lot of commotion, a lot of yelling. I know that the -- I believe his name is Geno and Skaggs were both seeming to try to instigate it more. Mr. Ard stood back. I walked up to Mr. Ard. He was giving some kind of verbal, I'm not sure. I asked him to get his buddies and leave, we don't want any trouble.

At that time he stated, "Well, I've been to jail. I don't want to go back." I said, "Well I don't want to you go back either."

Q. And at that point did they leave?

A. With -- they kind of took off, I mean --

Q. Was there actual, a physical touching out there when you were there?

A. There was some shoving, yeah.

Q. And who was involved in the shoving; do you recall?
A. No, I don't. I think, and this is only thinking because I haven't reviewed the videos, I think Mr. Skaggs, the driver, was the one that actually did one of the pushings. Like I said, I turned and was trying to get Mr. Ard to get his people out of there.
Q. So, and that was, I believe, involving Ryan Kinard?
A. Yes.
Q. Okay. And when you said they were starting a fight -- trying to start a fight, who was trying to start the fight? Was it your bouncers?
A. No, no. They were all saying, "Please leave, just get out of here. It's done." You know, we -- I actually heard them say, "There's plenty other places to go. Just go." You know, "just don't come back here."
Q. And, as far as you were concerned at some point after the physical altercation at the front, did they then walk away as if they were leaving?
A. Correct. They went up towards Harden Street and actually disappeared. I didn't see them for a little bit at least.
Q. And when is the next time you actually saw that group of men?
A. Mr. Geno come running back, kind of wildly, screaming, and like he was coming back to start back up or

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something, start a fight.
Q. Did he actually get back to the door at that point?
A. No. He got close to the door. I think at that time Mr. Ard came and grabbed him and was like, "We'll take care of this."
Q. And during these first two times you saw them, at any point did you see anyone with a weapon?
A. I did not.
Q. After Geno came running towards the door then Mr. Ard got him and got away from the door, did they disappear again?
A. They did.
Q. And could you tell what direction they went in?
A. It looks like, back the direction they came, towards Harden Street.
Q. And at both, the first time they left and the second time they came back left, were they on foot or in a vehicle or how were they --
A. They were on foot.
Q. And were you still near the front door of your establishment?
A. Yes.
Q. What did you observe next?
A. The next instance with them involved, I was

actually -- I believe my back was turned to the door as I was talking to somebody. And I heard a commotion.

Q. Could you tell where it was coming from?

A. Well, I knew it was behind me at the door itself.

Q. Okay.

A. And with what's now known, it's obviously when Jesse was being attacked.

Q. So you didn't actually see the attack?

A. I did not.

Q. In your establishment are there cameras set up?

A. There is.

Q. And do all eight cameras see the same thing?

A. No, they're spread out through the whole bar to cover areas. More for burglary than this kind of instance.

Q. Once you heard the commotion behind you, what did you next observe?

A. Well, I started to spin around to see what was going on and there was Geno in front of me.

Q. Did you know their names at that point?

A. I did not. I never met them.

Q. Had you ever see them before?

A. No.

Q. The person we now know as Benjamin or Geno or whatever it is, was he in front of you?

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A. He was.
Q. And what did you see next?
A. His fist in my eye.
Q. Oh, and he actually hit you?
A. Correct.
Q. Then what happened?
A. I guess just a natural reaction. I tried turning my head. And when did I saw Mr. Ard laying or getting up from the ground in the doorway.
Q. Mr. Ard, the Defendant?
A. Uh-huh.
Q. Okay.
A. And at that time --
Q. Did you observe anything?
A. At that time I thought he was trying to punch me but in turn it turned out that he was actually stabbing me.
Q. And what part of his body was he stabbing you in? Where did you get stabbed?
A. I got stabbed in the arm and in the chest next to the heart.
Q. Those were two different stab wounds or could you tell?
A. Correct.
Q. And who was trying to stab you?

A. Mr. Ard.
Q. The Defendant?
A. That's correct.
Q. And at that point did you know Jesse had been stabbed?
A. No.
Q. And did you even know that he was stabbing you?
A. No, I did not.
Q. You thought you were getting hit?
A. Yeah.
Q. How did you realize that you'd been stabbed?
A. Someone told me.
Q. Would you say all of this was happening pretty fast?
A. Yes.
Q. Could you feel the pain in your arm or in your chest?
A. No.
Q. Was your adrenalin going?
A. Yeah.
Q. What did you see next as far as either Geno or Mr. Ard? Did you ever see the other two gentlemen --
A. I did not.
Q. -- that came in initially with them?
A. No. I did witness -- to back it up a bit. I did

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witness a car pulling into the Ultra Tan parking lot kind of unusual.
Q. Was that before this last incident?
A. Way before, yeah -- not way before but just before.
Q. Just before?
A. Yeah.
Q. Do you remember what color the car was or anything?
A. I do not.
Q. Okay.
A. I do not.
Q. Then prior to that car pulling in, you hadn't seen a car involved with them at all?
A. No, no.
Q. When Mr. Ard was actually stabbing you, you said he was trying to get up off the ground, was he stabbing you from the ground or was he upright at that point?
A. He was -- it seemed like he was in the motion of getting up from the ground.
Q. And you could actually see him lash out at you --
A. Correct, correct.
Q. -- and you thought it was his fist then?
A. Correct, correct. I was trying to deflect it.
Q. What happened next?
A. They ran off. I learned about -- (losing

composure) sorry.
Q. This was pretty upsetting?
A. I saw what had happened to Jesse. And immediately was, like, "Call the police, call 9-1-1."
Q. And at that point did you even know you had been stabbed?
A. Huh-uh.
Q. Did you know you were bleeding too?
A. Huh-uh.
Q. So your concern was for Jesse?
A. (Nods head), yes.
Q. What was Jesse's condition when you saw him?
A. He was in a huge pool of blood, screaming. Brett had mentioned that he thought he had a punctured lung because he saw the bubbling. So at that time it was just a matter of getting Jesse out of there and in the hospital.
Q. And did the police respond quickly?
A. Yes.
Q. Did EMS respond quickly?
A. Yes. Thank God.
Q. When the police got there, did you talk to them briefly?
A. Yes.
Q. But you had -- by the time they got there, did you

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realize you'd been injured significantly too?
A. I thought I'd only been cut on the arm. I had a napkin on it trying to stop the blood.
Q. And did you get transported to the hospital?
A. I did. I walked to the ambulance or was told to go to the ambulance trying to get them to come up for Jesse.
Q. For Jesse?
A. Uh-huh.
Q. And your focus was on Jesse that night?
A. Uh-huh.
Q. Not your own injuries?
A. (Nods head.)
Q. Once you got to the hospital you got treatment?
A. Correct.
Q. And Jesse luckily got treatment too?
A. Yeah. He was in the next room.
Q. And later that day were you released from the hospital?
A. That night, yes.
Q. That night?
A. Yeah.
Q. But you got there in the morning hours?
A. Correct. Well, that morning, I guess.
Q. At any point did you ever hear anything about anybody asking for a watch?

A. No, ma'am.
Q. Did you ever see a watch?
A. No, ma'am.
Q. Did you take a watch?
A. No, ma'am.
Q. Did you do anything to provoke the attack on you and Jesse?
A. No, ma'am.
Q. Did Jesse do anything?
A. No, ma'am.
Q. The person that you thought hit you but ended up stabbing you, do you see him here in the courtroom?
A. I do.
Q. Can you point him out for the jury?
A. He's in the blue shirt with the curly hair.
Q. And has his appearance changed in any way?
A. Yes, he's grown hair.
Q. Any doubt that's him?
A. No.

MS. CAMPBELL: Thank you.

THE COURT: All right. Ms. Zmroczek?

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. I just have few questions for you. Are you sure you're okay?

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A. Yeah.
Q. Okay. I think you told the jury and I think that you were probably the most clear headed because you weren't in the bar that night with all the energy and the music, were you?
A. No.
Q. No. So you were kind of able to -- I'm assuming, as I am, a little older than the bartenders, you're able to kind of step back and take the emotion out of it, right.
A. Correct.
Q. But you have seen fights in the bar, and you have seen your guys get mad at other guys, and not that it's your guys' fault, but you've seen the aggression level raise, right?
A. As far as what?
Q. As far as when drunk guys are screaming at them, they don't just sit there and say, "Please leave," do they? Or do they say --
A. They start with that, yes.
Q. Right. It starts with that, but eventually it elevates to "Get the blank out," et cetera, because they want to leave? They want them to leave.
A. They don't usually curse at them, no.
Q. Okay. But you did witness the shoving and the

pushing between the two groups, between Geno and Skaggs who's another --
A. I saw them push the doorman.
Q. Right.
A. I did not see the doorman make any aggressive move towards them.
Q. You didn't see them push back?
A. No. And I will -- to elaborate, I mean, I was standing there. So, that would take even less of a reason for them to even be aggressive.
Q. Right. Because you told them not to do that?
A. Right. It's a policy.
Q. And we have video, at least some of them the videos, that show some angles, right?
A. I don't know what angles you have.
Q. Okay. But we have some cameras that were provided to us. I mean, you've been sitting in the courtroom so you know we've been watching them, right?
A. Right.
Q. And I believe that you told Ms. Campbell that you were actually having a conversation with Ard, like, "Dude, get your kids out of here, get these, get these guys out of here"?
A. Right.
Q. So that's a conversation that you and he were --

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A. Not -- it was not a conversation-conversation. I was asking him to get his other guys out of there.

Q. And he was saying "C'mon, let's go"?

A. After he made the statement that he had been to prison and he didn't want to go back. And I think that's why he was standing back. That's what he said to me, I'm sorry.

MS. ZMROCZEK: Your Honor, I have a matter of law.

THE COURT: All right. Ladies and gentlemen, you can step back to the jury room. Please don't discuss the case while you're there.

(Jury exits courtroom at 11:58 A.M.)

MS. ZMROCZEK: Your Honor, at this time I'd like to move for a mistrial. I think that maybe he said it when Ms. Campbell said it, she was so close up I couldn't hear it, but it's extremely prejudicial for him to say that Ard said "I'd been to prison."

I've been very careful to keep out things that they have wanted me to keep out. And, Your Honor, I think that they have instructed all of their witnesses not to bring that up. And the fact that --

THE COURT: I don't know. Were you told not to talk about he had been to jail?

THE WITNESS: No, sir.

THE COURT: Did y'all know that conversation

existed?

MS. GARFIELD: I did, and I thought I had instructed all the witnesses. I know I spoke with several of them not to mention the jail. I thought I had spoken personally to Mr. Flemming.

THE COURT: Well, you did or you didn't.

MS. GARFIELD: If he says I didn't then --

THE WITNESS: I do not recall. I thought we were -- I was under the assumption that I needed to say what was said to me.

THE COURT: Well, that's true and not necessarily true, of course. Were you aware that he had made that statement before?

MS. ZMROCZEK: Not to -- no, I was not aware that he had said that to him at all. The conversation that I was told about, he -- I've never been provided a statement from him. So the conversation I was told about, that happened in the back of the bar with the other, all the other bartenders who were coming up who hadn't said a word about it. When they said they were saying stuff.

THE COURT: So you never had any indication that your client had made the statement to him or that somebody was going to say that he had been to jail before and didn't want to go back.

MS. ZMROCZEK: None.

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MS. GARFIELD: Ms. Zmorczek, I told you that he said that to the bartenders as he was leaving.

MS. ZMROCZEK: I've never been provided that.

MS. GARFIELD: He wasn't scared because he'd been to prison before. I told that you on June 6th in that meeting.

THE COURT: Talk to me. Don't talk to her.

MS. GARFIELD: I'm sorry, Your Honor.

I instructed counsel in our discovery meeting that witnesses said -- I specifically remember. I said, "Witnesses would say that the Defendant was yelling that he wasn't scared, he'd been to jail." And she even smiled. Ms. Zmroczek smiled at me and said, "You're going to instruct the witnesses not to say that." And I said, "Of course." But I did disclose that to Ms. Zmroczek.

THE COURT: There wasn't any motion in limine made to see that that was not done.

(Pause.)

All right. I'm going to deny your motion. He's testifying to what was told him by your client at the time that's right before this incident occurred. I will -- do you have a curative instruction you would like me to give this jury?

MS. ZMROCZEK: I will, Your Honor.

THE COURT: Well, you don't want one now?

MS. ZMROCZEK: I guess, Your Honor, at this point I want them to be instructed that that has no -- that's not in any way to be considered. Whether or not he went to prison or didn't go to prison is in no way to be considered in the charges for this case.

THE COURT: All right. Don't say anything about -- and I caution anybody that testifies, better not say anything about the statement that he made to the witness prior to this incident occurring.

All right. Bring the jury in if you would, please.

(Jury enters courtroom at 12:04 P.M.)

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: All right. Ladies and gentlemen, I'm going to specifically instruct you at this time that any comments that were made or allegedly made by the Defendant prior to the alleged incident relating to his not having any interest in going to jail at any time are to be disregarded by you and are not be considered by you whatsoever with respect to anything involved in this trial. They don't have anything to do with the case. So you disregard those.

And when you have your deliberations I'm going to instruct you that that is not to enter into your deliberations and be part of your conversation.

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So, all right.

MS. ZMROCZEK: Thank you, Your Honor. I just have a few more questions.

Q. So as you recall, Mr. Skaggs and Mr. Benjamin Geno were the ones causing the trouble in the group?

A. Yes.

Q. And you instruct your bartenders not to get into fights, not to push back, not to cause trouble, right?

A. Correct.

Q. Did you eventually have to fire Mr. Patterson?

A. I did have to release him, yes.

Q. Is that because he got into a fight?

A. No. It was because he was a bartender and bartenders do not step behind the bar to handle customers and that's why he lost his job.

MS. ZMROCZEK: I have no further questions.

THE WITNESS: Okay.

MS. ZMROCZEK: Thank you.

THE COURT: All right. Anything?

MS. CAMPBELL: No, sir.

THE COURT: All right. Thank you, Mr. Flemming. You may step down. Do you want to call your next witness, please?

MR. SHALABI: The State calls Joseph Molino.

JOSEPH MOLINO, having been duly sworn, was examined

and testified as follows:

THE CLERK: Have a seat in the witness stand. State your name for the Court.

THE WITNESS: Joseph Molino.

DIRECT EXAMINATION

BY MR. SHALABI:

Q. Joe, where are you from?

A. Philadelphia.

Q. And when did you move to Columbia?

A. In 2010.

Q. And you've been living here since then?

A. Yes, sir.

Q. Where do you currently work?

A. I'm currently unemployed. The Pour House just shut down. I'm in the act of looking for new employment.

Q. You were working at the Pour House until they closed down?

A. Yes, sir.

Q. And when did they close down?

A. They closed down June 1st of this year.

Q. I want to draw your attention to July 28th of last year, were you working at the Pour House on that night?

A. Yes, sir.

Q. And what was your position at the Pour House?

A. Just a door guy and a bar back.

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Q. And what do you do as the door guy and a bar back?
A. Just check IDs and I keep the peace, get stuff for the bartender and stuff like that.
Q. Are you allowed to consume alcohol while you were working?
A. No, sir.
Q. Did you consume alcohol that night while you were working?
A. No, sir.
Q. I want to draw your attention to the incident on that night. Did you notice anything unusual at the Group Therapy, outside Group Therapy?
A. Yes, sir. I was working the door and I noticed people running from the door. And usually when people run in Five Points, there's usually something wrong happening.
Q. And tell the jury what you did.
A. Basically ran to where everybody else was running to to see what was going on.
Q. Where did you run towards?
A. Towards Group Therapy and the tanning salon.
(State's Exhibit No. 27, chart, marked for identification.)
BY MR. SHALABI:
Q. Joe, I'm showing you what's been marked for identification as State's Exhibit 27. What is this?

A. It's a picture of Five Points.
Q. Okay. And does this look substantially similar to how it looked on that night of the 28th?
A. Minus a lot more people on the street and dark, yes.
MR. SHALABI: Your Honor, at this time I'd like to introduce State's Exhibit 27 into evidence.
THE COURT: So admitted.
MR. SHALABI: Can I ask the witness to step down?
THE COURT: You may.
(State's Exhibit No. 27, chart, received into evidence.)
BY MR. SHALABI:
Q. Show the jury where Pour House is.
A. Pour House is right here on the corner, 800 Harden. And this is the front door right here. This is Group Therapy, the tanning salon, and then the back alley were Group's back door's at.
Q. So where did you hear the commotion coming from?
A. Well I saw the people running out the front door and towards the tanning salon.
Q. Is that where you ran?
A. Yes, sir.
Q. How far did you get to?
A. I got to right there, the tanning salon, the first

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the spot and that's when Stewart Ard was halfway in the car and got out and start swinging a knife at us. I ran away.

Q. And where did that happen?

A. Roughly this area right here.

Q. Okay. Re-take the stand.

A. Yes, sir.

Q. Was anything said to -- did you say anything to -- do you know what happened?

A. I had no idea what I was getting into that night.

Q. You just ran over to see what was going on?

A. I just ran down there, yes, sir.

Q. And at that point Stewart Ard leaves the vehicle?

A. Yes. He was halfway in the vehicle and got out, coming at me and my friend, Gabriel.

Q. With?

A. With a knife. Like a knife, an object in his hand. Most people when they fight they hold up their hands (indicating). When someone comes like this, (indicating) it's a totally different story.

Q. Did he swing at you?

A. He swung it. I put my hands up and I said, "I don't want anything." I recall him yelling something. "Do you want this, do you want this." I was, like, "You're through, man." I was out.

Q. So what did you do then?
A. I just ran, start flailing my arms and trying to flag down the police.
Q. What was that man wearing that night?
A. A lime green shirt, shorts, white shoes, bald head.
Q. Is he in the courtroom right now?
A. Yes, sir.
Q. Could you identify him for the jury?
A. It's that man right there, sir (indicating).
Q. What's he wearing?
A. Blue shirt, curly hair.
MR. SHALABI: Your Honor, let the record reflect that the witness identified the Defendant.
THE COURT: All right. He's identified the Defendant.
BY MR. SHALABI:
Q. Were you scared that night?
A. Yes, sir.
Q. Did you have any -- did you even see them at any point before that incident?
A. I'd seen them earlier that night. I was outside smoking a cigarette. They walked by. And sometimes you see people and you just know that they're going to cause trouble. Working at Five Points for a couple years, you can --

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Q. Did you --
A. -- just tell.
Q. I'm sorry. Go ahead.
A. I said, you can just tell sometimes about some people, you just know.
Q. Did you have any interaction with them at all prior to this incident?
A. Not at all.
MR. SHALABI: Your Honor, can I ask the witness to step down here?
THE COURT: You may.
BY MR. SHALABI:
Q. Have you had a chance to review the videos?
A. Yes.
Q. I'm showing you what's State's Exhibit 20. What is this?
A. That's the parking lot of the Ultra Tan, Nicky's Pizza over there.
Q. So where is Group Therapy in relation to this?
A. This would be an alleyway, and then Group would be to left of that alleyway.
Q. And then Pour House would be?
A. To the left of Group Therapy.
Q. So at this point nothing, right?
A. Nothing.

Q. Is that the car?
A. That's the cross over.
Q. And who is this man?
A. That's Stewart Ard.
Q. Is that the guy sitting at the table in the blue shirt?
A. Yes, sir.
Q. At this point you heard in the commotion?
A. Yes, sir. That's why I ran down there.
Q. Did you see him mess with that license plate?
A. I did not.
Q. And where are you?
A. This is me, sir. I put my hands up. "What do you want?" Knife comes out.
Q. And what did he say to you?
A. I don't recall exactly the words. It was, like, "What do you want," or "Do you want this, do you want this," skipping away too, like he's happy.
Q. Did you have a chance to look at the license plate?
A. No, sir. I was -- you know, someone comes at you like that, I was out. Fight or flight. I didn't have anything to fight with.
Q. All right. You can retake your seat.
A. Yes, sir.
MR. SHALABI: Your Honor, I have no further

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questions of this witness.

THE COURT: All right. Ms. Zmorczek?

MS. ZMROCZEK: Thank you. I just have a few.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Mr. Molino, the incident that you came running down for to see if you could help, that was -- that was the first instance you had heard that night, that's the first commotion you had heard from down there, right?

A. Yes, ma'am.

Q. And you gave a statement to the police that night or the next morning, right?

A. Yes.

Q. But you never told them that you had a funny feeling about that group of people?

A. No.

Q. No? Okay. You had an opportunity to speak and get ready for trial and get prepared, right?

A. Yes, ma'am.

Q. Mr. Ard was acting like a crazy man, right, swinging a knife at you?

A. Yes.

Q. But he didn't hit you, right?

A. If I would have stayed around, I probably would have been dead right now.

Q. Right. But he didn't?
A. But the intention in his eyes --
THE COURT: Answer the question.
THE WITNESS: No, he did not hit me. Sorry.
BY MS. ZMROCZEK:
Q. That's okay. And he didn't hit anybody else, he didn't hit Gabe?
A. No.
Q. In fact, when you put your hands up, "I don't want any of this," I think your words were fight or flight, right --
A. Yes, ma'am.
Q. -- because that's a natural reaction in that situation?
A. Yes.
Q. If somebody became aggressive towards you, you have two reactions, you fight or you flight?
A. Or you run away. Yes, ma'am.
Q. And you're a skinny guy. You didn't have much to fight with, you took off, right?
A. Well, soft body and sharp steel.
Q. Don't match. And you didn't tell him you had a knife or anything like that?
A. No, ma'am. I had no weapon on me or else I probably would have stuck around a little bit longer.

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Q. And I believe you watched all the videos in this. So there is video of when you come back and you were kind of having a conversation out front --

A. Yes, ma'am.

Q. -- of Group Therapy. I think you were dancing around, you were showing him how you were able to --

A. Yes, I was happy in my agility that night.

Q. Absolutely.

A. Yeah, I was alive.

Q. Y'all were joking about it. I mean, you all were laughing about it, right?

A. Yes, it was good to be alive that day.

MS. ZMROCZEK: All right. I have no further questions.

REDIRECT EXAMINATION

BY MR. SHALABI:

Q. Did you know that he had stabbed Jesse?

A. I was not aware that anyone had been stabbed that night.

MR. SHALABI: That's all I have.

THE COURT: Thank you. You may step down. Call your next witness.

MR. SHALABI: The State calls Gabe McDaniel.

GABRIEL McDANIEL, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your name for the record.

DIRECT EXAMINATION

BY MR. SHALABI:

Q. State your name for the record.

A. Gabriel McDaniel.

Q. You go by Gabe?

A. I do.

Q. Can I call you Gabe?

A. It works for me.

Q. Gabe, where are you from?

A. I'm from Orangeburg originally.

Q. Do you currently reside in Columbia?

A. Yes.

Q. And how long have you been living in Columbia?

A. About six years now.

Q. Where do you currently work?

A. Patterson Logistics in Blythewood. I was an employee of the Pour House the night of the incident.

Q. How long have you been working at your current job?

A. My current job?

Q. At Patterson?

A. About three years.

Q. Okay. So you were actually working two jobs at the time?

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A. Yes.
Q. Because you were working at Pour House?
A. Uh-huh.
Q. Did you work there on July 28th of last year?
A. Yes, sir.
Q. What was your position at Pour House?
A. I was a door guy.
Q. What are your duties as a door guy?
A. I check on IDs, basically make sure everyone is safe, make sure the bartenders don't need anything, make sure all the patrons are being decent people.
Q. You have the same position as --
A. Yes, as Joe.
Q. -- as Joe, who testified before you?
A. Yes, sir.
Q. Are you allowed to consume alcohol?
A. No, sir.
Q. And did you consume alcohol on that night?
A. No, sir.
Q. Are you allowed to have weapons while you're working?
A. No.
Q. Did you have a weapon on you that night?
A. No, sir.
Q. I want to draw your attention to that night around

one A.M. Did you notice anything unusual while you were working?

A. I'm guessing one A.M. is --

Q. I'm sorry?

A. I'm guessing one A.M. is right when the incident happened. You're asking right before that?

Q. Yeah.

A. No. I didn't notice anything until me and Joe were actually at the front door together. And we saw just a big commotion. And the door guys at Group and the door guys at Pour House are like family, kind of just look out for each other in case we need help. So we ran down there just to see what was going on.

We had no idea anything had happened out of the ordinary, out of just anything really.

Q. What were you running towards?

A. Just towards the people. Just towards -- we ran towards the alleyway and the Ultra Tan parking lot and Nicky's Pizzeria. Just that's where the commotion was going on outside of Group. They ran off. We looked, sometimes there will be a fight in the alleyway if it's just two random patrons just end up fighting in the alley or somewhere. So we ran down there just to check to see what was going on.

Q. And then at that point what happened?

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A. We stopped for -- we got to the alleyway and stopped. Joe was a little in front of me. We stopped for a brief second. And Mr. Ard came out with his knife.

He was yelling. I don't recall what exactly he said. But it was pretty threatening. He came out immediately but he obviously didn't want to actually have a fight. He wanted to stab someone because, I mean, if I want to fight someone --

Q. Why would you think that?

A. Well, I mean, if I want to fight you I'm going to put my hands up and, you know, we can fight like men.

Q. Did he have a knife on him?

A. Oh, immediately.

Q. Did you see it?

A. Yeah, he pulled it. That's the first thing he did. He came out of the car and started yelling and whipped his knife out. And as soon as he pulled his knife out he started coming at us. And that's when Joe -- I think he was asking what we wanted, why we were there and Joe immediately put his hands up. You know, he was, like, "Oh, we don't..." He went at Joe first and Joe went to run and that's when he came at me.

Q. And what did you do?

A. I started back peddling. I didn't want to turn my back on a man trying to stab me.

Q. Did he came at you?
A. Yeah, he came at me. He -- actually with his left hand he caught the front of my shirt. He didn't get a good grasp on it because I was back peddling about as fast as I possibly could. I ended up actually falling. And right when I fell he came around and actually swung the knife at me with his right hand, kind of like if you're throwing a hook at boxes and swung it right around me. He missed me. I can't really recall by how much. But he swung it right at me but when I fell he missed. Whenever he missed he took a step back and kind of -- I 100 percent believe he thought he was going to stab me so when he missed me he was confused. And as soon as that happened I was -- he gave me that little bit of space I needed to be sure that I could get away and I turned and ran.
Q. Where did you run to?
A. Just back towards Pour House, away from him.
Q. Did you see him get back into that car?
A. Yeah. I turned back around, was looking by then. I saw him get back in the car.
Q. And he drove away?
A. Yeah.
Q. Did you see him at any point prior to that incident?
A. Yeah, when me and Joe were both sitting outside

GABRIEL McDANIEL - DIRECT BY SHALABI

smoking a cigarette. We actually had a conversation about it. I believe I told Joe, "I hope those guys don't try to come in there." It's just something we do. I mean, it's just something we do, you know, as -- I bounced for five years. And you get to a point where, you know, sometimes you look at people and, you know, I really just don't want to have to deal with those people tonight.

And they just gave off that vibe. As soon as we saw them they walked -- I remember like it was yesterday. They walked up from, like, they were coming from down towards Rite-Aid. They walked around Pour House and was going towards Group Therapy.

Q. Did you talk to them at all?

A. No.

Q. Didn't have a word with them?

A. Not a single word, not with any of them.

MR. SHALABI: May I ask the witness to step down for a moment, Your Honor?

THE COURT: You may.

BY MR. SHALABI:

Q. I'm showing you State's Exhibit 23. Point to the alleyway you're referring to.

A. Right there.

Q. And why was that alarming when you ran down?

A. Well, sometimes whenever -- whenever we ran down we

came from obviously right here. Pour House, that's actually the backside of Pour House right there. We ran down right here.

Q. This tan building?

A. Yeah, the tan building. We ran down right here. Joe stopped somewhere up in here. And I stopped right there because we didn't see anything so we're, like, all right.

Q. See anything where?

A. We didn't see -- like, we looked in the alley and then that's when we looked towards the car because he was about halfway in the car. He started getting back out. And I was like, you know, I pointed at him. All right. We might need to watch out for this guy and immediately he comes back, he's swinging a knife.

Q. Where exactly were you when he was swinging a knife?

A. I was back here.

Q. And where were you back peddling?

A. I was back peddling right here. That's where I actually -- I started, I probably started from right there. I was back peddling. I guess I hit that slope and that's what actually caused me to fall, but he was coming. The car was parked right here. He was in the back passenger side. And he was getting in right whenever

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we came up and he came from right there and ran all the way over here to us while Joe put his hands up and that's whenever all of that happened.

Q. All right. Thank you.

THE COURT: You can have a seat.

BY MR. SHALABI:

Q. Do you think that little stumble you had kept him from stabbing you?

A. Oh, 100 percent. There's no doubt.

Q. Is that man in the courtroom right now?

A. That's him sitting right there in the blue shirt with the curly hair.

MR. SHALABI: Your Honor, let the record reflect that the witness identified the Defendant.

No further questions.

MS. ZMROCZEK: I just have a very few, Your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Gabe, you gave a statement to the police that night; right?

A. Yes, ma'am.

Q. You did not tell them that you got close enough to cut your shirt, did you?

A. I didn't say he cut my shirt. He got close enough

to where he barely missed me. That's what I told them.
Q. Okay. Would it help to review your statement?
A. I mean, if you would like me to. I remember it.
Q. I'm just confused. You're saying he got close enough to cut your shirt --
A. Whenever --
Q. -- when you stumbled, or touch your shirt?
A. Yeah. He didn't cut my shirt. Whenever I started back peddling, he reached out with his left hand and he caught the very front of my shirt. He didn't get a good grip on it. He just caught the front of it like that (indicating). I was back peddling and whenever he caught it that's when he came around with the knife. And when he came around with the knife that's when I was in the midst of falling and he was -- like, the shirt -- whenever I fell the shirt came out of his grasp and he swung the knife at me. And that's whenever -- he didn't stab my shirt with the knife. He missed me by about, if I had to guess, I'd say about that far (indicating).
Q. If he wanted to stab you he probably could have if you were lying on the ground; right?
A. Well, he thought he could. As soon as he swung through he went to back peddling and as soon as he back peddled and took a couple steps I was already gone.
Q. And you claim that you saw the group earlier and

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you said, "Don't come in the bar"? Because drunk people are obnoxious, right?
A. No, I didn't tell them not to come into the bar. I just, I told Joe I hoped they didn't.
Q. Right. And you stated that they walked in front of Pour House?
A. Uh-huh.
Q. Towards Rite-Aid?
A. No. They walked -- the only time I saw them -- and we switch around throughout the night. They could have come by five or six times, I may not know it. But the time that I saw them they came from, from Rite-Aid. It was a while before the incident happened. They came from the, where Rite-Aid is and walked around Pour House.
Q. Down Green Street?
A. Yes.
Q. I mean, down Harden to Green Street?
A. Yes, ma'am.
Q. And that's the only time you saw them that night other than --
A. Other than until --
Q. -- this incident?
A. Yes, ma'am.
Q. Okay. And you didn't have any -- see any commotion or hear any commotion?

A. Other than that, no, ma'am.
Q. Other than that?
A. No, ma'am.
Q. And, you don't know Mr. Ard at all, do you?
A. Other than from that night and all of this, no, ma'am.
Q. So for you to say he was confused or make any guesses about emotions, those are simply guesses, right?
A. Yeah.
Q. Okay. And, thankfully you did not get hurt that evening, did you?
A. No, ma'am.
Q. And you and Joe came back and you all had a little meeting in front of Group and were laughing?
A. We still at that point had no idea that anything had happened with the guys at Group. We were kind of laughing about it, like, man, that was crazy. But then we started -- of course everyone's talking at that point, and we stuck our head in and saw Jesse laying there and that's when, like, it actually kind of hit us.
Q. Right. It was at that point --
A. Yes.
Q. -- not before?
A. Yes, ma'am. Before that we had no idea that he had even stabbed anyone. So we were just thankful that he

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didn't stab us.
Q. Okay. Thank you.
A. Yes, ma'am.
MR. SHALABI: No questions.
THE COURT: All right. Thank you very much. You may step down.
All right. Ladies and gentlemen, we're going to go ahead and break for lunch. It's almost 12:30. I'm going to ask you to come back here in an hour 15 minutes which will be quarter till two. That will give us an hour and 15 minutes for you to have lunch.
Please do not discuss the case while you're gone with each other or with anyone else. And y'all have a nice lunch. We'll see you in a little while.
(Jury exits courtroom at 12:32 P.M.)
THE COURT: All right. What do we got coming up?
MS. GARFIELD: Do you stipulate to the knife?
MS. ZMROCZEK: Yeah.
MS. GARFIELD: At the most six more, Judge.
THE COURT: Who are we going to call next?
MS. GARFIELD: Next will be Corporal Buck who's the second officer that came on the scene and took photographs.
THE COURT: All right.
MS. GARFIELD: And then the next witness is

Ms. Ganaway.

THE COURT: Ms. Who?

MS. GARFIELD: Ms. Ganaway. Amethyst Ganaway.

THE COURT: All right.

MS. GARFIELD: And then following that would be the co-defendants.

THE COURT: Geno and Skaggs?

MS. GARFIELD: Yes, sir.

THE COURT: Is Bundy one of them?

MS. GARFIELD: And Stephen Richardson. He wasn't charged but he was with them.

THE COURT: One, two, three, four, five. That's six?

MS. GARFIELD: Investigator McCoy. And we may call someone from the jail. We're going to discuss that at lunch.

THE COURT: Seven?

MS. GARFIELD: Yes, sir.

THE COURT: Possibly eight?

MS. GARFIELD: I lost count. Sorry. Math is not my forte.

THE COURT: Huh?

MS. GARFIELD: Math is not my forte. If I counted wrong, sorry.

MS. ZMROCZEK: Your Honor, I would inquire about

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this jail --

MS. GARFIELD: Phone calls.

MS. ZMROCZEK: -- person. I don't think phone calls are relevant but I guess we'll have an issue about that unless there have been more phone calls that we were not provided. He, he does not talk about the incident on there. All it is is his brother is talking him into a plea.

So I don't think that's relevant or appropriate.

THE COURT: Is that all you're going to put up?

MS. GARFIELD: I would disagree with the content. I think he does talk about it, but I just told Ms. Campbell before you asked that I'm going to listen to them again at lunch to make sure before we reconvene.

THE COURT: Y'all intend to offer any evidence?

MS. ZMROCZEK: Nope.

THE COURT: All right. So --

MS. ZMROCZEK: I mean, I know you want to wait until the end but you can do a colloquy now.

THE COURT: We'll wait until after. All right.

Well y'all have a good lunch and we'll see you back here.

Well, let me ask you something. Do you want any lesser includeds?

MS. ZMROCZEK: Yes, your Honor.

THE COURT: Which ones?

MS. ZMROCZEK: We would be asking for -- I looked at the case law last night and the lesser includes we'd be asking for are assault first which is a lesser included of attempted murder and assault third which is a lesser included of assault.

THE COURT: Not assault HAN?

MS. ZMROCZEK: No, we wouldn't be asking for that one.

MS. CAMPBELL: Your Honor, we would like to be heard on the assault first. We do not think it would be appropriate in this case to the lesser included of attempted murder. I would agree ABHAN would be.

THE COURT: Well, if y'all got something you need me to look at --

MS. CAMPBELL: I'll get it to you after lunch.

THE COURT: Well --

MS. ZMROCZEK: I mean, the statute says that assault first is a lesser included of attempted murder.

MS. CAMPBELL: We would not disagree with that but in this case there's an injury.

THE COURT: There's what?

MS. CAMPBELL: There was an injury in this case on the attempted murder. I'll look at the case law again, Your Honor, too.

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And I don't understand --

THE COURT: Assault first would be a lesser included of ABHAN too, wouldn't it?

MS. CAMPBELL: It can be, depending on the facts.

THE COURT: Well, I understand depending on the elements but the ones that were met.

MS. CAMPBELL: My understanding of assault first, Your Honor, is under Subsection A, injures another and either touches the private parts or occurs in a robbery, burglary or other offense. We don't have that.

THE COURT: Hold on.

MS. CAMPBELL: Then under B attempts to --

THE COURT: Hold on, hold on.

MS. CAMPBELL: But I do agree with you that ABHAN would be a lesser included.

I'm sorry, Your Honor. I left my copy of the actual statute upstairs.

MS. ZMROCZEK: I have it here.

MS. CAMPBELL: Do you mind if I look at it? Thank you so much. I appreciate it.

MS. ZMROCZEK: (Document handed to Ms. Campbell.)

THE COURT: I don't understand. You mean assault first, a person commits the offense of assault and battery in the first degree if a person unlawfully offers or attempts to injure another person with the present ability

to do so and the act is accomplished by means likely to produce death or great bodily injury.

MS. CAMPBELL: That's the offer to do it. It's the attempt, not the actual injury. If it's an injury then it falls under ABHAN, otherwise the first subsection under A if there's an actual injury and then you have the aggravating circumstances under A which are limited to the touching and occurring during robbery, burglary or kidnapping. If it's an attempt to injure and likely to produce great bodily injury, that would then be subject to B.

MS. ZMROCZEK: But then on Section One it says: If accomplished by means likely to produce great bodily injury or death. I think it's absolutely appropriate.

MS. CAMPBELL: That's ABHAN you're reading there. That's not assault and battery first. That's what you gave me.

MS. ZMROCZEK: Huh-uh.

THE COURT: Well, you better get me what you want me to look at.

MS. CAMPBELL: Yes, sir. But we would agree with the Court's assessment that ABHAN would apply here.

THE COURT: So your position would be it would be attempted murder, ABHAN, and assault in the second degree?

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MS. CAMPBELL: No, sir. I would just say attempted murder and ABHAN would be appropriate in this case.

THE COURT: Why is that? Why wouldn't assault second degree?

MS. CAMPBELL: She wasn't -- she didn't --

MS. ZMROCZEK: Three people are charged with assault second degree, Your Honor.

THE COURT: I mean, on the attempted murder if the jury determines it was moderate bodily injury.

MS. CAMPBELL: Your Honor, the only testimony I believe before this jury is that this was a life-threatening injury, but I could be wrong.

THE COURT: That doesn't necessarily make it a serious bodily injury under the definition. I mean, great bodily injury.

MS. CAMPBELL: Okay. I understand.

THE COURT: You might be right on assault first degree. But you can look at it and you can get me what you want.

MS. CAMPBELL: Yes, sir.

THE COURT: All right. Y'all have a nice lunch.

(Luncheon recess taken at 12:39 P.M. At 1:47 P.M., the trial resumed:)

THE COURT: Doesn't this case say it needs to be charged?

MS. CAMPBELL: No, sir. It says when there is no injury it needs to be charged.

MS. ZMROCZEK: Your Honor, the way I read it, it was an error but it was a harmless error because it wasn't charged.

MS. CAMPBELL: Because there was no injury. It talks specifically about two different parts of the statute.

THE COURT: I understand. But I mean, the way I read this thing I think it needs to be charged too. In this instance it was harmless but it's, but --

MS. CAMPBELL: No, sir. They said -- in the case involving it said specifically the one with no injury.

THE COURT: I haven't read the whole case but you'll have to point that out.

MS. CAMPBELL: I'll point that out. And then they said it's harmless as to that one. It says harmless error.

THE COURT: Where are you reading?

MS. CAMPBELL: Subsection headnote two.

THE COURT: What page?

MS. CAMPBELL: First page.

THE COURT: All right. Paragraph two.

MS. CAMPBELL: To instruct first degree assault and battery as a lesser-included offense of attempted murder

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as to the victim who did not suffer any injury was harmless.

THE COURT: Well, I understand that. It says it should have been charged but the failure to do so was harmless error.

MS. CAMPBELL: No, but in the body of it it talks about the two subsections. Under C(1)(A) when there's an injury and then the difference between C(1)(B).

THE COURT: Well, I know, but I interpret that to mean in that instance if it had not been charged it would not have been harmless.

MS. CAMPBELL: It says Subsection A does -- then if you go on, see where it quotes Brewer it says: While Subsection A does require an injury to the victim, Subsection B of the statute applies when there is no injury to the victim.

THE COURT: Correct.

MS. CAMPBELL: In this case the only attempted murder lesser includeds we have is there is an injury so only Subsection A could apply.

THE COURT: It says that that was error not to charge it but harmless error because --

MS. CAMPBELL: There were two different victims.

THE COURT: In the one where there was no injury it was in error but it was harmless.

MS. CAMPBELL: That's correct. Then there was no injury.

THE COURT: Failure to charge. So you're asking me to go ahead and commit error but it will be harmless.

MS. CAMPBELL: I believe if you look at the facts of this case that there were two --

THE COURT: I did look at the facts. Somebody pulled it up.

MS. CAMPBELL: Two counts of attempted murder and one had injuries and one didn't.

THE COURT: Somebody drives up with a pistol and shoots and misses this one. The Court says it should have been charged but the fact that it wasn't because there was no injury it was harmless error.

MS. CAMPBELL: Because one victim was injured and one was not. They refused on both.

THE COURT: The one that wasn't --

MS. CAMPBELL: Injured, they said it should have been on that one, not the other one is what the case says.

THE COURT: Well, I'll read it.

MS. CAMPBELL: Okay.

THE COURT: All right. Are we ready to go? All right. Let's bring the jury in if we can.

MS. ZMROCZEK: You Honor, I think she had some pictures that I objected to.

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THE COURT: Something more than what we've had last night?

MS. CAMPBELL: Your Honor, I think we narrowed it down this afternoon. We only have three witnesses left. Over lunch we were able to eliminate some.

THE COURT: Are they something different from what we discussed last night?

MS. GARFIELD: I showed them to Ms. Zmroczek. She said she objected to all of them and we agreed to argue it later on.

THE COURT: I don't know what that means. Last night I told you all what you could do.

MS. GARFIELD: Not these.

THE COURT: So these are so different?

MS. GARFIELD: These you didn't see.

THE COURT: These then are in addition to what we had last night?

MS. GARFIELD: I had them with me back there but we agreed to discuss it later.

THE COURT: All right. Let me see.

MS. CAMPBELL: They're just stills from the video, Your Honor, showing certain things.

THE COURT: You got 17, 18 and 19. Why do you need 17, 18 and 19?

MS. CAMPBELL: Can I just look at the picture?

THE COURT: Same guy walking which is the Defendant.

MS. CAMPBELL: Your Honor, I can narrow it down to 17. How about that?

THE COURT: That's good. Why do you need that?

MS. CAMPBELL: I don't. I'll withdraw 16 or I won't offer it. And I can narrow it down to one of those. State's 14.

MS. ZMROCZEK: Your Honor, my objection would just be that they're cumulative, duplicative. They have the video. They can see it. I mean, they want to take out the stab scene and just keep showing that, but they have the entire video which I think is a better reflection of what happened. That's my objection.

THE COURT: Well, it may be a more complete. I don't know that it's better. That will be a decision that the jury will have to make.

MS. ZMROCZEK: Right. And it would be more complete if we had the whole video too, but we don't. So I understand.

It's -- I mean, I would have no objection to them using, like, stills in closing. I just don't think that they need to also go back to the jury.

THE COURT: I'm going to let them admit two of those pictures.

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MS. CAMPBELL: Thank you, Your Honor.

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

(Jury enters courtroom at 1:56 P.M.)

THE COURT: All right. Madam Solicitor, are y'all ready to call your next witness?

MS. GARFIELD: Yes, sir. Thank you, Your Honor. The State calls Corporal Matthew Buck.

MATTHEW BUCK, having been duly sworn, was examined and testified as follows:

THE CLERK: Have a seat. State your name for the record.

THE WITNESS: Matthew Buck.

DIRECT EXAMINATION

BY MS. GARFIELD:

Q. Corporal Buck, where are you employed?

A. City of Columbia Police Department.

Q. How long have you been employed with the City of Columbia?

A. It will be eight years in August -- or, correction, September.

Q. What are your duties with the Columbia Police Department?

A. At the time my duties, supervise, patrol, respond to calls and, you know, handling calls for service.

Q. And are you assigned to any specific area of the city?
A. Assigned to our Shop Region which incorporates Five Points, Outbound, Garners Ferry Road and parts of Forest Drive.
Q. And were these your same duties back in July of last year?
A. Last year I was assigned to Five Points, specifically Five Points, but now I'm on the road patrol.
Q. Back in July it was only Five Points where you were?
A. Yes, ma'am.
Q. And were you working on July 28th of last year?
A. Yes, I was.
Q. Specifically the early-morning hours?
A. Yes, ma'am.
Q. And did you have an occasion to respond to Group Therapy Restaurant and Tavern?
A. I did.
Q. And can you explain to the jury what the nature of that response was?
A. The night was going pretty well. And, I mean, well, not a lot of calls for services at Five Points. And then several of my units stated they were getting flagged down in reference to a stabbing at the Group Therapy, I

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believe it was.

And at that time dispatch was also dispatching the call. So we were on the scene moments after it happened.

Q. And Group Therapy, is that in the Five Points area?

A. Yes, ma'am.

Q. On the corner of Green and Harden or on Green Street?

A. Yes.

Q. Is that in the City of Columbia?

A. Yes.

Q. Also the County of Richland?

A. Yes.

Q. You went to that location?

A. Yes.

Q. And upon arriving -- were you the first officer?

A. No, I was probably the third or fourth officer on the scene.

Q. Did you go inside Group Therapy?

A. I did.

Q. And when you went inside, tell the jury what you observed.

A. I observed then a male subject laying on the ground. He, his breathing was shallow. I could definitely tell he was in a lot of pain. There was a lot of blood at the immediate entrance of the door and where

he was laying. And he was receiving medical treatment from employees of the business.

Q. And did you remain on scene?

A. I did for a short time.

Q. What did you do while you were there?

A. I took pictures of the scene. Other officers were trying to talk to witnesses to get an idea of what the suspects looked like so we could BOLO through the city and the county to try to hopefully try to locate these individuals.

Q. Were you able to provide a BOLO? And tell us what a BOLO is.

A. A BOLO is be on the lookout. It's any pertinent information that we can get out that may help identify suspects or potential suspects. I contacted Carey Shealy who's also in charge of all the cameras, the majority of the cameras in Five Points. He's more than willing to come down at any time of the day. And he actually did respond. So we were able to get a clear identification on a similar car or that car that was involved.

Q. And can you share with the jury the description the of the BOLO that you put out?

A. Oh, we put out that it was several males involved, one wearing a green shirt, bald headed with several tattoos on both arms. And another individual was wearing

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a red shirt with, I believe, red shorts that was also involved. And they left in a maroon or red-in-color SUV-type style what we were given at first.

Q. Backing up to when you first arrived. Did you actually make any contact with the victim?

A. I made contact with Mr. Fleming who was outside. I could definitely see his injuries to his extremity and his body. He was kind of obviously visibly upset. I knew he needed medical treatment but then they said there was somebody else inside who also had more severe injuries.

Q. And that's when you went inside?

A. Yes, ma'am.

Q. And were you able to identify the victim inside?

A. At the time I didn't know his name, I didn't know who he was, but I could definitely tell he also was a victim of an assault.

Q. Did you stay until the emergency -- the ambulance arrived?

A. I did. Again, we made sure EMS was coming through our dispatch even though they were already dispatched to the scene.

Q. And did you remain on scene after the ambulance left?

A. I did, when I started taking pictures and securing the scene as well.

Q. After you took the photographs at Group Therapy, where did you go next?
A. I went to the hospital to check on the injuries or potential injuries of the suspect -- or the victims. So I went down and was able to photograph some of the injuries also at the hospital.
Q. You made reference to Scott Flemming. Did you make contact with Scott Flemming?
A. I did.
Q. At the hospital?
A. Yes, ma'am.
Q. And share with the jury your contact, the nature of that contact.
A. My contact with Mr. Flemming was when I got down to the ER he was already in the emergency bay where they started doing their assessment of injuries. I could definitely see a puncture wound to his left chest area and an injury to his left arm. His eye was beginning to swell and bruise. And he stated that he had been hit and obviously been stabbed twice.
Q. Did you take photographs of Mr. Flemming?
A. I did.
Q. Did you make any contact at that time with the second victim, Jesse Patterson?
A. No. I was able to see what was going on in the

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other trauma bay because they're right next to each other, and I could definitely tell that he was getting immediate medical attention.

Q. I'm going to show you what's been marked for identification purposes as State's Exhibits Number One, Six, Seven, Nine, 10 and 11. Can you just flip through these photographs and tell me if you recognize them.

A. (Complying.) I do.

Q. What are those photographs of?

A. The first photograph here is blood that's been pooled up on the floor of the establishment. And where Mr., or where Jesse had been laying receiving medical treatment.

And then there's some blood on the outside of the sidewalk, outside of the establishment, which indicated to me that the attack had occurred somewhere in that area.

And then these last two photos are injuries that Mr. Flemming sustained.

Q. And those photographs were taken by you?

A. Yes, ma'am.

MS. GARFIELD: Your Honor, at this time I'd like to introduce these exhibits into evidence.

MS. ZMROCZEK: Subject to my previous objection, Your Honor.

THE COURT: All right. So admitted.

Exhibit Nos. 1, 6, 7, 9, 10, 11, photographs, received into evidence.)

MS. GARFIELD: Your Honor, at this time may I publish the photographs to the jury?

THE COURT: You may.

MS. GARFIELD: Corporal Buck, please answer any questions defense counsel may have.

THE COURT: Ms. Zmroczek, let's wait a minute to let the jurors...

(Jurors viewing exhibits.)

THE COURT: All right.

MS. ZMROCZEK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Good afternoon, Corporal Buck. You -- did you look at the videos with Carey Shealy or did you just ask him to pull some things for you?

A. There was other officers on the scene. I know the supervisor was on the scene. So at the time, no, I didn't look at the video. I can only go off of what was given at the time.

Q. Oh, sure. And you would agree, though, that having -- for example, if there is a break-in in a restaurant, you would like the video from the whole night to see what happened, everybody's actions, right?

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A. Yes, ma'am.
Q. Okay. You wrote a report or you at least approved a report in this case at the end of -- after everybody was arrested, correct?
A. Correct.
Q. And in that report, didn't you write "Mr. Flemming received non life-threatening injuries"?
A. That was in the report. Yes, ma'am.
Q. And then additionally also in the report was, "Mr. Patterson received a puncture wound to the left side of his torso, causing a collapsed lung at a minimum." According to medical staff they were unable to determine any other internal injuries.

But according to medical staff, Mr. Patterson's injuries were also going to be non life threatening. Is that your report as well?
A. Were you saying with Mr. Flemming's injuries or Mr. Patterson's injuries?
Q. Both.
A. Ma'am, I can only, you know, tell you what was told to me during my speaking to medical staff. I mean, at the minimum they're receiving medical treatments at the time. It may appear not to be life threatening. I don't know. I'm not a medical personnel.
Q. Of course you're not. You don't write the report

that night, do you?
A. Ma'am, I didn't write the report. The other officer did.
Q. Did you approve it?
A. I did.
Q. So it would be one that information in here would be correct, or it would have been corrected; isn't that --
A. Should be, ma'am.
MS. ZMROCZEK: Thank you. I have no questions.
THE COURT: Anything further?

REDIRECT EXAMINATION

BY MS. GARFIELD:
Q. Corporal Buck, life threatening or non life threatening means they're going to survive, right?
A. Yes, ma'am.
MS. GARFIELD: Nothing further.
THE COURT: All right. Thank you, sir. You may step down.
MS. GARFIELD: Your Honor, may Corporal Buck be excused?
THE COURT: You may. Yes, ma'am.
MS. CAMPBELL: The State calls Amethyst Ganaway.
AMETHYST GANAWAY, having been duly sworn, was examined and testified as follows:
THE CLERK: Please have a seat. State your full

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name.

THE WITNESS: Amethyst Ganaway.

DIRECT EXAMINATION

BY MS. CAMPBELL:

Q. Ms. Ganaway, how old are you?

A. I'll be 24 August, in August.

Q. And do you currently live in Columbia?

A. No. I live in Aiken.

Q. Aiken, South Carolina?

A. Yes.

Q. How long have you been living in Aiken?

A. Since December.

Q. What do you do in Aiken?

A. I'm a waitress.

Q. And where are you a waitress down there?

A. Longhorn Steak House.

Q. How did you end up going to Aiken from Columbia?

A. I used to work at the Longhorn here on Gervais Street, and I transferred.

Q. How long did you live in the Columbia Area?

A. About five years.

Q. And what were you doing here in Columbia?

A. I went to school and I worked in Five Points as well.

Q. And did you graduate from school?

A. I did.
Q. And when did you graduate?
A. I graduated in December.
Q. In December?
A. Yes, ma'am.
Q. Of this last year?
A. Uh-huh.
Q. And what was your major?
A. Religious studies.
Q. During the time that you were in school, did you also work?
A. Yes.
Q. And where did you work, ma'am?
A. I worked at a Longhorn and I worked at Grill Teriyaki.
Q. At Grill Teriyaki?
A. Yes.
Q. As well as Longhorn?
A. Uh-huh.
Q. Where is Grill Teriyaki located?
A. On the corner of Green and Harden.
Q. And are you familiar with some of the bars or restaurants located across the street from Grill Teriyaki?
A. Yes.

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Q. And what are those bars?
A. Group Therapy is directly across from us as well as Pour House.
Q. The Pour House?
A. Uh-huh.
Q. And Group Therapy?
A. Uh-huh.
THE COURT: Ma'am, you need to say yes or no, please.
THE WITNESS: Yes.
MS. CAMPBELL: Thank you, Your Honor.
Q. I want to turn your attention back to the evening of July 27th, early morning hours of July 28th. Were you working that night?
A. I was.
Q. And which restaurant were you working at?
A. Grill Teriyaki.
Q. You talk faster than I do. Okay? And on that night, what were your duties at Grill Teriyaki?
A. I was waitressing that night.
Q. At some point around midnight or shortly thereafter, did you go outside?
A. I did.
Q. Why was that, ma'am?
A. I went outside for a smoke break.

Q. And where -- in relation to Grill Teriyaki, where were you outside that night?
A. On the corner of Green and Harden directly on the corner. Not directly in front, but to the side, closer to Group Therapy.
Q. And how late did Grill Teriyaki stay open?
A. Fridays and Saturdays we stayed open till four and three in the morning at least.
Q. So you still had several hours to go on your shift?
A. Yes, ma'am.
Q. And during that time period, do you remember exactly what time it was you were outside?
A. It had to be after -- I know it was after midnight. That's when our shift started.
Q. Okay. When you went outside, did you come in contact with a group of men?
A. I did not personally come in contact with them but I did see them, yes.
Q. And explain to the jury what you saw.
A. I was standing, like I said, on the corner and it was a group of three or four guys walking past me clearly, clearly drunk. And one guy, tall, thin guy, bald, short haircut, green shirt, he was acting, like, kind of erratic, really loud and saying things like, "No, fuck

AMETHYST GANAWAY - DIRECT BY CAMPBELL

that, we're going to go back. They kicked us out for something stupid. They want a problem, we're going to give them a problem."

There was a shorter gentleman with a red hat on actually trying to pull him away telling him, like, "It's not worth it, let's just leave them alone." Then they walked past me, walked past me again and at that point I actually walked back into work.

Q. And at that point did you think anything about it?

A. Not necessarily. No, ma'am.

Q. Shortly thereafter, what came to your attention?

A. There's a window that directly faces Group Therapy from where I work at, huge window. So I looked out there and I see at Group there's a bunch of cop cars, bunch of ambulances.

So at that point I walk outside because if there's something at Group we're so close, I actually know Mr. Scott and we seen Jesse a lot. So I go out there and say, "Hey, you know, what's going on." "Scott and Jesse got stabbed." "That's real weird."

So I just went back inside at that point and told my boss about it.

Q. And later on did you see some videos?

A. I did. Grill Teriyaki has cameras placed out there as well. So I think it's the gentleman that Officer Buck

was talking about, I think. He comes in there often, Comes in often to use our video cameras, our videos. And I just happened to be back there reviewing it and I said, "Well these are the guys I heard walking past," saying what I heard them say at the time.

Q. And you actually, you saw them on the videos --

A. Uh-huh.

Q. -- when he was reviewing everything to see if anything from the Teriyaki cameras would be helpful?

A. Yes, ma'am.

Q. And have you had an opportunity to review that video?

A. I have.

Q. And does it fairly and accurately depict basically those gentlemen saying the things that you overheard?

A. Yes, ma'am.

MS. CAMPBELL: Your Honor, at this time we'd ask permission to publish that video and for the witness to step down?

THE COURT: All right.

MS. CAMPBELL: Thank you.

Q. If you'll come over to this side.

A. (Complying.)

Q. Where is Grill Teriyaki?

A. This is Grill Teriyaki. These are our front steps

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right here. These people are walking to Grill Teriyaki. This is Grill Teriyaki. This is the corner of Green and Harden. And I'm standing, like, right here. Directly right next to this trash can.

Q. Just off of where you can see it?

A. Uh-huh.

THE COURT: Is that a yes?

THE WITNESS: Yes. I'm sorry.

So at this point I'm standing over there and I hear, like, a lot of yelling. So I'm not really thinking anything of it, really, because it's Five Points.

And then when they were over there just now, standing next to the trash can, that's when this guy here told him, like, "It's not worth it, let's walk away." He tried to pull him away.

BY MS. CAMPBELL:

Q. Back it up one more time, just quickly.

And at this point do you see them walking up?

A. Yeah. The guy in hat and then the taller guy.

Q. And there's four of them?

A. Three or four.

Q. Okay. And then they go over to where you are?

A. I'm like, literally, right here where they stop at. This is when he's telling the taller guy that he keeps pulling away from, "It's not worth it. Let's leave,

leave it alone."
Q. And which one is the taller guy you said you heard saying things earlier?
A. I guess, Mr. Ard.
Q. And where is he? Right there?
A. This guy.
Q. Okay. Thank you.
A. You're welcome.
Q. At this point you see them actually coming back into the scene?
A. Uh-huh. Yes.
Q. And at some point did you realize that these were the guys that may have been involved?
A. Yes, ma'am.
Q. And did you actually give this information to the police?
A. I did. That same night at Grill Teriyaki. He came in and asked to use the video.
Q. And then later you made contact with Investigator McCoy as well?
A. Yes, ma'am.
Q. The person that you saw, what did you hear him say?
A. He said, "Fuck that. They kicked us out for something stupid, so if they want a problem we're going to go back and give them a problem," you know. Just general

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obscenities and yelling.
Q. Do you see him here in the courtroom?
A. Ma'am?
Q. Do you see him here in the courtroom?
A. Yes, ma'am.
Q. Can you point him out for the jury?
A. This gentleman here (indicating). Blue shirt, curly hair.
Q. Has his appearance changed since the night you saw him?
A. Yes, ma'am.
Q. What's changed?
A. His hair.
Q. Is that it?
A. Yes, ma'am.
MS. CAMPBELL: Thank you, Your Honor.
THE COURT: She's identified the Defendant. All right.
MS. ZMROCZEK: I have no question, Your Honor.
THE COURT: Counsel, no questions?
MS. ZMROCZEK: None.
THE COURT: All right. Thank you, ma'am. You may step down.
MS. CAMPBELL: The State would call Investigator McCoy.

MATTHEW D. McCOY, having been duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat. State your full name for the record.

THE WITNESS: I'm Investigator Matthew D. McCoy, Columbia Police Department.

DIRECT EXAMINATION

BY MS. CAMPBELL:

Q. Where are you employed?

A. Columbia Police Department.

Q. And what do you do there, sir?

A. I'm a criminal investigator in the crimes against persons unit.

Q. And as an investigator in that unit, what do your duties include?

A. Well, I mainly investigate criminal activity. I handle homicides, kidnappings, major assault and batteries, attempted murders, armed robberies.

Q. I want to turn your attention back to July the 28th of last year. Did you become involved in the investigation of this case?

A. I did.

Q. And when did you actually become involved, what day?

A. It was the following morning. I believe it was on

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the 28th, that morning after the incident occurred.
Q. And when you first became involved, you can't say what was said to you, but were you briefed on information the police had at that point?
A. I was. I actually was the on-call investigator at that time. And I got a phone call from our on-call investigator sergeant who briefed me about what happened and I also seen an article on WIS about what had occurred that night at Five Points.
Q. That afternoon, did you make contact with a man named Carey Shealy?
A. I did. I called him.
Q. And what was the purpose of you calling him?
A. I know he runs video down in Five Points, most of it anyway. And called him to get a copy of that. He said the officers on the scene had already spoken to him, he'd already begun pulling the video and he would have it to me shortly.
Q. And at that same afternoon, did you also request some 9-1-1 tapes as well?
A. I did via e-mail. That's standard.
Q. That day, did you try to make contact with any of the victims involved in this case?
A. I did. I spoke with Mr. Flemming on the phone. And I actually went and saw Mr. Patterson. Mr. Flemming,

I believe, had been released from the hospital. Mr. Patterson, Jesse Patterson was still at the hospital.

Q. And you can't say what Mr. Flemming told you, but was he able to give you some information that became useful in your investigation?

A. He did.

Q. That day, I believe that evening you actually went over and made contact with the other victim, Mr. Jesse Patterson?

A. That's correct.

Q. And where did you come in contact with him?

A. It was in a hospital room. The number's in my notes but it was at the hospital. Palmetto Health Richland is where he had been transported that night.

Q. And at that point were you able to get certain information including the nature of his injuries and what he recalled happening?

A. That's correct, I was.

Q. That same evening, did you make contact with Brett Babcock?

A. I did.

Q. And was he also, without saying what he said to you, able to give you some information?

A. He did.

Q. Later that evening also did you make contact again

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with Carey Shealy?
A. I did.
Q. And what was the purpose of that contact, sir?
A. He actually delivered the video at the time.
Q. The video that he delivered initially, was that all the video you ended up getting in this case?
A. No, it was not.
Q. And at a later date pursuant to your request, did you retrieve additional videos in this case?
A. Yes. It was actually the previous day. I want to say around three o'clock, according to my notes, I got additional video. It was actually the interior cameras of Group Therapy.
Q. And in getting the cameras from Group Therapy did you get every camera in Group Therapy or just those relevant to this case?
A. Just the ones relevant to the case.
Q. That day, did you also create what's called a BOLO?
A. I did.
Q. And what's a BOLO?
A. It's be on the lookout for. Investigations -- normally if we have a photograph or a video of an individual, we'll put that together on a form that's standard. And we'll e-mail it to the entire department to be on the lookout for this individual.

We'll also send it to surrounding agencies in case they live in other parts of the state. And also with this particular crime because of the heinous nature of it, we -- I sent stills to our public information officer, Jennifer Timmons. She's responsible for releasing images to the news to help the public aid in identifying the individual on the video.

Q. And in the video that had been provided to you, just the video you got initially not the additional video you went back and got, were there some pretty good shots of the person who actually did the stabbing?

A. Yes, there were.

Q. And those are the stills that you were actually able to provide to Jennifer Timmons as well as putting on the BOLO?

A. Yes, ma'am. That's correct.

Q. Once the information had been put out over the media the next day, did Stewart Ard and his lawyer make contact with you?

A. She actually made contact with me prior to the news release.

Q. Okay. Let me back up on that. When you say she actually made contact with you, who are you talking about?

A. Ms. Zmroczek, the attorney for the Defendant.

Q. The attorney for the Defendant?

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A. Yes, ma'am.
Q. And when did she make contact with you?
A. It was before 11 P.M. on the 28th. I was actually home and she called me on my cell phone, work cell phone, advised that she had a client who wanted to turn himself in.
Q. And at that point did you know it was in conjunction with this incident?
A. She advised me that it was.
Q. And at that point had the information been publicized over the, broadcast over WIS?
A. Yeah, there had been an article that there had been a stabbing. However, the photographs, the photographs that I had made up from the video, no, had not been put on the news. Not that I was aware of anyway.
Q. That day did you make contact with Mr. Ard and his lawyer?
A. Yeah. The next day, the 29th, is when he did, he came in with he's attorney, Ms. Zmroczek, to headquarters, and turned himself in.
Q. At that point was he placed under arrest?
A. He was.
Q. That next day did you receive the additional video that you had requested from Mr. Shealy?
A. It was actually the afternoon. Right after -- I

believe it was right after he was transported. Mr. Shealy brought it to headquarters and dropped it off downstairs while I was up there with them. I went down after he was transported and retrieved it from our front desk.

Q. That same day did you also become aware of a knife that may have been used in this crime?

A. Yes.

Q. And how did you become aware of that?

A. I asked Ms. Zmroczek where the knife was that Mr. Ard had used. And she stated she had it in her possession at her office.

Q. I'm going to show you what's been marked as State's Exhibit Number 25. Did the knife end up in y'all's custody?

A. It did.

Q. How did that happen?

A. I requested -- after speaking with her on the phone, I requested Officers Czeladko with the Metro Region since their office is nearby to go down to that office and retrieve the knife and bring it in and enter it into evidence.

Q. State's Exhibit 25, is that the knife that was retrieved?

A. That is. He showed it to me as well when he brought it back.

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Q. The officer did?
A. The officer, Officer Czeladko.
MS. CAMPBELL: Your Honor, at this time I would offer State's Exhibit 25 into evidence.
MS. ZMROCZEK: Without objection.
THE COURT: So admitted.
(State's Exhibit No. 25, knife, received into evidence.)
BY MS. CAMPBELL:
Q. And you had reviewed the video at that point?
A. Yes, ma'am.
Q. And State's Exhibit 25, is that consistent with what you saw?
A. Yes, ma'am.
Q. What type of knife is this? Can you pull it out for me?
A. It's a folding knife. A black handle, silver blade. I couldn't tell you the inches without measuring it.
Q. Can you pull the blade up for me?
A. I can. (Complying.)
Q. And this is a folding knife; is that correct?
A. That's correct.
Q. But it can be, say if it were going to be transported, put in like that (demonstrating).

A. That's correct. That's typically how you transport a knife like that.
Q. In reviewing the video we saw, all the videos in this case, when Stewart Ard showed up right before the stabbing, what position was this knife in?
A. When he initially stabbed -- when he walked down the sidewalk with Mr. Benjamin Geno, as he approached Mr. Patterson he pulled the knife from his right pocket on the video.
Q. His right pocket?
A. That's correct. The knife --
Q. Was it folded?
A. I'm sorry?
Q. Was it folded?
A. No, ma'am. The knife was open just like that in his right pocket, when he pulled it from his pocket.
Q. During the course of your investigation did you also become aware of the identities of the other people that were with Mr. Ard that night?
A. Yes.
Q. And what were their names?
A. Benjamin Geno, Jason Skaggs, and his last name was Richardson. I can't remember his first name.
Q. Mr. Richardson?
A. Yes, Mr. Richardson.

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Q. And subsequently were additional people charged in this case including Mr. Ard?
A. That's correct. Benjamin Geno and Jason Skaggs were both charged.
Q. And their charges are still pending and they'll have their day?
A. That's correct. They're still pending charges, yes.
Q. The next day on July the 30th, did -- what's his name -- Mr. Geno and Mr. Skaggs turn themselves in also?
A. They did, the following day. Yes.
Q. During the course of this, did you also follow up with other witnesses in the case?
A. I did.
Q. Were formal statements taken from every witness in this case?
A. Not from every witness, no.
Q. Is that unusual?
A. It's not. Typically what we try to do is we'll try to get a written statement if we can. Of course with the victim, Jesse Patterson, he was in so much pain at the hospital. He told me he couldn't write, so I got his oral statement from him.
Q. Okay. Later on in September, did you also prepare search warrants for medical records?

A. I did.
Q. And what was the purpose of you getting medical records in this case?
A. Determine the severity of the injuries and what the proper charge for it would be.
Q. You've also heard reference to these being non life-threatening injuries?
A. That's correct.
Q. What does that mean to you?
A. Well, typically when they say non life threatening at least in our police world, if you will, that means he's in no danger of dying. Once he's under medical care at that particular point in time there's no reason to start calling the homicide team out.
Q. And that information was gotten after they received treatment?
A. I'm sorry?
Q. That was after they had received treatment?
A. That's correct. That's correct. My understanding -- I didn't write the report but my understanding, they finished the report after they was in the care of the hospital.
Q. When you made contact with Ms. Zmroczek and her client from the 29th, were they -- was she made aware that there was a video?

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A. Yes.
Q. At any point did she contact you about getting additional video?
A. She never contacted me after that point, not that I can recall.
Q. And if she had contacted you wanting additional videos, would you have gotten those for her?
A. Yes.
Q. I want to show you State's Exhibits 14 and 17. These are stills from two of the different videos that were retrieved.
A. Okay.
Q. And do those fairly and accurately depict still shots of what's on the video?
A. They do.
MS. CAMPBELL: Your Honor, at this time we would offer these two into evidence.
MS. ZMROCZEK: Subject to my previous objection.
THE COURT: So admitted.
(State's Exhibit Nos. 14 and 17, photographs, received into evidence.)
BY MS. CAMPBELL:
Q. State's Exhibit Number 17, who does that show?
A. That's Benjamin Geno at the top there with the writing on the shirt. That's Stewart Ard's tattoo.

Q. Okay.
A. Benjamin Geno is there.
Q. And Stewart Ard is here?
A. Stewart Ard is the one below, closer to the camera with the colored shirt, tattoos on his arm, bald headed.
Q. And where is Stewart Ard's hand at that point?
A. In his right pocket.
Q. And, again, this is on video?
A. That's correct. Yes, ma'am. That's a still from the video.
Q. You're also aware of a confrontation between two of the bouncers from the bar next door?
A. Yes, ma'am.
Q. The Pour House?
A. Yes, ma'am.
Q. And I show you State's Exhibit 14. Who does that show?
A. That's Stewart Ard in the green shirt, bald head in the corner.
Q. And this car?
A. That car belongs to Jason Skaggs. That's the car they arrived in in front of the tanning salon, and they also fled in that car after the incident.
Q. What -- here up in the corner you can just barely see the shirt of somebody that he's reaching for.

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A. That's one of the victims that testified earlier. I believe that's even a Pour House emblem on the shirt there.
Q. I want to talk about the Five Points Area a little bit. There's been reference to several different places. I'm going to show you -- let me mark this real quick.
(State's Exhibit Nos. 28 and 29, charts, marked for identification.)
MS. CAMPBELL: I want to show you -- Your Honor, at this time I offer State's 28 and 29 into evidence?
MS. ZMROCZEK: Without objection, Your Honor.
THE COURT: I'm sorry?
MS. ZMROCZEK: 28 and 29. Yes, just those two.
(State's Exhibit Nos. 28 and 29, charts, received into evidence.)
BY MS. CAMPBELL:
Q. Have you also had an opportunity to review all the video in this case?
A. I have.
Q. And specifically I think all that's been shown to the jury except for -- is there a portion of the video showing the Defendant and his three friends in the bar?
A. Yes, there is.
MS. CAMPBELL: Your Honor, at this time I'd ask permission to just publish that final video.

THE COURT: All right.
BY MS. CAMPBELL:
Q. Investigator, if you don't mind stepping down here. I want to show you some evidence too.
A. (Complying.)
Q. What area of Group Therapy does this show?
A. This is the bar. The front door would be over here. The front area at the top. And this is the bar.
Q. And that would be the front door on Green Street?
A. That's correct.
Q. And do you see -- can we go ahead and blow it up?
MR. SHALABI: (Nods head.)
BY MS. CAMPBELL:
Q. Do we see the individuals that were involved in this?
A. This is Stewart Ard here. Stephen Richardson, that's this individual. This would be Jason Skaggs and Benjamin Geno is down here at the bottom.
Q. And this is, generally shows the group as a whole?
A. That's correct. This individual's not involved in the group that I'm aware of. The other, the fourth one, Mr. Richardson, behind Mr. Ard.
Q. Do you know who's who on this video?
A. Benjamin Geno and Jason Skaggs is here. Stewart Ard is over here with the bald head sitting at the bar and

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Stephen Richardson has stepped off camera. He was there. He's in a baseball cap.

Q. Okay. And is this before or after any of the altercations have taken place?

A. This is prior to any of the altercations. This is when they initially walked into the bar according to the time stamps.

Q. And that goes on for awhile. It basically just shows their general demeanor?

A. That's correct. They'll stand there for, I believe, a few more minutes. And then they'll walk back toward the dance floor area where the first --

Q. Where the first, the initial altercation inside took place?

A. That's correct.

Q. You can stop this. But stay here for a second because I want to show these diagrams.

If you can step over here.

A. (Complying.)

Q. We've heard reference to the Teriyaki Grill as well as the Pour House, the Rite-Aid.

I'm showing you State's Exhibit Number 28. Does that show an overview of the general area of Five Points?

A. It does. That's around the seven-, 600 block of Harden Street.

Q. And where is Group Therapy on this? Can you tell?
A. Group Therapy. This is -- Green Street's right over here.
Q. Right here?
A. That's correct.
Q. That would be the actual front door of Group Therapy right there?
A. That's correct.
Q. And then the Pour House, where is it shown on here?
A. Right next door.
Q. Right about here?
A. That's correct.
Q. And then there's also, you just mentioned that still shot where you saw the car pull in and the alley?
A. That's a tanning salon, and it's right here next to Group Therapy.
Q. Is that beside the tanning salon. Are these parking places?
A. Yes, I believe it was in the first or second parking spot. I believe the first one he pulled in.
Q. And the Teriyaki Grill --
A. Grill Teriyaki is right -- excuse me. Teriyaki Grill is right here.
Q. Right here?

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A. Yes. Right in front of the Post Office is here. Grill Teriyaki would be here.
Q. And it actually faces onto Harden Street?
A. That's correct. The front door is on Harden Street and they have windows that face the bar there.
Q. And then the Rite-Aid, the drugstore that's been referred to is where?
A. It's behind it here, this brick building.
Q. And it's actually facing Harden Street as well?
A. That's correct.
Q. And this is the general area we're talking about?
A. Yes, ma'am.
Q. And then just to put in perspective, an overview on State's Exhibit Number 29, does that show the entire Five Points area?
A. Yes, ma'am. That's the Five Points area.
Q. And if you're coming from downtown, would you come down Harden Street?
A. If you're coming from downtown you would come up Harden Street towards Blossom Street. This would be coming from Rosewood.
Q. Rosewood?
A. And this would be from coming from Gervais Street this way.
Q. And where is the bar on this?

A. The bar is here. Here's Harden and Green Street here. The bar is right there.
Q. Right there?
A. Yes, ma'am. Right there.
Q. And the Chick-fil-A is actually down the street?
A. It's over here, yeah, on the right-hand side of Harden.
Q. Okay. Thank you.
A. You're welcome.
Q. You can take the stand.
A. (Complying.)
Q. Mr. Ard, he turned himself in with his lawyer. Has his appearance changed today?
A. It has.
Q. And what's different about his appearance?
A. Mr. Ard has grown hair. He was bald at the time he was arrested.
Q. And I'm going to show you this photograph. Does this fairly and accurately depict how he looked at the time?
A. That's a booking photo.
Q. You made contact with him the next day?
A. That's exactly how he looked. That's a booking photo from Alvin S. Glenn.
MS. CAMPBELL: Your Honor, at this time we would

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offer State's Exhibit Number 30 into evidence.

MS. ZMROCZEK: Object, Your Honor.

MS. CAMPBELL: It just shows a change in his appearance.

MS. ZMROCZEK: Your Honor.

THE COURT: Overruled.

MS. CAMPBELL: Thank you.

(State's Exhibit No. 30, photograph, received into evidence.)

BY MS. CAMPBELL:

Q. And State's Exhibit 30, that's how he appeared when you made contact with him?

A. Yes. When he turned himself in the following day that's how he appeared

MS. CAMPBELL: Thank you, sir. I don't have anything further.

THE COURT: Ms. Zmroczek?

MS. ZMROCZEK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. This is the picture that he turned himself and that you took -- or that they took the day he turned himself in; right?

A. That's what he looked like. Yes, ma'am.

Q. Before it went on the news?

A. You asked me if he turned himself in before it was on the news or --
Q. Uh-huh.
A. It was on the news but you'd notified me prior to going on the news. Yes, ma'am.
Q. Right. And in that picture his eyes are all red because he'd been crying, right?
A. I'm not sure what he had been doing.
Q. You don't recall him crying?
A. I recall him crying during -- when he turned himself in?
Q. Uh-huh.
A. I do recall he did shed some tears. Yes, ma'am.
Q. Okay. And, you recall, without telling me what was made in the statement or what was said in the statement, you recall --
MS. CAMPBELL: Objection, Your Honor. May we approach?
(Off-the-record discussion.)
BY MS. ZMROCZEK:
Q. During the course of your investigation that started the day that you were called in, were you able to arrest and identify other individuals?
A. Yes, I was.
Q. And through the course of your investigation, were

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you able to learn why all of those individuals returned to --

MS. CAMPBELL: Objection, Your Honor, as to hearsay.

THE COURT: I don't know what he was -- overruled.

BY MS. ZMROCZEK:

Q. Why they returned to Group Therapy?

A. I had been told something, yes.

Q. Okay. And through the course of your investigation, did you learn that there was a watch missing from one of the defendants?

MS. CAMPBELL: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Yes, I had been given that information.

BY MS. ZMROCZEK:

Q. Okay. Had that watch been recovered?

A. No.

Q. You said that you took an oral statement from Jesse Patterson. Did you record that or did you write down some notes from that?

A. I did write down some notes. Yes, ma'am.

Q. And you turned everything over to the State?

A. That's correct. It would be in my typed notes, yes.

Q. And you're familiar that there are cameras across the street, directly across the front door from Group Therapy, correct?
A. You say directly across, on the other side of Harden Street?
Q. On the other side of Green Street.
A. Near the Grill Teriyaki?
Q. Correct.
A. Yes. I'm aware there's cameras by Grill Teriyaki.
Q. And I'm showing you what's marked as, or it's in evidence as State's Exhibit 23.
A. Uh-huh.
Q. In fact, that picture is taken from that Grill Teriyaki camera, isn't it?
A. I'm not sure where that photograph was taken. I didn't make those photographs.
Q. Okay. Are you familiar with the videos because you've seen the one that Mr. Shealy provided, correct?
A. Yes. I've seen the ones we requested Mr. Shealy to provide, yes.
Q. Okay. And this would be similar to the ones that he provides to you?
A. It could be. I don't know. I don't normally watch it in video form but, sure.
Q. And you say you don't recall being questioned about

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access to all the videos, or is it something you just don't recall?

A. When you say questioned about, you're talking about you questioning me about asking for more?

Q. Uh-huh.

A. I don't recall you asking me to obtain additional video. I did request Carey Shealy to provide all videos he had relevant in that area, which when he turned them over I took him at his word those were all the cameras we had.

Q. And who got to decide the relevance of that?

A. When, when I request video from Carey Shealy I call him and ask, I say, "What cameras do you have in this area, this block range? Here's the time frame I'm looking at. Please provide it."

And he will, he'll provide it.

Q. So the time frame that you would be looking at would be the time frame from which the defendants entered the bar or at least entered one of the cameras to enter the bar to the time that they, that the incident was complete? Would you agree with me, that would be a relevant time period?

A. That's right. In talking with the witnesses trying to figure out when the whole incident took place and what happened.

Q. But you would agree that the 28 minutes of video that's entered into evidence does not reflect that?
A. Reflect the incident or the reflect the entire time?
Q. Reflect the entire time.
A. I don't know. The only thing that I've seen is what I was provided.
Q. So you didn't edit it?
A. I never edited it, no. Everything that I provided to the State was the way it was presented to me by Carey Shealy.
Q. Thank you. You talked a little bit about police talk and non life-threatening injuries?
A. Uh-huh.
Q. Do you use the words serious injuries in your reports?
A. I have, yes.
Q. Did you use that word in this report?
A. I didn't type this report, the incident report. I typed supplemental reports after that. I'd have to look at them to tell you if I did or not. I don't know.
Q. And you did a case summary as well?
A. Correct.
Q. And I can show that to you, or would you agree with me that the word serious life -- the word serious, life

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threatening, dangerous, none of those appear in there?
A. Without looking at them, I couldn't tell whether I did or not. If you say they weren't --
Q. But you would agree that non threatening appears in there?
A. Appears in which report?
Q. In your case summary.
A. In the case summary, I'd have to look at it. If you have it.
Q. I have it.
While I'm looking for it -- actually I'll move on.
A. Okay.
Q. You said that you use that information to effectuate arrest; is that correct?
A. That's correct. We would look at the statute and the severity of the injuries and see what fits.
Q. Did you arrest Mr. Ard for attempted murder?
A. I did not.
Q. Did he go to jail on other charges for turning himself in that day?
A. He did.
Q. And that's where that mug shot was taken?
A. That's correct.
Q. And he has not been out of jail since that day, has he?

A. I don't believe so. I believe he's been in there on bond, yes.

MS. ZMROCZEK: Thank you. That's all I have.

THE WITNESS: Thank you.

MS. CAMPBELL: Your Honor, a couple questions.

REDIRECT EXAMINATION

BY MS. CAMPBELL:

Q. Do you decide if he stays in jail or who decides that?

A. That's a bond judge decides if he stays in jail or not.

Q. And initially you charged him with assault charges?

A. I charged him with assault and battery by a mob in the second degree which is -- mob by first degree would be if death resulted. This would be a mob act with great bodily injury.

Q. And is it unusual at all later on once you get more information, as you did in this case, for charges to change, to be upgraded or downgraded or whatever?

A. It's not unusual at all. Typically you have -- his arrest came very early on in the investigation. It was the next day. There was still a lot of witnesses to talk to, additional co-defendants to capture. So of course once all of the evidence is in and placed in the packet for the solicitor's office, they'll review it and if they

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feel like charges, a higher charge is necessary they'll take that, of course, in front of the grand jury and try to secure an indictment.

Q. And the grand jury determines if that's appropriate?

A. That's correct. I give the facts of what I know what happened truthfully, and they decide whether or not it meets the elements of the charge.

Q. And in this case, when did you actually request the medical records?

A. I could look at my notes to tell you the exact date. It was toward the end of the investigation, I believe.

Q. I have a copy of your notes.

A. I've got a copy here.

Q. You've got it?

A. I'll give you the exact date it occurred. I requested via search warrant on September the 5th, 2013, when they were requested. And I received them on October 24th, 2013.

Q. Thank you, sir. And she also asked you about the video. Would you have expected Mr. Shealy to provide videos that didn't show something?

A. No. There's multiple cameras at Five Points. I wouldn't assume him to provide me every Five Points'

video. He provided -- again, I asked for a specific area, "What cameras do you have? Please provide me with those videos."

Q. And specifically was he able to provide you videos that showed actual interaction and the actual assaults in this case?

A. That's correct.

Q. And that's what you were trying to get?

A. That's correct.

Q. You don't have every moment that he was in Five Points that night?

A. No.

MS. CAMPBELL: Thank you, Your Honor. I have nothing further.

MS. ZMROCZEK: I have a few follow up.

RECROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Investigator McCoy, was it your -- is it your statement that it was your decision to bring that charge to the grand jury?

A. No, ma'am.

Q. Okay. And you were aware that there are three -- two co-defendants in this case?

A. That's correct. I arrested two additional people besides Mr. Ard, yes.

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Q. And you are aware that they were under subpoena to be at this trial as well?
A. I'm not sure. I didn't see the subpoenas so I'm not sure whether they were or not. I know I was.
Q. And -- you know they were?
A. I know I was under subpoena. Yes, ma'am.
Q. Okay. And, you received that information back from the hospital on October 24th, correct?
A. Yes. That's what I testified to; yes, ma'am.
Q. And at that time, is that when you turned it over to the solicitor's office?
A. Yes. Once I received it, it was turned over.
MS. ZMROCZEK: Thank you. I have no further questions.
THE COURT: All right. Thank you, sir. You may step down.
THE WITNESS: Thank you, Your Honor.
MS. CAMPBELL: Your Honor, may we approach?
THE COURT: I tell you what. Ladies and gentlemen, let's go ahead and take a break. I'm going to let you go back to the jury room. Please don't discuss the case while you're back there, and we'll be with you momentarily.
(Jury exits courtroom at 2:51 P.M.)
THE COURT: All right. What do you want to

approach about, Ms. Campbell?

MS. CAMPBELL: The only thing, I wanted to check with the court reporter to make sure everything was in that we were supposed to have in. I just wanted two minutes to do that.

THE COURT: All right.

MS. CAMPBELL: And then we'll rest.

THE COURT: My understanding is we're going to bring the jury back and the State's going to rest. Is that correct?

MS. GARFIELD: Yes, sir.

THE COURT: My intentions are to argue and charge in the morning. I'm going to have a little charge conference with y'all before we do it, and I don't argue and charge after four.

Do you want me to query your client today, and then if he changes his mind we'll take it up in the morning?

MS. ZMROCZEK: Please, Your Honor. That way they're not coming back and forth.

THE COURT: Mr. Ard, let me get you to stand and raise your right hand if you would, please.

(Defendant placed under oath.)

THE COURT: All right. You can put your hand down.

I'm going to ask you some questions. They're not

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going to have anything to do with the case. It's going to relate to your right to testify or tell your side of the story and your right to not testify.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And your attorney has indicated that you have determined that you do not want to testify in this trial; is that correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Do you understand, of course, you have that constitutional protection, and that I will in fact instruct the jury that the fact that you did not testify, you elected not to, can't be considered by the jury in their deliberations? They can't discuss it and can't consider the fact that you didn't testify.

Do you understand that?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: All right. But you also understand you have the right to testify, to tell your side of the story, get on the stand and tell the jury whatever you think is important that's relevant in this case.

Do you understand that?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Of course, if you elect not to testify, you don't get to tell your side of the story.

Do you understand that?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And if you elected to testify you would be subject to being cross-examined by the solicitor's office and they could attempt to impeach you in any manner they thought was appropriate so long as it complied with our rules. That is to show that there may be some credibility problem with what you're testifying to.

Do you understand that? Including any prior record, do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You've had an opportunity to talk to your attorney about this matter?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And y'all had have a thorough discussion about your right to testify or not testify?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And she's advised you and counseled you about that; is that correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: But this is your decision?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Now has anybody threatened you, coerced you, forced you, or pressured you into making this decision?

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THE DEFENDANT: No, sir, Your Honor.
THE COURT: You're doing so freely and voluntarily?
THE DEFENDANT: Yes, sir, Your Honor.
THE COURT: And you're doing so knowingly and intelligently?
THE DEFENDANT: Yes, sir, Your Honor.
THE COURT: You have not had any alcoholic beverages in the last 24 hours, have you?
THE DEFENDANT: No, sir, Your Honor.
THE COURT: You haven't taken any drugs, had any medication in the last 24 hours?
THE DEFENDANT: No, sir, Your Honor.
THE COURT: Are you under the influence of any kind of substance here today?
THE DEFENDANT: No, sir, Your Honor.
THE COURT: Any decision you're making is being made in a lucid manner; is that correct?
THE DEFENDANT: Yes, sir, Your Honor.
THE COURT: Ms. Zmroczek, anything you want to ask your client or say at this point, or anything you want me to make further inquiry of your client?
MS. ZMROCZEK: Your Honor, simply that we continually throughout the trial, I have continued to let him know that he still had that opportunity to plead and

that he has chosen not to.

THE COURT: All right. With respect to his not testifying, you've had an ample opportunity to talk to him about it?

MS. ZMROCZEK: Yes.

THE COURT: And this is his decision?

MS. ZMROCZEK: It is.

THE COURT: Even though I'm sure you've advised him and counseled him but ultimately it's his decision; is that correct?

MS. ZMROCZEK: I have.

THE COURT: You don't know of anything that is forcing him to make this decision, you think his decision is being made freely and voluntarily?

MS. ZMROCZEK: I do, Your Honor.

THE COURT: All right. If you change your mind by tomorrow morning when we come back in here, then let me know and we'll revisit the issue, although I'm probably going to ask your attorney when the jury comes back in is there anything from the State -- I mean, from the Defendant and she'll indicate we're not going to offer anything. And that would foreclose your coming forward with anything further in the case unless you plan on calling other witnesses.

MS. ZMROCZEK: I do not, Your Honor.

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THE COURT: All right. Thank you, sir.

THE DEFENDANT: Yes, sir.

THE COURT: All right. Let's -- anything we need to take up before we bring the jury back in?

MS. CAMPBELL: No, sir.

THE COURT: All right. Let's bring the jury back in if we could, Mr. Talbert.

(Jury enters courtroom at 3:14 P.M.)

THE COURT: Thank you, sir. All right. Anything further from the State?

MS. GARFIELD: Your Honor, at this time the State of South Carolina rests its case.

THE COURT: All right. Ladies and gentlemen, that means the State has concluded the presentation of the State's evidence in their case in chief.

And is there anything from the Defendant?

MS. ZMROCZEK: Your Honor, the Defendant rests.

THE COURT: All right. As I indicated the other day, ladies and gentlemen, the Defendant doesn't have any burden in this case. And they don't have to testify, don't have to put up anything. And they've elected to not do so.

And so the next phase of the trial is going to be the arguments and the charge which we are not going to do today because we're under a little bit of a

get-out-of-court deadline every afternoon. And so we might, by the time the arguments and the charge is ready, it would be close to the time that y'all might want to be in a position to leave.

So we're going to come in first thing in the morning and we will go forward with the closing arguments by the parties. And then I will charge you the law and you will get the case and go back to the jury room and begin your deliberations.

Now, I'm going to ask you a couple of things. I'm going to ask you to be here tomorrow -- we're going to start at 9:30, but I'm going to ask you to be here at 9:20 because I want you to select a foreperson for the jury, if you would.

That foreperson, I will give some instructions as to responsibilities of the foreperson. The foreperson will occupy the seat that this young lady is seated in right next to Mr. Talbert.

The other thing I'm going to ask you to do, again, is to not discuss the case with each other or with anyone else while we're gone and when you come in in the morning. Y'all have invested two days. You don't want to do anything to jeopardize your good work and your close attention that you've paid in this case. Don't do any investigation when you're gone again tonight. Don't get

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on the computer or do anything else. You've heard the evidence and now you're going to be in a position to bring this matter to a close.

So, I'm going to let you to go. I ask you to be here at 9:20 in the morning to select a foreperson. Write that foreperson's name down, give the piece of paper to one of the bailiffs and they'll give it to me and we will go from there.

So y'all have a nice afternoon and I thank you for your day's work today and we will turn you loose and see you tomorrow morning. Thank y'all.

(Jury exits courtroom at 3:18 P.M.)

THE COURT: We will recess until 9:30 in the morning and y'all have a nice afternoon. And if I could see the attorneys, we'll take a few minutes to talk about the charges.

END OF DAY: 3:19 P.M.

ON WEDNESDAY, JUNE 25, 2014 AT 9:36 A.M.:

THE COURT: Did y'all get to see the verdict forms yesterday?

MS. GARFIELD: No, sir.

(Attorneys reviewing verdict forms.)

THE COURT: Okay. Kara Setzer is the Forelady. And she is a teacher. All right.

You indicated you have a motion you want to make?

MS. ZMROCZEK: I do, Your Honor.

At this time I'd move for a directed verdict on all the charges. Like I said, he is -- in our opening statement, like I said the whole time, as far as one of the victims, he's charged with assault and battery second. He's indicted for assault and battery second.

And, Your Honor, we had agreed that he is guilty of assault and battery second. So I don't know if the jury needs to consider that. They certainly can, but we would ask that a directed verdict be granted on that.

And as far as the other two victims, we -- Joseph Molino and Gabe, we had, Your Honor, indicated that we believe that he was guilty of assault and battery third. And under the definition and including their testimony, Your Honor, we believe that the burden has been met for Mr. Ard to be found guilty of assault and battery third on those two victims.

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And as far as the fourth victim, Mr. Jesse Patterson, Your Honor, we would simply restate our arguments that we made or statements that we made in opening that we do believe that Mr. Ard is also guilty of assault and battery second of those victims.

THE COURT: All right. Anything from the State?

MS. CAMPBELL: No.

MS. GARFIELD: No, sir.

THE COURT: All right. The standard in a directed verdict in a criminal case is any direct evidence or any substantial circumstantial evidence. The evidence is almost -- it's admitted in some instances that the two assault and battery seconds where there was not actual injury, that there was an attempt to injure. And I think there is some evidence that if successful it could have resulted in moderate injury.

With respect to Mr. Flemming, he was cut. And so I think there is some evidence that that would be for him. And there's a number of options that the jury's going to have on your client, but there is some evidence with respect to each of the charges and all of the elements in those charges that the jury could reach a verdict.

And I don't know what they might do in terms of the attempted murder, but I think there's some evidence. And

that's all there has to be.

Anything further?

MS. ZMROCZEK: That's all. Thank you, Your Honor.

THE COURT: All right. Y'all ready to go?

MS. CAMPBELL: State's ready, Your Honor.

THE COURT: Y'all ready to go?

MS. ZMROCZEK: Yes, Your Honor.

THE COURT: Jackie?

THE CLERK: Yes, Your Honor.

THE COURT: What I anticipate based on what I've been told by the attorneys is that the closings are probably going to take about an hour and a half. And then I'll probably take a break and then give them the charge.

I guess we need to consider lunch.

Do you want to say something about --

MS. CAMPBELL: No, sir.

THE COURT: -- what I'm talking about?

So you might want to get some menus maybe when we send them back after I charge, then we can give them the -- or maybe we can give it to them when they take their break and they can fill it out and decide what we want to do.

THE CLERK: Okay.

THE COURT: All right. Let's bring the jury in if we could.

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THE BAILIFF: Yes, Your Honor.

MS. CAMPBELL: Your Honor, while they're bringing them in, she was going to narrow down the number of stills she's going to use.

MS. ZMROCZEK: I'm not going first, Your Honor.

(Jury enters courtroom at 9:41 A.M.)

THE COURT: Thank you, Mr. Dye. Good morning, ladies and gentlemen.

THE JUROR: Good morning.

THE COURT: First I want to thank you very much for coming in a little earlier and designating Ms. Setzer. I see you didn't want to give up your seat, but I appreciate your willingness to serve as Forelady and I'll explain to you when we get into the charge what some of your responsibilities will be in this matter.

Ladies and gentlemen, since we left yesterday has anybody had any conversation about this case with each other, or with anyone else, or have you been approached by anyone to discuss the case?

THE JURY (COLLECTIVELY): No.

THE COURT: All right. Anybody do any investigation, make any inquiry into anything involving this case since we left yesterday?

THE JURY (COLLECTIVELY): No, sir.

THE COURT: All right. As you will recall, when

we concluded yesterday both parties had concluded the presentation of any evidence they wished to offer in the case.

And the next phase of the trial is what we call closing arguments. And both the State and the Defendant will have a right to make their closing argument. And as I told you, the State will go first in this matter.

So, Ms. Campbell, are you ready to proceed?

MS. CAMPBELL: Thank you, Your Honor.

Good morning. The first thing I want to do on behalf of the State of South Carolina, the citizens of Richland County, is to thank you for your service in this case.

I know when you showed up on Monday morning you may have tried to anticipate what kind of case you might be on, maybe a wreck case where liability was an issue, damages might come up, or for something else. But as you have seen, and I think each and every one of you paid close attention over the last two days, this is a very important case. It's important to the State of South Carolina and it's important to Stewart Ard.

So thank you for your attention. It is very important.

Now as the Judge has told you, you're going to hear from me. First I'm going to talk to you a little bit

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about the law in this case because in cases where assaults or murders occur, typically there are what's called lesser-included offenses. And I'm going to go over some of those definitions with you.

And once I have finished talking to you about the law, I'm going to talk to you a little bit about the facts in this case. Then the defense will get up and I can only try to anticipate what she may argue, I don't know, but she will have the last word before you.

But all we ask is that as either side is talking about the facts or the law, if I say something about the law, and ultimately it's Judge Barber who tells you what the law is you should apply in this case. If I say anything different it's not intentional, but you take the law as he gives it to you.

In that same vein, as each of us are up here before you, if anyone misquotes the facts, you remember. Because the roles in this courtroom are very well defined and that's for a reason.

The State's role is to present credible evidence before you about what happened back on July the 28th. The defense's role is to defend her client. The Judge's role is to decide what's actually admissible, what you're allowed to hear. Because you're only allowed to base your verdict on what's come before you in this courtroom.

But finally, ladies and gentlemen, no one will argue any different than this, the most important role in this courtroom is yours. Each of you individually, and then once you go back to that jury room, collectively, because you must come up with a unanimous verdict.

Verdict comes from a Latin phrase, veredicto. And it simply means to speak the truth. And that is the only thing the State asks for in this case is a verdict that speaks the truth and seeks justice.

Now I want to apologize if we have done anything over the last several days to offend anyone. At times our questioning has been clumsy, unartful, things may be admissible but they're not admissible, things of that nature. Please don't hold that against the State if we have done anything to offend anyone.

You have now heard all the evidence you can consider. And as the Judge told you, what is the evidence? It's what the witnesses got up here, swore an oath, and they testified to. It is the video that has been admitted, the physical evidence, the photos, the knife. That is what you can base it on. Not on speculation, innuendo, conjecture, or just plain wishful thinking. That is not evidence.

And in that same vein, questions by the lawyers on either side are not evidence. The answers of the

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witnesses who swore an oath is what you may consider in doing that.

Now, what witnesses came before you? In this case when we opened -- we can only anticipate what the defense will be. And the scope in this case has been narrowed down very, very simply by the defense's opening argument. That narrowed down the scope of what the case was because there was no dispute that Stewart Ard is the person that stabbed these people or attempted to stab people on that night.

By her opening argument that is no longer in dispute. So the State was able to narrow their case down to witnesses, lay witnesses, victims who don't have something to gain or lose, independent witnesses who don't have a dog in this fight. Not the Defendant's cohorts. Those are the witnesses the State brought before you because the video actually is the reason the scope is narrowed.

Now the Judge will tell you in this case in this courtroom the burden is on the State of South Carolina to prove this Defendant's guilt beyond a reasonable doubt, just as it should be. And, ladies and gentlemen, I submit in this courtroom in this case with this evidence, that is a burden the State welcomes.

What is proof beyond a reasonable doubt? The

courts have defined it in various ways. And perhaps the most simple way to define it is, a reasonable doubt is the type of doubt that would cause a reasonable person -- and listen to the Judge. Reasonable, it's key here. -- a reasonable person to hesitate to act.

But the courts have gone a little bit further in defining what is reasonable doubt. They have held that proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt.

There are very few things things in this world that we know with absolute certainty. And in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced of the Defendant's guilt of the crime charged you must find the Defendant guilty.

If, on the other hand, you think there is a real possibility that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find him not guilty.

The law recognizes that we don't have to overcome every possible doubt, although I submit with this evidence there is no doubt about the stabbing that night. All we have to prove is, give you proof that leaves you firmly convinced of the Defendant's guilt.

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Now as I alluded to earlier, in assault cases there are various levels of assaults. You are going to hear the Judge charge you as to what the charge was that the indictment brought before you. And the indictment is just the charging paper that puts us on notice on what we have to prove and it puts the defense on notice of what they have to prove.

There are different levels. Under murder is attempted murder, when someone does die as a result. And I'm going to go through the definitions of these but I just wanted to show you how they line up.

Then under that, a lesser included, is assault and battery of a high and aggravated nature. And then a lesser included of that is assault and battery in the first degree. A lesser included of that is assault and battery in the second degree. And then assault and battery in the third degree.

And the charges that have been brought before you are the proper charges to charge this person as an individual.

You heard Investigator McCoy talk about assault by mob. They also have different degrees identifying whether there's death or serious bodily injury.

Stewart Ard is charged as an individual in this case. And he is charged in one indictment -- and when you

go back there, you're going to have five different verdict forms. Five different verdicts to come up with because there are five charges. That's not unusual that a person may commit more than one charge during the course of events in a single night.

So there are going to be five different charges. One indictment for attempted murder. Three indictments for assault and battery in the second degree. And one indictment for carrying a concealed weapon that could be used to cause personal injury.

Those are the charges generally I want to start with. And I want to start with the first one, attempted murder. Because very simply, ladies and gentlemen, attempted murder is defined by our code of laws as a person who with intent to kill attempts to kill another person with malice aforethought either express or implied, then would be guilty of the crime of attempted murder. And what do some of those terms mean? And the Judge will instruct you further and using some of these terms, called legal terms of art.

What is an attempt to kill with malice aforethought? And very simply, ladies and gentlemen, when considering attempted murder if you think of it this way, with common sense. If the person had to die as a result, and luckily in this case for Jesse Patterson he

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got help immediately. Even though his blood pressure went away, he got help immediately and he was able to be saved. But if he had died as a result of the Defendant's actions, would that be murder? I submit, yes.

We must prove that it is the attempt to kill or attempt to injure another with malice aforethought. And very simply, the Judge will instruct you, malice typically is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will even infer an evil intent.

There is no dispute in this case. And I'm going to show you the video one last time. You see him actually dig Jesse Patterson. He inflicted that injury with an evil intent. And, remember, malice under the law does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, a combination of the previous evil intent and act.

Malice aforethought may be express or inferred, or implied. These terms, express and inferred, do not means different kinds of malice but merely the manner in which the malice may be shown to exist, either by inference from

the fact -- either by direct evidence or by inference from the facts and circumstances which are proved.

The law goes further in defining what malice is. And, ladies and gentlemen, the word malice itself, if you think of it, the base for the term malicious. Were his acts malicious that night? I submit this case reeks of malice.

Express malice is shown when a person speaks words which express hatred or ill will for another. You heard from the independent and, I submit, credible witnesses who were corroborated by the video how this Defendant repeatedly threatened the people involved with getting him thrown out that night.

Threat after threat from inside the bar, out the front door, across the street to Teriyaki Grill he was still going after them and he made good. Is that express malice? Prepared beforehand to do the act which was later accomplished. The fact that he had the knife in his pocket with the blade already open, is that malice?

There's been all this talk about somebody's watch being lost. Well, not his watch. He didn't hesitate to attack Jesse. For example, lying in wait for a person or any other acts of preparation going to show the deed was within the Defendant's mind would be express malice. We don't even have to prove -- and I submit this case has

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express malice all over it.

Because the law recognizes in most cases, not this one, somebody may not go up and announce "I'm going to come back and get you." We don't even have to prove that although, I submit, we have. Malice may be inferred from conduct showing a total disregard for human life.

That's it. And I submit when you walk up behind someone who's just been cold cocked by your friend and then stab them, not once but repeatedly to make sure you got him good enough, that's malice. It doesn't get any more malicious than this, ladies and gentlemen. Up close and personal.

The Judge will also instruct you in considering the charge of attempted murder, a specific intent to kill is not an element of attempted murder. We don't have to show that he actually meant to kill him although, I submit, his actions were such in this case. But there must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs, not accidentally or involuntary.

Look at his actions on that video.

Intent may be shown by acts and conduct of the Defendant and other circumstances from which you may naturally and reasonably infer intent. Intent may also be inferred when it is demonstrated the Defendant voluntarily

and willfully commits an act, the natural tendency of which is to destroy another's life.

Listen carefully to the Judge as he instructs you. And listen also because he's going to tell you, we don't have to show premeditation. Although in this case there's a 20-minute span from when they're approached in that bar to when the actual stabbing the first stabbing occurs. Is that premeditation? In that 20 minutes, think back, how many times does he tell them he's going to get them before he carries through with it? Is that premeditation?

Listen to the Judge. We don't have to prove it. We have it in this case. And motive. Listen. You won't hear the Judge say that we have to prove motive to prove attempted murder, but we have, because he was going to show those punks that they weren't going to control him. And he did.

Assault and battery of a high and aggravated nature is also a lesser included. And, again, in the tier, attempted murder, then assault and battery of a high and aggravated nature. And the Judge will instruct you on several lesser includeds as far as the attempted murder charge.

So if you find, however if there is malice, then you don't go to a lesser included. Listen to the Judge. If you find the State didn't prove that his acts were

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malicious, evil intent, intent on doing serious bodily injury, then you may consider assault and battery of a high and aggravated nature.

If a person unlawfully injures another person and great bodily injury results or the act is accomplished by means likely to produce great -- death or great bodily injury. Great bodily injury means causes a substantial risk of death which causes serious permanent disfigurement or protracted loss or impairment of a function of a bodily member or organ.

Even if you would go beyond the scope and find that malice didn't exist, at the very least his actions are assault and battery of a high and aggravated nature.

Jesse told you, it's not in dispute, he can't even use his arm anymore. He can't train like he used to doing the cross-fit. He has permanent loss of the use. With great bodily injury, a very substantial risk of death.

The doctors got up here -- what dog do they have in this fight? -- and told you about the serious nature of his injuries, how he almost died that night, how his blood pressure didn't exist. It was 70 over nothing.

At the very least, if you were to find for some reason that his actions weren't malicious, it is assault and battery of a high and aggravated nature.

But as the law requires, there are other lesser-

included offenses you can consider.

Assault and battery in the first degree. If a person unlawfully injures another person and the act either involves a non-consensual touching of the private parts of a person, that part doesn't apply here, or it occurred in the commission of a robbery, burglary, kidnapping or theft, that doesn't apply here, or if the person offers or attempts, this is the attempted part, to injure another person with the present ability to do so and the act is accomplished by means likely to produce death or great bodily injury or occurred in the commission of a robbery, burglary, kidnapping, or theft. The Judge will charge you this, as he should. I submit it doesn't apply in this case. You make that determination.

And finally as to the charge of attempted murder, the last charge he will charge you with, is assault and battery second degree. And this is also what the three other indictments are.

This Defendant's charged with -- the ones involving the owner of the bar, Scott Flemming, Joe, and Gabe, the two that ran after from him the Pour House. These are those charges. What is assault and battery in the second degree?

And the defense is going to get up here and say that the State is a bully. I submit the State has given

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him the benefit of the doubt in these charges. A person commits the offense of assault and battery in the second degree if he unlawfully injures another person or offers or attempts to injure another person when there is moderate bodily injury to another person, or it could have resulted in that and the acts involves non-consensual touching. That will part doesn't apply. That's the statute.

What is moderate bodily injury? Physical injury requiring treatment to an organ, system of the body other than the skin, muscles and connective tissues, except where there is penetration of the skin or muscles or connective tissue which requires surgical repair of a complex nature, or when the treatment of the injuries requires the use of regional or general anesthesia. The definition alone takes it out as far as what happened to Jesse of assault and battery second degree.

The defense got up here and she told you in the beginning, that's what she wishes it was.

The minor charge. He is charged with three counts of that. Yet the State was overreaching?

And finally is a lesser included on the assault and battery second charges. You can consider the charge which is similar to simple assault which is, a person commits the offense of assault and battery in the third degree if

he unlawfully injures another person or offers or attempts to injure another person. This is way beyond the charges we're talking about now.

That's what she wants you to find him guilty for for what he did to Joe and Gabe.

The final charge that will be before you is the fact of carrying a concealed weapon. And, I submit, this is not in dispute. The Defendant possessed a deadly weapon usually used for the infliction of personal injury. It was used for the infliction of personal injury. He carried the deadly weapon about his person and it was concealed.

You will see it in two different spots on the video. And I'm going to talk about the video a little more. You will see it when he's inside the bar. If you look when he's back there on the deck area where they approached him to get them ejected because his little friend was hitting the wall, you actually see his friend hit the wall about 10 minutes before they're actually ejected and then you can't see him until it's right before.

He pulls the knife out at that point. You see him flick it against his leg as if trying to open it, but he thinks twice about it at that point. Is that a concealed weapon? You don't see it in his pocket. Is this weapon

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used for personal injury? That's not in dispute.

And the final part about the law that I want to talk to you about, is there has been -- it's obvious on the video -- there's drinking going on. The law recognizes that voluntary intoxication is not an excuse or a defense for a crime regardless of whether the crime is one involving general or specific intent.

A person who voluntarily ingests alcohol and thereby becomes intoxicated is no less responsible for his acts while in such a condition. If one drinks -- voluntarily drinks intoxicating liquors, wine, or beer, and becomes intoxicated to whatever degree, and that while in this condition commits an act which would be a crime that wouldn't have been committed by a sober person, the fact of intoxication would not relieve the intoxicated person from responsibility.

Just because he chose to go out and drink doesn't give him a pass. It doesn't reduce it. It doesn't mitigate it. It doesn't do anything because he's held to the same standard, as he should be, under the law. And don't let anyone argue differently.

Listen to what the Judge says.

Now, in every case as we're getting ready for trial you try to anticipate a defense. In an assault case or a murder cause typically the defense is kind of one of

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three. First it may be, well, it was just a drug deal gone bad, you know, everybody's at fault; or, we know the offense happened but we just don't know who did it, it's an ID case. The person was wearing a mask. We couldn't see them. And in that case a lot of times DNA comes in. This isn't a DNA case because there's no dispute about who did this. And finally, typically, self-defense, more commonly called the stand-your-ground case. Not here. Not in this courtroom.

Listen to the Judge. He's not going to instruct you on self-defense. He's not going to say anything.

And as I listened to opening statements, the video, which we talked about, narrows the scope of what possible defenses are here. Because typically in the majority of crimes in this nation there's not a video that shows exactly what happened. It's eyewitness testimony which is relied on, as it should be. But in this case the defense is hemmed in because there's no dispute it's him. There's no dispute he did it.

So go to the oldest defense in the book; when the evidence is overwhelming and the law is against you, go to the art of confessing error. Just tell the jury ignore the evidence, it's not really that bad. Just convict him of a lesser included. That's all he did. Get up here and put your hand up and talk about how that's half a hand --

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MS. ZMROCZEK: Objection, Your Honor. Can we approach?

(Off-the-record discussion.)

MS. CAMPBELL: Thank you.

-- a hand, and talk about how you haven't seen the other side, as if we are hiding something.

Spending an inordinate amount of talking about how there may have been a video camera across the street at Teriyaki Grill which might have shown the same thing that's already in evidence from a different angle. Try to divert the attention from the overwhelming evidence in this case.

Attack the victim, attack the police, and do whatever it takes. Get up here and just say oh, oh, oh, he might be guilty of these minor charges, but it's really not that bad that Jesse almost died. Don't rely on the video that's in evidence. Ignore his actions.

And, again, all the State is asking for is a verdict that speaks the truth.

She talks about the video from across the street that's supposed to look across a dark street through the cars that are parked in front of Group that you can see from the video and capture something that's already been captured by the cameras that are pointed that way.

And the cameras that are on Teriyaki's are there

for the Teriyaki business. They show, just like the cameras at Group Therapy, they don't show the Teriyaki, they show the area right in front of it.

She even got up here and alluded, in State's Exhibit Number 23, that, look, here's a picture taken from that camera that's supposed to be, that she wishes was across the street, that this indicates was manufactured by a company called Microsoft on the Internet.

She then got up and talked about how Ryan Kinard threw a punch, didn't he. Because you see him pull back as he's shoving. There's no punch. Even if there were, he doesn't have the right to come back and stab people and try to kill them.

She talks about, hey, the bouncers, you know, they were throwing people out. That was their job. And somehow they're to blame? What about the victim? Oh, yeah, he got fired six months later. Because his life -- you know, near-death experiences, they change you. His life's altered forever. But he got fired because he reacted badly. He went behind the counter when he wasn't supposed to because he was afraid. Blame him for that.

And then there's been all of this talk about some watch. She even tried to show in the video where he drops pizza. Y'all look at it. He then picks it up later,

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balls it up in the paper plate that the pizza was on, and throws it out. And there's this allegation that he was stealing watches from, I guess it's going to have to be Geno because he's the only one that has a watch on at one point but doesn't have it on later, so it's not even his, I guess.

She talked about how somebody slapped a drink from Geno's hands, even if that were true, which it's not.

Then there were all these questions about, hey, who did the victim card that night. He didn't card Geno. Look at Geno. He looks almost as old as me. He didn't card him. And look at the other two. They showed up because he was carding the young one, the little one that looked little. He was doing his job and somehow he's at fault for that? He deserved to get stabbed for that? Does that even make sense? I don't know what she's going to say.

Then, I mean, the Defendant, he turned himself in before his photograph was actually on TV. But remember Investigator McCoy, it wasn't that his photograph was on TV but the event had already been broadcast on TV because Investigator McCoy got there that day. He had already seen it. And somehow that excuses him?

And then we have this whole colloquy on life threatening. One of the responding officers said that the

wounds were not life threatening only because, as the doctors told you, they saved him. So that's supposed to reduce it to assault and battery second degree or assault and battery first degree?

Basically just attack the evidence. There's an old joke and I've used it before with certain defenses. And it talks about what I learned in law school which has been a long time ago. It talks about how a preacher and a lawyer were walking down the street and it rained the day before. And if you look down, the preacher looked down and there was a puddle of water right by the sidewalk. And in the bottom of the puddle of water you see a silver dollar. And he looks at the lawyer and goes, look, there's a silver dollar.

And the lawyer picks up a stick and he stirs up the water and the mud and the silt that's sitting in it. Obscures it. Can't see it. And he says, what silver dollar.

Ladies and gentlemen, I want to take a few minutes and talk about the facts. I don't want to belabor it. You'll have the evidence. You've seen the evidence. It's all on video.

And she's going to talk about how we don't have the video from when they came back the second time and yelled at them, that both Mr. Flemming and Jesse testified to. I

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submit, we don't have that video, nor do we have to produce it. What we have to produce is testimony. And it can be from one person. It be from two people. In this case it's from eight, nine, 10, however many, or it can be from a single video. All we have to produce is evidence that leaves you firmly convinced. And for anyone to get up here and argue differently, it is wrong.

You heard from a number of witnesses. You heard from Brett Babcock. He was one of the initial bouncers. And let me be the first to tell you, you didn't hear from every bouncer in the bar that night, just the ones that had anything to add.

Brett Babcock. What did he tell you? He told you, he was in there that night. They started causing a commotion. By the way, he didn't say it was Stewart Ard that was causing the commotion. It's not like we're out to get Stewart Ard. It was his friend, the little one in the video. He walks up to him, asked him to leave. They get rowdy. They start putting their hands on him. Guess what? You saw the video. You can see that. The only part that you can't see is the last time the little one hits the wall because he's back in the shadows.

And by the way, the cameras inside Group Therapy, we didn't produce them all because the Defendants didn't go in every part of Group Therapy. They didn't go in the

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back where some of the cameras were. We produced the ones that showed them either being there, because they're all together, and then the ones showing the actions that led to what happened that night.

You heard from Ryan Kinard. He was the one that came up and helped Brett get him out of the bar. You heard about the threats they made while in the bar. Look at the video. I'm not going to show it to you, you'll have it if you want to see it again.

You even see Ard at that point reach into his pocket while inside the bar in that back area on the deck while being confronted by Brett and he pulls out the knife and it's not open at that point like it was later. You see he slapped the back of his leg thinking about opening it, but then he puts it back up. The deed was already in his mind.

You heard from Alex Cromer. You see him in the video. He was able to tell you about what he observed. The aid that was given to the victim in this case, what the victim's condition was as he struggled to breathe, to live.

You heard from Courtney Walker. She was right there. She was inside. You saw what she did, her concern. She ran outside. She immediately called 9-1-1, trying to get help for Jesse. And thank God for these

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people. For Jesse, that's why he's here today.

You heard from Jesse Patterson. What did he do to deserve this? He was at the door doing his job, minding his business, trying to protect the rest of the patrons in that business.

And what did he get for that? Two stab wounds to the back. One so deep it was within an inch of his heart.

Scott Flemming, he testified. And he got emotional, because the last thing he wanted to see was someone in his employ get hurt trying to protect his business.

Joe Molino, Gabe McDaniel. They ran down there. And, again, the video speaks volumes. Look at him. On the video as he comes out he was in the car. All he had to do was close the door and drive off. But, no, nobody was getting it on him that night. Malice? Malicious?

What does he do? He gets out and brandishes the weapon. Joe runs. Gabe almost gets stabbed. That's in the video.

Amethyst Ganaway. She's across the street. Has nothing to do with anybody. But what does she hear? And she remembered it. And this is a woman that works in the bar district every night. But it was significant enough that she remembered that group of men because she thought they could be involved because they were troublemakers,

led by Stewart Ard.

And the defense is going to get up here and go oh, at one point Stewart Ard's trying to pull them away. And that's true. That's in the video. That's what we brought before you. Right outside, because he's getting away, he's getting away to get his game plan together.

Malice. Malicious.

You heard from Gary Shealy. He got attacked because he pulled video. He initially pulled some of the video. At the request of police he went back and pulled more. He would have pulled more for anybody else that wanted it but he wasn't asked. And then to argue that there's not enough.

Kaitlyn Griffin gets there. She treats both of them primarily. And, remember, look at the video. I'm going to talk about the times on the video in just a second. EMS is there within four or five minutes. It's quick. And luckily, luckily for Jesse, his friend, Brett Babcock, had training as a medic and he knew what to do to try to save his life. Luckily for Jesse, Brett Babcock was there that night. EMS responded within five minutes. The hospital is less than two miles away. The doctors were ready, prepared, and did their job. That's why he's here.

You heard from Stephen Tackett. Life threatening

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injuries. Life threatening injuries. This was a 9-1-1 call, the highest level of trauma that enters the emergency room, the Critical Care Center of Columbia.

You heard from Dr. David Ford, Dr. Jeremy Reeves. Life threatening. The procedures, how long he had to stay in the hospital. And the defense says, it's not attempted murder because he didn't have to stay in the hospital more than four or five days.

You heard from Officer Theodore MacLaughlin, Corporal Matthew Buck, and Investigator Matthew McCoy.

In considering this case, look at the actions of the Defendant who turned in this knife, which was pristine when it came in. This is the knife he chose to give to the police through his lawyer. This is the knife he chose to carry. This is the knife he pulled out, like this, not folded.

And this isn't like a pocketknife that's got like a blind corkscrew or, you know, pliers. This is a hunting knife. And on that night Stewart Ard was doing the hunting.

Look at his actions in the video. And look at the injuries that you have, I think, a photo of, because this wasn't a simple in and out when it came to Jesse Patterson. This one might have been in and out and maybe a little twist. But this one, it was a jerk. Three

inches. Malice. Malicious.

On the back, he's out, everybody's drunk. He didn't know about the bouncer. He counted on the fact that even if the police investigated they'd never do anything about it. He's just a bouncer.

He counted on the fact that even if the police did do their job and found him, that nobody would really care. It's not a big deal. He's just a bouncer. It comes with the job.

He counted on the fact that even if police charged him it'd just be minor charges, assault and battery first or second.

And he counted on the fact that even if the prosecution felt his life was worth prosecuting for that a jury wouldn't care.

And he counted on the fact that even if his lawyer would get up here and talk about stuff, try to confuse the issue, Stewart Ard miscalculated. The video speaks volumes. All we ask in this case, ladies and gentlemen, is justice. Stewart Ard got mad. He got revenge. No one could insult him. No one dare control him. He's above the law. He treats it with disdain. You saw him.

Let Stewart Ard know that he might be different, older, but he drinks from the same cup of justice as any other defendant that comes before this Court and he is

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held responsible in the same way. He's not above the law.

In the beginning in opening statements the defense counsel told you that you would see who the true bully was when you've seen all the evidence in this case. I don't know if she was alluding to me, the State, to the victim, to the police. I submit, ladies and gentlemen, she was right because in that bully playground scenario she talks about, who was the bully on July 28th who snuck up behind Jesse Patterson and tried to gut him? Bully? I submit, attempted murderer.

All we ask is that you reach a verdict that speaks the truth. Hold him responsible. Don't let him win those charges. Hold him responsible for what he did.

Finally, you will have back there the videos. If you want to see them the Judge is going to send back a computer, a laptop you can watch them on, or if you want to see them out here in the courtroom he'll let you come back and watch them.

Notice the time. You see what time they walk in the bar, a group of them, 11:57 P.M. And there's a difference in the time inside and out. The actual outside times are right. The inside times are off by about 11 and a half minutes but it doesn't matter, it's still the same time frame.

You see them drinking at the bar at 12 A.M.,

walking towards the smoking area in the back at 12:07 A.M. Richardson punches the wall the first time at 12:14 A.M. At 12:25 A.M. on the inside -- these are the inside cameras here, these are the outside cameras -- you see him being asked to leave. You see Ard pull the knife from his pocket at 12:25 and 30 seconds on the inside camera. At 12:27 A.M. they're escorted out of the bar. At 12:27 A.M., according to the inside camera, they are having the first altercation, the shoving, in front of the bar.

Then you see them walk in front of Grill Teriyaki. And you can see the corroboration because that says 12:38 on the outside camera. So that coordinates. In front of Grill Teriyaki where the young lady overheard the threats at 12:42 A.M. You see the car pulling up at the tanning Salon, the red car, at 12:58 A.M. and in that same minute you see the stabbings and the attempted stabbings at 12:58 on the outside view and 12:46 A.M. On the inside.

All we ask is that you consider the evidence and hold him responsible for his choices, his actions, and what he did that night.

Thank you.

THE COURT: All right. Ms. Zmroczek?

MS. ZMROCZEK: Thank you, Your Honor. May it please the Court.

THE COURT: Yes, ma'am.

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MS. ZMROCZEK: Good morning, ladies and gentlemen of the jury. I too wanted to thank you for your attention. And Stewart Ard wants to thank you.

It was Aristotle, not Reese Witherspoon, that said "The law is reason free from passion." If you recall in opening statements, I did set out exactly what we submit Stewart Ard did. What you have now are the facts to apply to the law, free from passion. There's no doubt, there's never been a doubt that Stewart Ard was the Defendant who committed these acts.

I submit that the passion and the emotion that's trying to be stirred can be shown from every witness. He turned himself in before his face was on the TV. He called me. He called the investigator that night. Yet -- and that wasn't new. That wasn't something that came out in opening statements. Every witness sat here and pointed to Stewart Ard. The man in the blue shirt. And what's different? He has hair.

There was one reason and one reason only everybody did that; to make you angry at Stewart Ard, because if you're angry at him you can find him guilty.

The Judge will give you the law and the law is going to be your guidance to the facts. It will tell you how to explain and apply the facts to the law free of emotion.

The burden was on the State. We got up and we admitted to it. We didn't have to do that. We didn't have to question -- and this is my opportunity to explain to you some of those questions, why those questions were asked.

Maybe when you're sitting there and you've seen the video and we're admitting guilt, why are we here. And we're here to do what's just. Not to punish, not to be angry but to do what's just.

Not one time has it ever been suggested that what happened to Jesse Patterson was his fault. Stewart Ard was wrong. He was wrong and he told, he told the officer that. Turned himself in. The officer reviewed the videos, saw the blood, made the appropriate charges. The appropriate charges under the law.

Ms. Campbell went through the elements and the Judge is going to go through the elements. And I'll briefly explain to you how I think the facts apply to the elements. How I've broken down my opening statement (verbatim) is hopefully not going to be too long. I first want to talk to you about my biggest fear. I want to tell you what it is, get it out there, discuss it, tell you why it is my fear.

Then I want to talk about the State's case because as Ms. Campbell reminded you, it is about credibility and

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evidence.

And then lastly I want to talk to you about the facts and how they apply to the law, and why the just thing to do is to find him guilty of the appropriate charges.

There are lesser-included offenses. That is true. But the legislature did that for a reason and a purpose.

I want to talk to you about the State's case. But first I want to tell you my biggest fear. And my biggest fear is that the emotion that was brought up in this case and in this courtroom, calling somebody evil and malicious and showing you bloody pictures, was done for one reason. And that reason was to get you mad. And the fear is that that anger is going to circumvent what the law tells you to do.

Nobody's asking for any special favors, simply asking the law to be followed.

In opening statements the State promised you that you would hear from witnesses. And they listed all the witnesses that you -- from whom you would hear. And they said that changed when we admitted that Stewart was guilty. But you didn't hear from the co-defendants.

The reason that the videos were so important and that I was asking about an event or what was shown that night, it wasn't to excuse or justify Stewart's behavior

but to explain, explain what happened. Brett Babcock sat right here. And he was an amazing witness because, you know what, he told the truth.

You recall -- and I believe y'all did it in your oath too. When you take the witness stand, you raise your right hand. Does anybody know why that is? I'll tell you. It's because in the old days they used to brand a P on the inside of someone's hand for perjury. And that way when they raised their hand, you could see if someone was convicted of perjury.

We don't do that anymore but what you do do is you get to look at the witnesses and judge their credibility. What biases do they have? What reason, what anger do they have? Why would they be now saying that there's a second assault that wasn't on the video? What reasons do they have to testify the way they did?

But Brett got up here and he truthfully told you, it was heated. It was heated. It was a fight, it was a stupid fight and Stewart -- that doesn't mean that Stewart should have stabbed Jesse, and he will be punished because he is guilty, but that doesn't make him an attempted murderer. It was heated.

Ms. Campbell asked you over and over to watch the videos. I would ask the same thing. There are no better witnesses than the videos. Brett told you, and Brett's

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story is confirmed, the reason that I had a problem with Stewart at all is he put his hand up -- and you watched the video and it's true for point 02 (.02) seconds. He does put his hand on him. And then he walks away. And these are simply still shots that -- to show you. Stewart walks away. Walks away. Walks away.

And here's Brett having the discussion. And then Ryan gets up and Ryan says -- and remember Brett, "they were threatening me." They -- "Was it Stewart?" "No, no, no. It was mostly Geno and Skaggs."

But Ryan's like "No, no, no, it was Stewart," which is why I made it a point to point out -- remember Ryan was in the hat -- Stewart is not even there. Stewart's not even there making those threats. Oh. "He had tattoos on his arm." So did one of the other co-defendants. Mr. Skaggs and Geno were the ones having the problem. And Stewart was trying to get them out. He's pulling him out. Right here.

The reason this picture is important is because it's at 12:27. Right before that first altercation. There's Geno, wearing his watch and they made such a big deal about the watch. And the reason is is because that's the reason they went back. They didn't go back to stab anybody. They went back to get the watch. And Stewart saw Geno get out of the car, and you saw it on the video.

His hand was already on the door getting out of the car. And you know what, he was, like, this kid's not going to stop. He's going to get his little behind beat.

Here he is, walking down the street, minutes -- right in front of the Grill Teriyaki -- minutes later. No watch. It's not a story that was made up. It's the evidence right there in front of you. And it's all how you look at it.

And I submit and the Judge will tell you that you need to look at it without anger. You need to look at it for what it is. And what it is is an assault.

The EMS workers did their jobs. And, remember, they sat right here. And, like she said, there's no dog in the fight for them.

And there was always Scott Flemming and Jesse Patterson's injuries are life threatening. Remember they were both life threatening. But Scott Flemming? Stewart Ard is charged with assault and battery second degree on Scott Flemming appropriately. And you remember when I asked EMS, "Do you assign trauma scores." "Yes." Because they do an evaluation of the trauma. Zero to 12. And they tell you in law school never to ask a question you don't know the answer to. And I didn't know the answer but I asked it anyway. "Well, what's zero?" "Dead". Zero's the most traumatic.

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Both of these victims, both of them, have 12 because they weren't hurt. And there's no doubt in that. And there's no doubt that Stewart did it. But he did not maliciously go to injure and kill. He did not. Because if he would have, if that was his intent then how can you make the argument that Scott Flemming is only assault and battery second? They brought that charge, not us.

It doesn't make sense. It just doesn't make sense.

What does make sense is this was a heated argument that got out of control. And every time Stewart tried to talk them out of it, Scott Flemming says that he talked to Stewart, right there, right outside. And you'll see it on the video. Then my question becomes: How does Scott have this conversation with him while he's supposedly threatening Jesse? It's not possible. You just watch the video. And I'm not calling anybody a liar. What I'm saying is, it's emotional, and people are angry. And they have every right to be.

That doesn't make him an attempted murderer. It doesn't even make it an assault and battery of a high and aggravated nature. It makes him guilty of assault in the first degree if it's going to be worse, if it's going to be worse for Jesse.

Elements of assault and battery second degree.

She, she, she discussed with you. And this is what the charge -- this is the charge they brought on Scott Flemming. And I submit to you, making your job as easy as possible, when the Judge gives you a form, he's going to have five separate forms, and you all have to agree and the Foreperson gets to check off which one it is.

And I'm making it easy. Scott Flemming, assault and battery second degree. There's no lesser included. It's an appropriate charge. And the reason it's an appropriate charge is because it's moderate, moderate bodily injury to another person that results or that could have resulted -- the injury requires treatment to an organ, the lung, other than the skin or muscles or connective tissue, or if the injury penetrates the skin, muscles, connective tissue and requires complex surgical repair.

Who does that sound like? Jesse Patterson.

But if we need to make his worse under the law, then he's guilty of first degree battery. We submit he's guilty of second degree battery.

The doctors who have no dog in this fight agree. And I said, as trauma surgeons of course they do their job. And then he sends him to the CT and to the X-rays and there was never a collapsed lung. It was punctured. An organ requiring surgical repair using anesthesia. And

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they talk about the lidocaine.

This is what this is. I'm not trying to minimize the pain or the anger that Jesse Patterson feels because it's appropriate in his person. It is not appropriate under the law.

Great bodily injury which causes a substantial risk of death. Substantial risk of death, or causes serious or permanent disfigurement.

There's been no testimony to that. You recall the testimony as you recall it. And if the evidence provided to you is that Jesse Patterson can no longer use his arm, then that's the evidence that you rely on. That also goes to credibility. We know he can use his arm. We know he was hurt. But we know what the doctors told you. Lacerations, two of them.

The prosecution told you it was their job to represent the citizens and the state (verbatim) of Richland County, just as it's my job to represent the constitution and people charged with crimes. We've admitted to what this malicious person did.

He turned in the night -- he turned himself in because he knew that he had done something wrong.

And when there's a serious question of fact that's put to you, and you look at the facts free from emotion, free from anger and hate, but just as you're supposed to,

you will find that he's guilty of assault and battery second degree on Scott Flemming, and assault and battery third degree on Joseph and Gabe.

Remember they did not -- at that point when they were chasing after him, they didn't know what had happened. What Stewart saw when he walked up, and you'll -- watch the video because you can see exactly what he saw was his stupid friend going back to get his stupid watch. And to submit that nothing was said, you can watch the video and you can see who's talking and who isn't, but what Stewart Ard sees is him punching a big guy and his friend falling on the ground.

They made a big deal about asking all the bouncers, "you're not allowed to carry weapons, are you?" "No." Why, why, why do they keep asking that? Is it because maybe one of the bouncers or bartenders while they were politely asking them to leave said, "Yeah, you come back because I got a knife with your name on it." Is that possible? Is it possible that that these boys --

(Phone goes off.)

THE COURT: Get that phone and stop that lady. Ma'am, come back in this courtroom.

UNIDENTIFIED SPEAKER: I thought it broke and I --

THE COURT: Don't say another word.

UNIDENTIFIED SPEAKER: I'm sorry. God.

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THE COURT: Sorry.

MS. ZMROCZEK: That's okay.

Is it possible? There's been a lot of firsts in this trial with me. The first time I ever agreed with a police officer because they did their job. And it's the first time that I haven't argued reasonable doubt, reasonable doubt, reasonable doubt, reasonable doubt.

But that is still the standard. And they have to prove their attempted murder and their assault and battery high and aggravated. They have to prove those beyond a reasonable doubt, each and every element of those. They have to prove the malice, the intent.

And when you watch the video, and you listen to the credibility of the witnesses and then you watch the other portions, the whole video, and you say, he did go back for the watch. That's doubt.

We're not trying to ask you to do any favors or to lessen anybody's crime. We're asking you to simply do your job. And that is the factual truth and the legal truth is to find Stewart Ard guilty of what he is criminally and legally guilty of.

Assault and battery second degree, Scott Flemming. Assault and battery second degree or first degree on Jesse Patterson. And assault and battery third degree on Joe Molino and Gabriel.

Thank you.

THE COURT: All right. Madam Forelady and ladies and gentlemen of the jury, I think before I give you the charge we'll take a little bit of a break. I'm going to let you step back to the jury room for 10 minutes, 15 minutes or so.

Please do not discuss the case while you're back there and we'll come back in just a few minutes and I'll give you your charge.

(Jury exits courtroom at 10:53 A.M.)

THE COURT: Ma'am, what is your name?

UNIDENTIFIED SPEAKER: Helen Black.

THE COURT: Helen Black?

MS. BLACK: Yes. I did cut it off down there before I came up under the thing where they put it through. They were watching me and it messed up.

THE COURT: Well, apparently you didn't successfully cut it off.

MS. BLACK: I know, but what I'm saying is a while ago when I cut it off it came back on, so I cut it off again and it broke it, kind of blew up. It's like a black screen. And so when I was cutting it off down there again it showed a black screen. So I assumed it shut off. And I'm so sorry. Honestly. But they did see me cut it off.

THE COURT: Ma'am?

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MS. BLACK: They did see me cut it off down there.
THE COURT: I don't know who they are.
MS. BLACK: Well, the officers.
THE COURT: Obviously it didn't get cut off.
MS. BLACK: I know and I'm sorry, but I didn't mean to disturb you.
THE COURT: Well, that phone is mine right now.
MS. BLACK: That's okay since it broke on me, I was going to have to --
THE COURT: Ma'am, I'll determine what I'll do with it.
MS. BLACK: It's okay.
THE COURT: All right. We will take a break for a few minutes and come back.
(Break taken at 10:56 A.M. At 11:05 A.M., the trial resumed:)
THE COURT: All right. Let's -- everybody back? Let's bring the jury in, Mr. Dye.
(Jury enters courtroom at 11:05 A.M.)
THE BAILIFF: The jury is seated, Your Honor.
THE COURT: All right. Thank you.
Madam Forelady and members of the jury, the indictments in this case charge the Defendant with the offenses of attempted murder as to Jesse Patterson; assault and battery in the second degree as to Joseph

Molino; assault and battery second degree as to Gabriel McDaniel; assault and battery second degree as to Scott Flemming; and carrying a concealed weapon.

Now, I remind you that the fact that the Defendant was arrested, charged and indicted in this case is not evidence in the case and cannot be considered by you as evidence of guilt nor does it create any presumption or inference of guilt.

The indictments are simply the formal written instruments which contain the charges made against the Defendant. They are the formal documents by which this case is brought into this court.

As I told you, the indictments allege several different offenses against the Defendant and those are: Attempted murder; three counts of assault and battery second degree; and carrying a concealed weapon.

Each indictment charges a separate and distinct offense. You must decide each indictment separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other indictment. The Defendant may be convicted or acquitted on any or all of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each indictment.

Now, ladies and gentlemen, as to the indictment the Defendant entered pleas of not guilty which places upon

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the State the burden of proving the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it is a vital important rule of the law of evidence that the defendant in a criminal trial, no matter how great or serious may be the offense for which he is charged, must always be presumed innocent until his guilt has been proven beyond a reasonable doubt.

This presumption of innocence remains with the Defendant at all times, from the moment of his appearance in this court, throughout the trial, and until the jury has, upon the testimony and evidence presented, reached a verdict of guilty beyond a reasonable doubt. For it is the solemn duty of the jury if not clearly convinced of the Defendant's guilt beyond a reasonable doubt to acquit the Defendant.

So the burden of proof is upon the State to establish by evidence to your satisfaction the guilt beyond a reasonable doubt as to this Defendant on trial for each of the crimes for which he has been charged.

Now what is a reasonable doubt? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. If you have such a doubt as to the guilt of the Defendant, then he would be entitled to a verdict of not guilty. Proof beyond a reasonable doubt

is proof that leaves you firmly convinced of the Defendant's guilt. Reasonable doubt may arise from evidence which is in the case or from the absence or lack of evidence in the case.

To think that the Defendant is probably guilty or the circumstances are suspicious is not enough. You alone must make the determination of whether or not reasonable doubt exists as to the guilt of this Defendant.

Now, ladies and gentlemen, there are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. However, to the extent the State relies on circumstantial evidence, all the circumstances must be consistent with each other and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt.

If the circumstances merely portray the Defendant's behavior as suspicious, the proof has failed. The State has the burden of proving the Defendant guilty beyond a

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reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Madam Forelady, members of the jury, under the Constitution and laws of South Carolina, you are the finders of the facts in this case. I do not have the right to pass upon the facts or even to express any opinion I might have as to them, nor may I intimate in any way what I may think about the guilt or the innocence of the Defendant.

You are also the judges of the credibility or the believability of the witnesses who have testified in this case. In passing upon their credibility you may take into consideration many things such as the demeanor or manner of testifying, whether the witness had reason to be biased or prejudiced, whether a witness's testimony was contradicted on the one hand or supported and corroborated on the other hand.

You certainly do not determine the credibility or believability by counting the number of witnesses who may have testified for one side or the other.

You may believe a small portion of a witness's testimony and disregard the larger, or vice versa. You may believe one witness against many or many or all of the witnesses.

You have heard the testimony of witnesses who have special knowledge, skill, experience, training, or education in a particular profession or occupation who have given their opinions as experts as to matters in which they are skilled. In determining the weight to be given such opinion, you should consider the qualifications and the credibility of the expert and the reasons given for that opinion.

You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled. All these things you will consider, bearing in mind that you should give the Defendant the benefit of a reasonable doubt.

Now, ladies and gentlemen, I instruct you and emphasize that the fact that the Defendant did not testify is not a factor to be considered by you in any way in your deliberations and in your consideration on the question of the guilt or innocence of the Defendant. It must not be considered by you in any manner whatsoever.

A defendant has the constitutional right to remain silent and the assertion of this right must not be considered by you in your deliberations. I repeat, under your oath you are not to draw any conclusion whatsoever from the fact that the Defendant in this case did not testify. The fact that the Defendant did not testify should not even be discussed by you in the jury room.

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The burden of proof, as I stated to you, is on the State. The Defendant is not required to prove his innocence. The burden of proof remains on the State to prove his guilt beyond a reasonable doubt.

Now the same constitution and laws which makes you the finders of the facts and the evidence as I've discussed with you, make me the sole and only instructor of the law. You must accept as correct the law which I charge and apply it to the evidence as you find it and then reach your verdict.

And finally I charge you in this charge that you should not be concerned about what you think the law ought to be or what you wish the law were but only what I charge you the law to be.

Ladies and gentlemen, in one indictment the Defendant is charged with attempted murder. In order to prove this crime the State must prove the Defendant attempted to kill another person with malice aforethought, either express or implied.

Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice

exist for any particular time before the act is committed, but malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be express or inferred. These terms express and inferred do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is, either by direct evidence or by inference from the facts and circumstances which are proved.

Express malice is shown when a person speaks words which express hatred or ill will for another or when a person prepares beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the Defendant's mind would be express malice. Malice may be inferred from conduct showing a total disregard of human life.

If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with the other evidence in the case and you may give it the weight you decide it should receive. A specific

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intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury.

Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the Defendant and other circumstances from which you may naturally and reasonably infer intent.

Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injuries may be considered in determining the intent which the act was committed. Intent may also be inferred when it is demonstrated that the Defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life.

Now, ladies and gentlemen, if you find that the State has not proven that the Defendant is guilty of assault and battery with intent to kill with respect to that charge, the attempted murder, then -- if you find him not guilty of attempted murder, then you would consider the offense of assault and battery of a high and aggravated nature which is a lesser-included offense.

A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully

injures another person and great bodily injury to another person results or the act is accomplished by means likely to produce death or great bodily injury.

Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of a function of a bodily member or organ.

If you find that the State has not proven that the Defendant is guilty of assault and battery of a high and aggravated nature, then you would then consider the offense of assault and battery first degree.

A person commits the offense of assault and battery in the first degree if the person unlawfully injures another person and the act either -- and offers or attempts to injure another person with the present ability to do so and the act is either accomplished by means likely to produce death or great bodily injury.

Again, great bodily injury means bodily injury which causes substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

If you determine that the State has failed to prove the offense of assault and battery in the first degree, then you would consider the lesser-included offense of assault and battery second degree.

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A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person or offers or attempts to injure another person with the present ability to do so and either moderate bodily injury to another person results or moderate bodily injury to another person could have resulted.

Moderate bodily injury means physical injury requiring the treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body except when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a complex nature, or when the treatment of the injuries requires the use of regional or general anesthesia.

Now, ladies and gentlemen, the Defendant has also been charged with assault and battery second degree with respect to Joseph Molino, Gabriel McDaniel, and Scott Flemming.

As I told you, assault and battery in the second degree occurs when a person commits the offense of assault and battery in the second degree if that person unlawfully injures another person or offers or attempts to injure another person with the present ability to do so, and either moderate bodily injury to another person results or

moderate bodily injury to another person could have resulted.

Moderate bodily injury means physical injury requiring the treatment to an organ system of the body other than the skin, muscles, and connective tissue to the body except when there is penetration of the skin, muscles, and connective tissue that require surgical repair of a complex nature or when the treatment of the injury requires use of regional or general anesthesia.

If you find the State has failed to prove the Defendant guilty on those three charges -- on any of those three charges of assault and battery in the second degree, then you would then consider the assault and battery in the third degree.

Assault and battery in the third degree occurs when a person commits an offense of assault and battery if the person unlawfully injures another person or offers or attempts to injure another person with the present ability to do so.

The Defendant has also been charged with the offense of carrying a concealed weapon. The State must prove beyond a reasonable doubt that the Defendant carried a concealed weapon on his person. A deadly weapon is usually used for the infliction of person injury.

For the purpose of this crime a deadly weapon is a

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firearm, a knife with a blade over two inches long, a blackjack, a metal pipe or a pole, or any other type of object which may be used to cause bodily injury or death. However, a deadly weapon does not include a rifle or a shotgun or a dirk, a slingshot, metal knuckles, or a razor, unless it is used with the intent to commit a crime or in furtherance of a crime.

Now, ladies and gentlemen, I charge you that voluntary intoxication is never an excuse or a defense to a crime, whether there is general intent or specific intent. A person who voluntarily renders himself intoxicated is no less responsible for his acts while in such a condition. If a person voluntarily drinks intoxicating liquors or ingests something that makes him intoxicated and therefore becomes intoxicated and while in that condition commits an act which would be a crime if it had been committed by a sober person, the fact of the drunkenness or intoxication would not relieve the intoxicated person from responsibility. Voluntary intoxication is not an excuse for or a defense to a crime.

Madam Forelady and members of the jury, you have been selected as fair and impartial jurors sworn to impartially try and determine the facts of this case. And when you comply with your oath to so then no one will have

a right to criticize your verdict and you will have fully discharged your duty as a juror.

You are to decide this case according to the testimony that you have heard from the lips of the sworn witnesses along with other evidence which has been introduced.

I charge you that as jurors you must decide the issues in this proceeding without bias and without prejudice to any party. You cannot allow yourself to be governed by sympathy, by prejudice, by passion, or by public opinion or any other arbitrary factor.

Both the State and the Defendant have a right to expect that each of you will carefully and impartially consider all of the evidence in this case and that you will follow the law as I have explained it to you.

Now, Madam Forelady, I have prepared five verdict forms here, one for each of the offenses for which he is charged. Now some of these verdict forms include a number of potential verdicts that you could reach.

As to Indictment 2014-GS-40-1777, the attempted murder charge, the possible verdicts that you can reach are: Attempted murder; or the lesser included offense of assault and battery of a high and aggravated nature; or the lesser-included offense of assault and battery in the first degree; or the lesser-included offense of assault

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and battery in the second degree; or not guilty.

Now you are going to have to consider, ladies and gentlemen, what, if any, of these offenses you might consider this Defendant guilty.

Your verdict has to be a unanimous verdict. It has to be the unanimous verdict of all 12 jurors as to whatever offense you believe the Defendant is guilty of, or if you believe the Defendant is not guilty of that specific offense.

Once you have determined what offense you believe he may be guilty of or if he is not guilty, I'm going to ask you, Madam Forelady, to initial the line right by that verdict, and I'm going to ask you to circle that verdict, the whole verdict, whatever it is.

I'm then going to ask you to sign the verdict form as Foreperson and then date the verdict form. As I said, your verdict has to be unanimous. It cannot be eleven-one, or nine-three. It has to be the unanimous verdict of all 12 jurors.

Now as to the three indictments for assault and battery in the second degree, there are three possible verdicts you can reach on each one of those as to each of the individuals who was allegedly assaulted and battered. Those are: We, the jury, unanimously find the Defendant guilty of assault and battery in the second degree; or we,

the jury, unanimously find the Defendant guilty of the lesser-included offense of assault and battery in the third degree; or we, the jury, unanimously find the Defendant not guilty.

Now with respect to each one of these indictments you're going to have to decide it separately and then you're going to have to make a decision. And your verdict, again, has to be unanimous. Again, Madam Forelady, when you have reached your verdict, I'm going to, as to each one of the charges, ask you to initial the line right by the verdict and then to circle the verdict completely. Again, sign the verdict form, date the verdict form.

And finally the last indictment, carrying a concealed weapon, has two possible verdicts. And those verdicts are: We, the jury, unanimously find the Defendant guilty of carrying a concealed weapon; or we, the jury, unanimously find the Defendant not guilty.

Again, your verdict has to be the unanimous verdict of all 12 jurors. And I'm going to ask you to initial the line right by the verdict and to circle the complete verdict, to sign the verdict form and date the verdict form.

Now, Madam Forelady, when you have reached a verdict as to all of the five indictments and your verdict

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form has been completed if you or someone else will knock on the door, there will be a bailiff seated outside, if you will advise the bailiff that you have reached a verdict as to all of the indictments, we will then bring you back in so that your verdicts can be published.

Now, there has been video played throughout the course of this trial and that video we are going to make accessible to you. We can do it one of two ways. I think we made arrangements for a computer to be available to put the -- is it a CD?

MR. SHALABI: Flash drive.

THE COURT: -- flash drive in. And maybe somebody knows how to operate that. If not we'll get somebody to show you, but with all of these teachers and professors I know we're not going to have any problem in that regard unless you taught in a law school. If you taught in a law school you might not know how.

But we will make that available and if you then want to see something on the big screen, we can make that available to you. We can have you brought back into the jury room (verbatim) and let that be played, that portion or whatever it is that you want to see. All you need to do is let us know.

In just a second I'm going to ask all of you but the alternates, the alternates will stay with me here for

a few minutes, to step back to the jury room but do not begin your deliberations.

And the reason I ask you to do that, I have to review with these attorneys the instructions that I just gave you. If they believe that I failed to instruct you in some way or that additional instructions are necessary and that I agree with them, then I will bring you back immediately and give you those instructions.

If not, no further instructions are necessary and I will have the bailiff bring to the jury room all of the exhibits that have been introduced in this case as well as all of the verdict forms and, I guess, the computer -- who's got the computer?

MR. SHALABI: It's down here, Judge.

THE COURT: All right. -- the computer and the flash drive. And you can begin your deliberations at that time.

As you know, we have ordered lunch and asked the people to go get it. And I think I was told they were going to leave about 20 till 12 and should be back hopefully by 12. When you get your lunch, you can stop and eat or you can eat and deliberate, whatever you're most comfortable doing.

So, if you will step back in the jury room at this time, my alternates to stay here. Do not begin your

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deliberations.

(Jury exits courtroom at 11:31 A.M.)

THE COURT: All right. Mr. Grant and Ms. Lambright, first I want to thank you for your service. Apparently all your colleagues survived the process and the ordeal and they're going to be able to go forward with the deliberations.

Oftentimes when we have cases that go several days and nights we lose a juror or two and that's why we took the precautions of having two alternates in this case. So I'm going to be able to turn you loose. Now you have lunch that's coming as well and we would be happy for you to wait and pick up your lunch. You can take it with you, you can eat it here or whatever you need to do.

And when I say we're going to turn you loose, we're going to turn you loose for the week as well. I don't know how you feel about not being able to participate in the process. Some jurors say, "Well, I spent all that time, I'd like to make a decision." And some jurors are so happy they don't have to make a decision.

But we do appreciate your willingness to make yourself available this week and I hope you realize how important you are to the whole process. And if you get an opportunity in the future to come back that you certainly will make yourself available.

So you if you need an excuse for work Ms. Pendergrass, wherever she might be --

MS. ZMROCZEK: I think she was coordinating the lunch, Your Honor.

THE COURT: We can get that for you. You will be getting a small token of appreciation from the citizens of Richland County for your services but do not plan a big weekend on what you get but we do thank you very much.

If you want to wait for your lunch just let the bailiff know and it should be here momentarily. You can certainly leave and come back and get it. You don't have to sit around and wait. If you want to stroll around and do whatever and come back, we'll be happy to have you do that.

Thank you again, and if you go with Mr. Dye. Y'all have a nice remaining portion of the week.

(Alternates exit courtroom.)

THE COURT: All right. Anything from the State with respect to the --

MS. CAMPBELL: Your Honor, as far as the charge the only thing is I thought we were in chambers yesterday and you said you would charge State versus Darby on reasonable doubt.

THE COURT: I don't know what State versus Darby --

MS. CAMPBELL: It would just be this language and

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that would be all we have.

THE COURT: Firmly convinced.

MS. CAMPBELL: Firmly convinced.

THE COURT: I charged that.

MS. CAMPBELL: I think all you said was that you have to be firmly convinced. But you didn't charge that there are very few things we know with absolute certainty.

THE COURT: Firmly convinced, what I thought you asked me.

MS. ZMROCZEK: We object.

MS. CAMPBELL: Your Honor, I believe we got instructions as far as the video the defense counsel has seen with the Court's approval.

THE COURT: Those are instructions as to what?

MS. CAMPBELL: How to use the video.

THE COURT: All right.

MS. CAMPBELL: If you want to see it. She's seen it.

THE COURT: Did you show that to defense counsel?

MS. ZMROCZEK: They e-mailed it to me last night. I'm sure it's the same thing.

THE COURT: They probably changed it.

MS. ZMROCZEK: Yeah.

MS. CAMPBELL: Just because there is a program, an installation program on there or something

THE COURT: Mr. Dye?

THE BAILIFF: Yes, sir.

THE COURT: We're going to give you this computer and these instructions to go with it. If you will give it to the Forelady and tell her these are the instructions. If they have a problem to let the Court know and we will rectify that problem.

THE BAILIFF: Yes, Your Honor.

THE COURT: And again if they want to see something on the big video to let us know that as well.

THE BAILIFF: Yes, Your Honor.

THE COURT: All right. Anything from the defense as to --

MS. ZMROCZEK: We have no exceptions.

THE COURT: -- the charge given?

MS. ZMROCZEK: No, none, Your Honor.

THE COURT: Let's gather it all up with Ms. Young.

(Off-the-record discussion. Attorneys reviewing exhibits.)

(Jury deliberations commence 11:40 A.M.)

(The trial resumed at 11:58 A.M.:)

THE COURT: I want to put on the record that your client understands this and you're doing this for strategic reasons and you think it will be helpful to clarify to the jury the differences between the respective

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charges.

MS. ZMROCZEK: (Nods head.)

(Defendant enters courtroom).

THE COURT: All right. Mr. Ard, I have gotten a note from the jury and I have spent a few minutes with the lawyers letting them know what the note says. And they have reached some sort of understanding and I want your client -- I mean, your lawyer to discuss it. They want a copy of the definitions of the charges. I normally don't give them my charge.

They want to get a copy of all the closing argument posters.

They want a list of the witnesses who testified.

It's my understanding that the lawyers are agreeable to give them all the poster boards which include the charges of the respective -- the elements of the respective offenses. So it wouldn't -- they would not get my charge.

They'll get, they're willing to give them the closing posters with, I think, some pictures. I don't know what Ms. Campbell had other than --

MS. CAMPBELL: I didn't have any pictures.

MS. ZMROCZEK: I believe the list of witnesses.

THE COURT: And a list of witnesses but I want you to discuss this with your lawyer. And ultimately you're

going to have to decide on your behalf whether you're agreeable to do that and I'm going to talk to you about it.

So I'll give you a few minutes to talk to your attorney. Okay?

THE DEFENDANT: Yes, sir, Your Honor.

(Pause.)

MS. ZMROCZEK: Your Honor, we've had a chance to discuss it.

THE COURT: All right. Mr. Ard, let me get you to stand and raise your right hand.

(Defendant placed under oath.)

THE COURT: Kaitlyn, would you show this to Mr. Ard and his attorney so he can see what the note is?

(Law clerk complies.)

MS. ZMROCZEK: Can we get a copy of the State's -- a definition of charge, can we get a copy of all the closing argument posters, and a list of all those that testified.

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Mr. Ard, normally in a trial the jury's entitled to whatever's been introduced into evidence which includes listening to any testimony, listening to my charge again, seeing any photographs, documents, anything like that that's been introduced.

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Things that are used for demonstrative purposes in closing arguments, a copy of the charge or poster boards that were used in the closing arguments, any lists, that's outside the -- any evidence introduced are not given to the jury and not required to be given to the jury but my position is that if all the parties agree to it, then we will do it.

And so the State would have to agree. And you and your attorney would have to agree and you've had a chance to talk to your lawyer about these items; is that correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Do you understand exactly what the jury has asked for?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: Are you in agreement with your attorney that these matters can be turned over to the jury for their use and review and in the course of their deliberations?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And this is a decision that you think will assist the jury in understanding the various elements of the different charges?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And this is a decision that y'all are

making, a strategic decision you're making in order to be helpful to you in your presentation of the case; is that correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: All right. And you're making this decision freely and voluntarily and after you've had the opportunity to consult with your attorney; is that correct?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: All right. Do you concur with your client?

MS. ZMROCZEK: I do agree with his decision and I've provided advice, and I believe that it's --

THE COURT: Y'all have agreed on whatever it is that's going to be submitted to the jury?

MS. CAMPBELL: Your Honor, the only concern I have is on her board on one of them, the definition of moderate injury is incorrect. I didn't get up and look at it during the thing but I would be concerned sending it back incorrectly.

THE COURT: I don't know what it says but the definition that I charged as to moderate bodily injury is the one that needs to -- if y'all have something that differs from what I charged.

MS. CAMPBELL: This is the same as what you

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charged.

THE COURT: Moderate bodily injury means physical injury requiring the treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body except when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a complex nature or when treatment of the injury requires the use of regional or general anesthesia.

Do you have something different from that?

MS. ZMROCZEK: It looks like the word except is not in there. I can either take this off or add it or.

THE COURT: That would be up to you.

MS. ZMROCZEK: I mean --

MS. CAMPBELL: Just take it off.

MS. ZMROCZEK: I can do that.

MS. CAMPBELL: Thank you, Your Honor. That's all Your Honor.

THE COURT: I'm going to bring the jury in and tell them that we're giving them these items that normally they're not part of the record and they wouldn't be entitled to them but with the consent of the parties and the Court we will give them to them.

And I'm going to tell them that I have not reviewed each of the charges that you have but if they're contrary to what I have charged them prior, then they need to

follow what I charged them.

MS. CAMPBELL: Yes, sir.

THE COURT: All right. Let's bring the jury in, if you will.

THE BAILIFF: Yes, sir.

(Jury enters courtroom at 12:07 P.M.)

(Court's Exhibit No. 3, note from jury, received into evidence.)

THE BAILIFF: Jury's seated, Your Honor.

THE COURT: All right. Madam Forelady, I've received your note. I assume it's your note. It's not signed --

THE FOREPERSON OF THE JURY: Oh.

THE COURT: -- but it's your note. And you asked three things: One, can we get a copy of the definitions of the charges; can we get all the closing argument posters; and can we get a list of all those that testified.

THE FOREPERSON OF THE JURY: Uh-huh.

THE COURT: Normally that would not be permitted because none of those things, they're not evidence in the case.

THE FOREPERSON OF THE JURY: Okay.

THE COURT: But in this instance after conferring with the attorneys and with their consent and with the

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consent of the Court, we are going to give you these items. The poster boards, some of the poster boards contain some of the various offenses for which you are considering.

But I want to tell you this: I have not personally reviewed all those poster boards. I've been assured by counsel for the State and for the Defendant that they comply with what I charged you, but if there's something there that is different from what I charged you then you are to take the law as I charged you and not as the poster board says.

Do y'all understand that?

THE JURY (COLLECTIVELY): Yes.

THE COURT: The other thing is these photographs and things like that which were used for demonstrative purposes, they're not in evidence but they have agreed that those can go back. The list is not something that's in evidence but you saw everybody that testified.

Of course if you want to hear my charge we can play it again on the tape recorder. If you want to hear any evidence we can play that as well.

But you are getting that with the consent of the attorneys. It's a little unusual that that occurs. But there are a number of things and I can see where it would be helpful to you in trying to distinguish the various

charges that exist with respect to each of the indictments.

So, if y'all will step back to the jury room. We will have the bailiff bring all of those poster boards and y'all can resume your deliberations as soon as you get back there.

Y'all gotten your lunch yet?

THE FOREPERSON OF THE JURY: No, sir.

THE COURT: Are y'all hungry?

THE FOREPERSON OF THE JURY: Oh, yeah.

(Jury exits courtroom at 12:11 P.M.)

THE COURT: I'm going to mark this as Court's Exhibit Number Three -- or it's already been marked.

And, Mr. Bailiff, if you will get these poster boards, these poster boards. What else? Who's got the list?

MS. ZMROCZEK: The list.

MS. CAMPBELL: It's on the boards.

THE COURT: All right. If you'll give them to Mr. Dye, he will ...

I want all of them to go in together, Mr. Dye. I want all of them to go in together. If you take those back, one of these folks will carry it back. We'll stand in recess until anything further happens.

(Deliberations resumed at 12:12 P.M. At 1:06 P.M.,

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the trial resumed:)

THE COURT: Do we have everybody here? All right.

As I have told the attorneys outside the courtroom, I received a note from the jury. And the first note said: "We would like to hear your recording of the charge to the jury. Is this possible?" Signed by Ms. Setzer.

Because y'all were at lunch and lunch had been delivered almost contemporaneously with my getting a note, I went to the jury and said, "Look, if you want to hear the charge it's going to take a little bit of time to find it and it's going to take time to hear it and lunch is here. So what I'm going to do is let y'all eat your lunch and then we'll bring in." Plus the lawyers had just left. Y'all -- I assume y'all had gone to get something to eat.

And they said okay and then one of them said, "Well, can we ask you a question?" And I said, "no, you can't do that." She said, "Well, we may not want to hear the whole thing." And I said, "well, if you know what you want to hear if you will write it down, then I will give it to the court reporter and we'll see if we can find it."

I then, after they had an opportunity to eat, I asked y'all to come down and as I think as the solicitors were walking up, they brought a second note to me. And it said: "Please re-read the attempted murder charge and

assault and battery of a high and aggravated nature."

So they have reduced what they -- the whole charge. So, I'm going to bring them out, Ms. Young has located on her equipment where those charges are, and confirm with them again that that's what they want to hear and we'll play that charge. And if that's sufficient for them, then we'll allow them to retire to the jury room again. If they want more we'll play whatever they want.

So, anything from the State with respect to the notes and what I did up to this point?

MS. CAMPBELL: No, sir.

THE COURT: Anything from the Defendant?

MS. ZMROCZEK: No, Your Honor.

THE COURT: All right. I will make these Court Exhibits Number Four and Number Five.

(Court's Exhibit Nos. 4 and 5, notes from jury, received into evidence.)

THE COURT: All right. Mr. Dye, if we can bring the jury in.

(Jury enters courtroom at 1:09 P.M.)

THE COURT: All right. Thank you, Madam Forelady. I have received both of your notes, and I have reviewed them with the attorneys and I just informed them a little bit that when I got your first note I went into the jury room because they weren't here and told y'all we were

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going to wait until you had an opportunity to eat because the food had just gotten here and they had gone to lunch and it would take a little bit of time to hear the charge.

And somebody indicated, well, maybe you could reduce what you wanted to hear. And I asked you to write down whatever it is you wanted to hear. And your note, the second note came just as the attorneys got here.

So, we have located it. It says: "Please re-read the attempted murder charge and assault and battery of a high and aggravated nature charge."

What I'm going to do is replay what my charge was before. And Ms. Young has located that on her computer, and we will play that. If you want to hear something after that, let me know that and we'll play whatever it is you want to hear.

So Madam Court Reporter, if you can.

(Portion of Judge's charge, page 414 line 15 through page 417 line 7 played for the jury.)

THE COURT: The next one would be assault and battery first degree. Did y'all want to hear that?

THE FOREPERSON OF THE JURY: (Shakes head.)

THE COURT: Okay.

I'm going to let y'all retire back to your jury room and resume your deliberations.

(Jury exits courtroom at 1:15 P.M.)

THE COURT: Anything from the State with respect to replaying the instructions?

MS. GARFIELD: No, sir.

THE COURT: Anything from the Defendant?

MS. ZMROCZEK: No, sir.

THE COURT: All right. We'll continue to wait.

(At 2:33 P.M., the trial resumed:)

THE COURT: All right. I just found out. I didn't know they had a verdict. Nobody told me that. So, we're waiting on Ms. Campbell; is that right?

MS. GARFIELD: I thought she was walking out of the door the same time I did.

(Pause.)

THE COURT: It's been reported that the jury's reached a verdict. Is the State ready to receive the verdict?

MS. GARFIELD: Yes, sir.

THE COURT: Defendant ready?

MS. ZMROCZEK: We're ready, Your Honor.

THE COURT: All right. Mr. Dye, if you can bring the jury in, please, sir.

THE BAILIFF: Yes, Your Honor.

(Jury enters courtroom at 2:40 P.M.)

THE COURT: All right. Madam Forelady, it's been

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reported that the jury has reached a verdict.

THE FOREPERSON OF THE JURY: Yes, sir.

THE COURT: Is that a unanimous verdict with respect to all five indictments; is that correct?

THE FOREPERSON OF THE JURY: Yes, sir.

THE COURT: If you would turn the verdict form over to the bailiff.

THE FOREPERSON OF THE JURY: (Complying.)

THE COURT: All right. Madam Clerk?

THE CLERK: The State of South Carolina, County of Richland versus Stewart Randall Ard, Indictment 2014-GS-40-1777, we, the jury, unanimously find the Defendant guilty of attempted murder. Signed by the Foreperson, Number 244, on June 25th, 2014.

Indictment 2014-GS-40-1766, we, the jury, unanimously find the Defendant guilty of assault and battery in the second degree. Signed by the Foreperson, Number 244, on June 25th, 2014.

Indictment 2014-GS-40-1767, we, the jury, unanimously find the Defendant guilty of assault and battery in the second degree. Signed by the Foreperson, Juror Number 244, on June 25th, 2014.

2014-GS-40-175, we, the jury, unanimously find the Defendant guilty of the lesser-included offense of assault and battery in the third degree. Signed by the

Foreperson, Number 244, June 25th, 2014.

And 2014-GS-40-1771, we, the jury, unanimously find the Defendant guilty of carrying a concealed weapon. Signed by the Foreperson, Number 244, on June 25th, 2014.

Madam Forelady, is this your verdict and the verdict of the entire jury?

THE FOREPERSON OF THE JURY: Yes, ma'am.

THE COURT: Thank you.

All right. Anything from the State with respect to the verdict from the jury?

MS. GARFIELD: No, sir.

THE COURT: Anything from the Defendant?

MS. ZMROCZEK: Your Honor, we would ask to poll the jury, please.

THE COURT: All right. Madam Clerk?

THE CLERK: Ladies and gentlemen of the jury, I'm going to call your number and ask you two questions related to your verdict. When I call your number just answer yes or no to both questions, please.

Number 244, was this your verdict?

THE FOREPERSON OF THE JURY: Yes.

THE CLERK: Is it still your verdict?

THE FOREPERSON OF THE JURY: Yes.

THE CLERK: 262, was this your verdict?

THE JUROR: Yes.

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THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 184, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 201, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 296, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 97, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 88, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 305, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?

THE JUROR: Yes.
THE CLERK: 198, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 140, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 109, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: 251, was this your verdict?
THE JUROR: Yes.
THE CLERK: Is it still your verdict?
THE JUROR: Yes.
THE CLERK: The jury's been polled, Your Honor.
THE COURT: All right. Anything further with respect to the jury?
MS. ZMROCZEK: Not with respect to the jury.
THE COURT: All right. Ladies and gentlemen of the jury, I thank you very much for your service in this case. These are tough cases and they require tough decisions by members of our community. But I certainly

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was appreciative of your attentiveness.

I'm going to ask you to step back to your jury room. If you need an excuse for work the clerk will -- do you have them with you now?

THE CLERK: Yes, sir.

THE COURT: We will give you those. If you'll wait just a minute, I want to come back and speak to you before you leave. That won't be but just a few minutes.

But I do hope you realize how important you are to the process having had a chance to sit on the jury this week. And, again, I thank you very much.

You are excused for the remaining portion of the week. And the good thing, you don't have to do it this year and actually you wouldn't have to do it again in '15 or '16 if you didn't want to, but if you get the opportunity I hope you will make yourself available.

So if you'll step back there, I'll see you in just a few minutes and thank you again.

(Jury exits courtroom at 2:45 P.M.)

THE COURT: All right. I guess you got to get some sentence sheets done and I would like to see the statute, that life-without-parole statute --

MS. GARFIELD: Yes, sir.

THE COURT: -- before we sentence. We will do any post-trial motions after I turn this jury loose, okay, and

before we sentence.

MS. ZMROCZEK: Okay.

THE COURT: All right. I want to go back to speak to them before they leave. I'll come -- y'all --

MS. CAMPBELL: You just want us to pull the life-without-parole statute?

THE COURT: Yeah, I want to look at it.

I'm going to have a motion that she filed, a motion that we have to deal with.

MS. CAMPBELL: Yes, sir.

THE COURT: And then I'm going to look at it. I'm not sure where -- I've got her motion right here. So all right.

MS. CAMPBELL: I'll go look that up, Judge.

THE COURT: Thank you. We'll stand in recess for just a few minutes.

(Pause from 2:47 P.M. until 2:53 P.M., and the trial resumed:)

THE COURT: Anything from the State?

MS. GARFIELD: (Shakes head.)

THE COURT: Anything from the Defendant?

MS. ZMROCZEK: Thank you, Your Honor.

Your Honor, first I'd like to make sure that I preserved my previous motions on the record including the one regarding the camera.

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THE COURT: The one regarding what?

MS. ZMROCZEK: The one regarding the cameras and the admissibility --

THE COURT: The camera.

MS. ZMROCZEK: -- of the cameras, the video.

THE COURT: Oh. The video.

MS. ZMROCZEK: Sorry. It's hard to hear me in here.

And, Your Honor, the other motion that we made is -- and you have a copy of it, I believe, in front of you is the motion to exclude --

THE COURT: I assume you're renewing all your motions that you had made previously --

MS. ZMROCZEK: Previously, yes.

THE COURT: -- that dealt with either pretrial, in-trial --

MS. ZMROCZEK: Yes, and pretrial.

THE COURT: -- renewing them based on the same arguments you made earlier?

MS. ZMROCZEK: (Nods head.)

THE COURT: I'm going to deny those based on the reasons I enumerated when I denied those motions.

MS. ZMROCZEK: Thank you.

THE COURT: Now you want to deal with your --

MS. ZMROCZEK: Deal with the motion that we filed.

Yes, Your Honor.

THE COURT: Motion on the life without parole.

MS. ZMROCZEK: Right. It's the Defendant's motion to exclude the penalty of life without parole on account of arbitrary use of prosecutorial discretion in the plea bargaining system.

Your Honor, there is no -- and the motion speaks for itself and I would like to make it a Court Exhibit for the record.

But basically, Your Honor, we feel like that it's -- the sentence is one that's used arbitrarily. And recently in the last year in the United States Supreme Court, State V Miller, the discussion of the arbitrariness and the wide discretion given to prosecutors especially when such severe penalties, Your Honor, I would argue makes it a violation of the Eighth Amendment. We would ask that that penalty be excluded for this case and he be sentenced on what the charge actually carries.

THE COURT: Anything further?

MS. ZMROCZEK: Nothing, Your Honor. I wanted to make sure I made that a Court Exhibit.

Thank you.

(Court's Exhibit No. 6, Defendant's motion, received into evidence.)

THE COURT: Anything from the State?

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MS. GARFIELD: Judge, the State did exercise its discretion in seeking life without parole against Mr. Ard. This was a made -- a decision made if we went to trial. Mr. Ard was given several options to plead.

Judge, I would like to make part of the Court's Exhibit the notice that we provided to Mr. Ard informing him we'd be seeking life without parole as well as three prior certified convictions that make it where we can impose such sentence. One being an indictment from the County of Aiken, Indictment Number 95-GS-02-1089 for a conviction of armed robbery. Another in the County of Lexington, Indictment Number 94-GS-32-2745, again for an armed robbery conviction. And lastly 94-GS-32-2745, again, a conviction for armed robbery out of Lexington County.

THE COURT: So he's got three armed robberies?

MS. GARFIELD: Yes, sir.

THE COURT: Anything else that would qualify? Just those three?

MS. GARFIELD: No, sir. He had a prior assault and battery with intent to kill that was pled down to common law ABHAN. He does have other convictions but nothing that triggers life without parole.

THE COURT: The armed robberies are most serious; right?

MS. GARFIELD: Yes, sir.

THE COURT: And under the statute it's two or more most serious?

MS. CAMPBELL: One.

MS. GARFIELD: One, just one.

THE COURT: One. All right.

(Court's Exhibit No. 7, State's notice to seek LWOP and supporting certified convictions, received into evidence.)

THE COURT: You don't have anything to say about her motion?

MS. GARFIELD: No, sir. I mean, we don't believe it was arbitrary. It's what the law provides. We believe he's a career criminal. We believe it's correct.

THE COURT: I have read your motion. I read it pretrial, Counselor, and I knew that the possibility existed that your client could conceivably be convicted of one of these offenses.

I'm going to deny your motion. I think the law clearly provides that the State has the ability to seek life without parole so long as it gives appropriate notice. I've not seen the notice other than what you've just told me, but apparently there's no issue with that or you would have raised that.

And I don't know of any basis that I would have to

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say that that's not an appropriate statute, can't be enforced and in violation of the Eighth Amendment. I'm going to deny your motion.

MS. ZMROCZEK: Thank you, Your Honor.

THE COURT: That does not speak to how I think about the law, but. All right.

Are we ready to go?

MS. GARFIELD: Yes, sir. I did provide you Court's Exhibits up there, the prior convictions and the notice.

THE COURT: Is that this?

MS. ZMROCZEK: And, sir. We didn't have issues with those, Your Honor.

MS. GARFIELD: And copies --

THE COURT: I didn't know you put them up there.

MS. GARFIELD: Oh, I'm sorry. Yes, sir. And copies were provided to Ms. Zmroczek previously.

THE COURT: All right. Well, she's not raising that. She's not raising the fact that he had prior convictions.

MS. ZMROCZEK: No, I'm not contesting that.

THE COURT: She doesn't like the law and thinks there's a constitutional basis that it should not be enforceable. We'll let another court review that issue if that happens.

All right. Did y'all have a chance to look at that

concealed weapon charge of --

MS. GARFIELD: Ninety days, Your Honor.

THE COURT: Ninety days? Do y'all know which one of the indictments was the assault and battery third?

MS. GARFIELD: The one against Joe Molino.

THE COURT: Mr. Molino was third. And that's 90 days as well.

MS. CAMPBELL: Your Honor, can I hand up the verdict forms?

MS. ZMROCZEK: It carries 30 days.

THE COURT: I'm sorry. All right.

Y'all ready to -- step up here.

(Off-the-record discussion.)

THE COURT: Okay. Is the State ready?

MS. GARFIELD: Yes, sir. And just in addition to the prior three armed robbery convictions, Mr. Ard also has a conviction from 1993 for simple possession of marijuana; 1993, unlawful possession of a pistol, disorderly conduct, disobeying a police officer.

In 1995, in addition to his armed robbery conviction, he was also convicted of four counts of criminal conspiracy. It appears to be three counts of burglary in the second degree.

In 2005, he pled to assault and battery of a high and aggravated nature reduced from assault and battery

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with intent to kill.

That's the extent of his record, Your Honor.

The victims in this case have elected -- since they know the sentences will be imposed, they do not wish to address the Court.

THE COURT: Nobody wants to say anything?

MS. GARFIELD: That's correct.

THE COURT: All right. Yes, ma'am?

MS. ZMROCZEK: Thank you, Your Honor.

Mr. Ard stands before you and I understand that you denied my LWOP motion, Your Honor, but he has completed two major programs while he's been in for a year over in Alvin S. Glenn. One of those was Turning Leaf. They had a big graduation. It's a very intensive program, Your Honor, where they address issues of anger and dealing with appropriate situations especially with people who grew up in broken homes, Your Honor.

And, of course, Your Honor, none of his behavior is an excuse. And he, again, turned himself in. He mitigated everything that he could do after his very poor choice.

Your Honor, he has a wife who is here today and she does not wish to speak. He has a daughter and a son who he has not met. He's actually seen one time, just because he's been locked up since the child was born.

And, Your Honor, we would -- we understand that the Court's bound by what the statute is, but we'd, again, just reiterate how he is a good candidate for rehabilitation. We would ask that he receive some sort of psychological treatment or some sort of ordered mental health treatment while he's in since he's going to be there.

THE COURT: I don't know what authority I have to order that, unless he's determined to have some sort of mental-health issues.

Anything you want to say, Mr. Ard?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: Apparently you've had a troubled adult life. You've gotten yourself in trouble for the last 20-plus years.

THE DEFENDANT: Well, not the last seven years two months.

THE COURT: Well since 1993 you've had a difficult time. For some reason you went out that night and did something that could have really taken the life of one or more people. And, I don't know what possessed you to do that.

One thing to go out and get angry but to pull out a knife and take it and start sticking people, just absolutely no reason that something like that happens

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especially -- how old you are?

THE DEFENDANT: Thirty-nine.

THE COURT: All right.

Mr. Ard, AS TO INDICTMENT 2014-GS-40-1777, the attempted murder, THE SENTENCE OF THIS COURT: YOU BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS FOR A TERM OF LIFE WITHOUT PAROLE PER 17-25-40 OF THE CODE OF LAWS OF SOUTH CAROLINA, PLUS COSTS AND ASSESSMENTS.

AS TO 2014-GS-40-1776, this relates to Mr. Flemming, THE SENTENCE OF THE COURT: YOU BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS FOR A TERM OF THREE YEARS PLUS COSTS AND ASSESSMENTS AS APPLICABLE. THAT'S TO RUN CONSECUTIVE TO THE SENTENCE ON YOUR ATTEMPTED MURDER.

ON 2014-GS-40-1767, ASSAULT AND BATTERY SECOND, with Mr. Garfield, (verbatim) SENTENCE OF THIS COURT: YOU BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS FOR A TERM OF THREE YEARS PLUS COSTS AND ASSESSMENTS AS APPLICABLE. THAT WILL RUN CONCURRENT TO YOUR OTHER SENTENCES.

ON 2014-GS-40-1771, CARRYING A CONCEALED WEAPON, SENTENCE OF THIS COURT: YOU BE COMMITTED TO THE COUNTY DETENTION CENTER FOR A TERM OF 90 DAYS, GIVING YOU CREDIT FOR THE TIME SERVED. THAT SENTENCE IS COMPLETED.

ON 2014-GS-40-1756, ASSAULT AND BATTERY THIRD, THE SENTENCE OF THIS COURT: YOU BE COMMITTED TO THE COUNTY DETENTION CENTER FOR A TERM OF 30 DAYS PLUS COSTS AND

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ASSESSMENTS AS APPLICABLE. I'LL GIVE YOU CREDIT FOR TIME SERVED ON THAT. Good luck to you.

END OF CASE: 3:14 P.M.

CERTIFICATE OF REPORTER

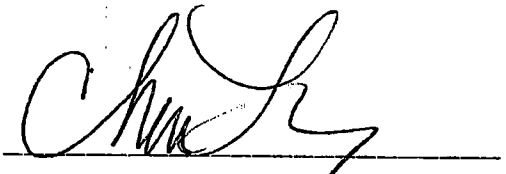
STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing proceedings were written stenographically by me using computer-aided translation; further, that the foregoing is a true, accurate and complete record, to the best of my skill and ability, of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, on the 23rd, 24th and 25th days of June, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

I have hereunder set my hand this Friday, the 7th day of November, 2014.



Cheri L. Young, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWARD RANDALL ARD,

APPELLANT

APPELLATE CASE NO. 2014-001463

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether appellant's due process rights and right to a jury trial under the federal and state constitutions were violated when the solicitor threatened appellant with increased charges and a mandatory life without parole sentence if he did not accept a plea offer?

STATEMENT OF THE CASE

Appellant was originally charged with four counts of assault and battery by mob, second degree. R. 468. On April 9, 2014, a Richland County grand jury indicted appellant for attempted murder, three counts of second-degree assault and battery, and carrying a concealed weapon. R. 468. On June 23, 2014, appellant was tried before the Honorable James R. Barber, III. R. 1. Luck Campbell, Dolly Justice Garfield, and Ramie Shalabi represented the State. R. 1. Aimee J. Zmroczek and M. Wade Dowtin represented appellant. R. 1. The jury convicted appellant as charged, except found him guilty of the lesser included offense of third-degree assault and battery for one of the counts. R. 442, l. 10 – 443, l. 7. Judge Barber sentenced appellant to mandatory life in prison without parole pursuant to South Carolina's recidivist statute for attempted murder, a consecutive term of three years' imprisonment for second-degree assault and battery, and concurrent terms of three years' imprisonment for the other second-degree assault and battery, ninety days' imprisonment for carrying a concealed weapon, and thirty days' imprisonment for third-degree assault and battery. R. 456, l. 4 – 457, l. 2. This appeal follows.

ARGUMENT

Appellant's due process rights and right to a jury trial under the federal and state constitutions were violated when the solicitor threatened appellant with increased charges and a mandatory life without parole sentence if he did not accept a plea offer.

This case arises from a bar fight in the Five Points area of Columbia. Appellant and three friends were at the bar Group Therapy when one of appellant's friends punched a wall. R. 90, l. 12 – 91, l. 8. A bouncer asked them to leave. R. 91, ll. 2 – 15. Words were exchanged and the bouncers "escorted them out of the bar." R. 91, ll. 2 – 15. Two bouncers assisted the original bouncer. R. 91, ll. 12- 15.

One of the bouncers pushed one of appellant's friends. R. 134, l. 17 – 135, l. 17. On cross-examination, this bouncer admitted that appellant tried to convince his friends to leave peacefully and was not pushing or shoving. R. 134, l. 3 – 135, l. 17. Appellant and his friends left. R. 120, ll. 12 – 20.

Jesse Patterson ("Patterson") was the bouncer working the door to the bar. R. 213, ll. 2 – 9. He claimed that appellant threatened him as they left. R. 217, ll. 3 – 7. Later that evening, Patterson was outside the door talking to the bar's owner when he heard screaming behind him, turned, and saw appellant's co-defendant running at him and throwing punches. R. 219, l. 15 – 220, l. 18.

During the course of this altercation, appellant stabbed Patterson and the bar's owner with a knife. R. 220, ll. 7 – 18. R. 260, l. 2 – 261, l. 10. Cameras both inside and outside the bar captured some of the fight. R. 224, l. 6 – 235, l. 18. The State charged appellant with attempted murder for the stabbing of Patterson and three counts of assault related to the bar's owner and two other bouncers who gave chase immediately following the fight, but

received no injuries. R. 458. In her opening statement, appellant's attorney admitted appellant was guilty of second-degree assault and battery with respect to Patterson, but denied he was guilty of attempted murder. R. 70, l. 25 – 71, l. 19. Appellant's attorney also admitted guilt as to second-degree assault and battery as to the bar's owner and third-degree assault and battery as to the other two bouncers. R. 70, l. 25 – 71, l. 19. In closing, appellant argued he lacked malice or intent to kill Patterson.[1] R. 402, l. 1 – 406, l. 12.

Prior to trial, appellant moved to quash the indictments and exclude life without parole ("LWOP") under South Carolina's recidivist statute as a possible sentence. R. 10, l. 10 – 14, l. 19. R. 473. The trial judge denied the motion to quash the indictments and stated he would hear argument on LWOP if appellant was convicted. R. 10, l. 10 – 14, l. 25. The motion was based on the fact that appellant's charge was upgraded from second-degree assault and battery by mob to attempted murder in an effort to force appellant to plead guilty because of the threat of LWOP. R. 473. R. 10, l. 10 – 14, l. 19. During the pretrial argument, the solicitor claimed that she increased the charges after reviewing the case, but admitted that she offered appellant a chance "to take advantage of the plea as charged" before she sought new indictments. R. 12, l. 14 – 13, l.

During the argument on LWOP after the guilty verdict, the State basically admitted that its decision to seek LWOP was because appellant exercised his right to a jury trial. The solicitor stated, "Judge, the State did exercise its discretion in seeking life without parole

[1] Should this Court elect to disregard its error preservation rules in favor of judicial economy, it should address the erroneous jury charge given by the trial court. When explaining attempted murder, the trial judge told the jury, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." R. 415, l. 25 – 416, l. 3. This charge is error. State v. King, No. 5513, ___ S.C. ___, ___ S.E.2d ___ (Ct. App. April 22, 2015).

against Mr. Ard. This was a made—**a decision made if we went to trial. Mr. Ard was given several options to plead.**" R. 450, ll. 1 – 5 (emphasis added).

The right of a criminal defendant to a jury trial is perhaps the most fundamental principle of our nation's criminal justice system. U.S. Const. amend. VI. "The right of trial by jury shall be preserved inviolate." S.C. Const. art. I., § 14. While a solicitor has discretion in making a charging decision, the decision may not be made vindictively. See Bordenkircher v. Hayes, 434 U.S. 357, 367-68 ("Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect.") Blackmun, J., dissenting.

Appellant is constrained to acknowledge the holding of the majority in Bordenkircher that a prosecutor may threaten increased charges to induce a guilty plea. Id. at 364-65. However, Bordenkircher was a 5-4 decision and even the majority acknowledged that the Constitution places limits on prosecutorial discretion. Id. Bordenkircher was also decided in 1977 and recent United States Supreme Court precedent shows greater emphasis on examining the plea bargaining process. See Lafler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Frye, 132 S.Ct. 1399 (2012). The Court is also more hostile to mandatory LWOP. Miller v. Alabama, 132 S.Ct. 2455 (2012). Considering these more recent precedents and the increasing arbitrary use of the threat of LWOP in plea negotiations, it is likely that Bordenkircher would be decided differently today.

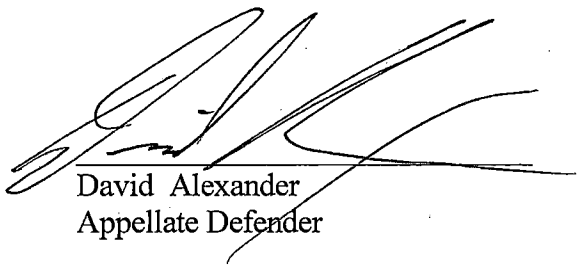
Furthermore, this Court should also recognize that the South Carolina Constitution places a greater emphasis on the right to a jury trial than the federal constitution. Our Constitution states that the "right to a jury trial shall be preserved inviolate." S.C. Const. art. I., § 14. This language, which is additional to what is contained in the Sixth Amendment,

shows that South Carolina is more protective of the right to a jury trial than the federal courts. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) (holding that additional language in South Carolina Constitution meant that it provided greater protections of South Carolinians' rights against illegal searches and seizures than the Fourth Amendment). Therefore, under the South Carolina Constitution, a solicitor may not use LWOP to penalize a criminal defendant's exercise of his right to a jury trial. Appellant's sentence should be reversed.

CONCLUSION

For the foregoing reasons, appellant's sentence should be reversed and this case remanded for resentencing without the possibility of an LWOP sentence.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWARD RANDALL ARD,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Stewart Ard states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge James R. Barber, III, which was held on June 25, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Stewart Ard.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWARD RANDALL ARD,

APPELLANT

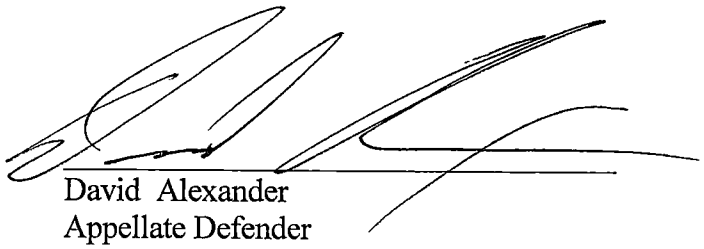
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Trial transcript;
(3) Arrest Warrants;
(4) Motion to Exclude Penalty of Life Imprisonment Without Possibility of Parole.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 15th, 2015



David Alexander
Appellate Defender

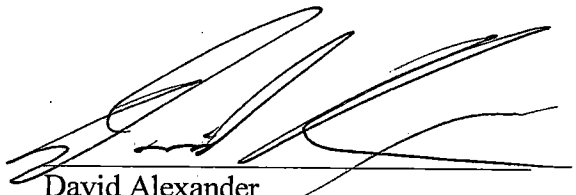
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 15th, 2015



David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWARD RANDALL ARD,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Stewart Ard, #217645 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 13th day of May, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of May, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

RECEIVED
JUL 22 2015
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEWART RANDALL ARD,

APPELLANT.

APPELLATE CASE NO. 2014-001463

ANDERS PRO SE RESPONSE

STEWART RANDALL ARD, APPELLANT
Lee Correctional Institution
990 Wisacky Hwy
Bishopville, S.C. 29010

DAVID ALEXANDER
ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether Appellants due process rights and constitutional right to a jury trial under the United States and South Carolina Constitutions were violated when the Solicitor threatened Appellant with a life without parole sentence if Appellant refused to cooperate and accept the guilty plea offer made by the Solicitor.

2. Whether the trial court committed error in denying the motion for mistrial by the defense.

3. Whether the trial judge erred in denying the defense motion for a directed verdict on all of the assault and battery charges.

4. Whether the trial judge gave an erroneous jury charge regarding the upgraded indictment for attempted murder.

STATEMENT OF THE CASE

Appellant was originally charged with four counts of assault and battery by mob, second degree. On April 9, 2014, Appellant was indicted by a Richland County Grand Jury for attempted murder, three counts of assault and battery in the second degree, and carrying a concealed weapon. Appellant stood trial as charged on June 23, 2014 before Judge James R. Barber, III. Luck Campbell, Dolly Garfield, and Ramie Shalabi represented the State. Attorneys Aimee Zmroczek and Wade Dowtin represented Appellant. The jury returned a guilty verdict on all charges except one, and found Appellant guilty of the lesser included offense of assault and battery third degree on one of the counts. Appellant was sentenced to mandatory life without the possibility of parole for attempted murder under the recidivist statute, with three years consecutive for assault and battery second degree, concurrent three year terms for the remaining assault and battery charges, ninety days for carrying a concealed weapon, and thirty days for assault and battery third degree. Appellate Defender David Alexander filed an ANDERS BRIEF OF APPELLANT, and this Court granted Appellant until July, 2015 to file an ANDERS PRO SE RESPONSE. The PRO SE RESPONSE follows.

APPELLANTS ARGUMENT IN RESPONSE

Appellants due process rights and constitutional right to a jury trial under the United States and South Carolina Constitutuions were violated when the Solicitor threatened Appellant with a life without parole sentence **if** Appellant refused to accept the guilty plea offer made by Solicitor.

Appellant states the claim that his due process rights and constitutional right to a jury trial were violated **at the moment** Solicitor first threatened Appellant with the life without parole sentence IF APPELLANT REFUSED TO ACCEPT HER OFFER. The Solicitor unjustly and unethically conjoined the plea offer with the threat of enhanced charges that would result in a life without parole sentence **if** Appellant refused. Appellant properly assessed the situation, gave due consideration to the legal ramifications of the attempted murder charge, and concluded that the 'either - or' guilty plea bargain was not a bargain at all, by reason that there was never any intent by Appellant to commit murder. Therefore, Appellant relied on his defense counsel and the integrity of the judicial creed of justice for all to extract the truth of Appellants assault and batteries, one of which inflicted serious bodily harm. However, the Solicitor also harbored a reliance, one that Appellant would succomb to the either or guilty plea offer, so that the Solicitors turnstyle of convictions would continue to spin. This manner of supplanting

convictions for justice, using the threat of severe penal enhancement in order to secure the guilty plea is contemptible, as well as constitutionally unsound. Both United States and South Carolina Constitutions confer guarantees and protections to ensure that Defendants may have their day in court **without** being pressured, threatened, coearced, or exposed to duress in any form, yet appellant was threatened outright by the Solicitor, and the Solicitors **admission of this** threat is documented by the record at trial transcript, p. 450, lines 1 - 5, where the Solicitor stated, "Judge, the State did exercise Its discretion in seeking life without parole against Mr. Ard. This was a made --- a decision made **IF WE WENT TO TRIAL**. MR. ARD WAS GIVEN SEVERAL OPTIONS TO PLEAD". This admission is transparent in showing the element of threat, and fully supports Appellants claim of a due process violation. The Solicitor literally used the cloak of authority to bring retaliation against Appellant for what the Solicitor perceived as Appellant 'disrupting' her continuous stream of courtroom convictions. In Bordenkircher v. Hayes, 434 U.S. 357, the Court handed down a ruling specifically relevant to the criminally accused Defendants that directed a Solicitor may not make a charging decision vindictively, as has occurred in this case. A Justice in Bordenkircher, in a dissenting opinion, stated that the Due Process Clause "ought to protect against prosecutorial vindictiveness". Appellant seeks this Court will find the principle applicable to the

present claim. SEE ALSO, Lafler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Frye, 132 S.CT. 1399 (2012); Miller v. Alabama, 132 S.Ct. 2455 (2012). In accord with the recent cases listed above, the South Carolina Constitution, under Article 1, ¶14, protects the criminal Defendant by the published declaration that the right of trial by jury shall be preserved inviolate. This is a resounding echo of the guarantee bestowed by the U.S.C.A. Sixth Amendment. SEE, State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), where it was held by this States highest Court that the language drafted in Article 1, ¶14 of the South Carolina Constitution provides greater protection of the right of South Carolinians than the U.S.C.A. Fourth Amendment, and THEREFORE, a Solicitor may not use a life without parole sentence to penalize [threaten] this Appellants exercise of his right to a jury trial, as was done by Appellant. While the procedural obligations of the Solicitors Office encompass every facet of prosecution in representation of the State, the Solicitor may not abuse discretionary authority by exceeding the limits placed upon that Office by the United States and South Carolina Constitutions. The record of the proceeding exposes that the Solicitor in this case crossed the threshhold of unethical conduct, and asks this Court to agree that the Solicitor abused her discretion when she threatened Appellant with the life without parole on at least two occassions.

The trial court committed error in denying the motion for mistrial by the defense.

In the testimony of State Witness Scott Flemming, trial transcript, p. 268, lines 4 - 7, defense counsel called the court to a matter of law regarding witnesses testimony alluding to Appellants previous bad character, resulting in a motion by defense for a mistrial. The trial judge excused the jury, took up the matter, and heard from the defense and the State. Defense moved for a mistrial based on the extremely prejudicial statement made before the jury by State Witness Flemming about Appellant saying he had been to prison. When questioned by the judge about instructions to the subpoenaed State Witnesses concerning their testimonies, it was revealed that the Solicitor had instructed all witnesses **except** State Witness Flemming. Solicitor offered the judge the paltry excuse of, "I thought I had spoken personally to Mr. Flemming", to which the judge returned, "Well, you did or you didn't", trial transcript, p. 269, l. 19. At the end of this investigation the judge erroneously denied the motion, failing to give sufficient weight to the tactical subterfuge employed by the Solicitor. The judge, by his response, obviously saw through the feigned apology of "I thought I had". After being called on her "forgetfulness", the Solicitor then used the manuever that she had verbally informed defense counsel that the witnesses were going to testify that Appellant was yelling he'd been to **jail**. Yet, at the end

of the colloquy the Solicitor agreed that she would instruct the witnesses "not to say that". The deeper, unspoken prejudice in this claim lies in the fact that Appellant was first heard to say he'd been to jail, and he didn't want to go back, trial transcript, p. 256, lines 18 - 20, which was revised, under examination of the Solicitor, to " . . . he had been to **prison** and he didn't want to go back, trial transcript, p. 270, lines 4, 5. Appellant states the claim that any juror of reasonable experience and understanding will make a very clear distinction in their thoughts about the difference between jail and prison. Without doubt many jurors have had experience with jail in some form, but it would be a safe estimation to state that virtually no jurists have experienced the devastation of prison life, and conceptualize PRISON as a presentiment of evil, dark and foreboding, and would also perceive anyone who has been there as having those dark elements. Appellant does not state, and neither believes, that the crux of his conviction hinged on the contrast of the words jail and prison, however, it can be stated accurately that the perception of the difference between the two words can be dramatic in the mind of a reasonable juror, and therein lies the basis for a claim of extreme prejudice. The Solicitor craftily assuaged the necessity for another hearing via a mistrial with the support of an erroneous denial of the motion for mistrial. The grant of a mistrial at that point in the proceding would have been legally correct, and the Solicitors

feeble attempt to justify a hidden motive to prejudice Appellant by inflaming the passion of the jury is reprehensible, unethical conduct. Appellant states the claim that a cause exists which shows the trial court to be in error for denying the defense motion for a mistrial. The conduct of the Solicitor supports Appellants first claim of vindictive prosecution, displaying openly that Solicitor was faking an 'oversight' in a trial of utmost importance, one which carried the second most serious penal consequence to Appellant - life without the possibility of parole - as compared with the most serious, the death sentence. Reality testifies loudly that the "I thought" scene played by the Solicitor was an impromptu effort to evade the harsh and embarrassing light of exposure, but the judge saw through the elementary school charade and called her on it. Unfortunately for Appellant the judge gave the Solicitor a window to crawl out, and allowed her to exit without a scratch. This Court should decide the merit and value of this claim in a light favorable to the Appellant. The court was properly moved for a mistrial and Appellant now seeks this Court will find that the lower court was in error for denying the motion.

The trial judge erred in denying the defense motion for a directed verdict on all of the assault and battery charges.

Defense counsel properly moved the trial court for a directed verdict on all the assault and battery charges, trial transcript, p. 363, l. 10, and explained for the court how the elements of each charge were applicable to the motion. The judge, in a somewhat rambling monologue, failed to answer each charge and element specifically. The judge also neglected to specifically deny the motion, only implying with the statement, " . . . but I think there's some evidence, and that's all there has to be". Appellant states the claim that he deserves more than "I think", assumptions, and suppositions based on whatever the solicitor decides, and justice demands that each and every aspect of a most important trial be attended to. The courtroom decorum between the judge and Solicitor, to the end of the hearing, was awash with undertones of southern justice from an earlier era, when civil rights were only hoped for. This is the twenty first century, yet it appears that the judicial system in South Carolina has chosen to remain in the past, as evidenced by the present case at bar, where an assault and battery of a high and aggravated nature has been inflated to the unrealistic proportion of attempted murder, with the imposition of a forever sentence in the presence of a non-homicide conviction. Prima facie the sentence does not equate to the offense; it is both illogical and unreasonable. An eye for an eye is Scriptural,

but even though Divinely Inspired, that Biblical principle is lacking in balance in this case. To impose a life without parole sentence for a bodily harm offense is ludicrous, at best. Justice decries equity, fairness, and impartiality. The U.S.C.A. Fifth Amendment guarantees that every accused person will receive a fair and impartial trial. Notwithstanding the procedural anomolies of Appellants proceeding, the evidence presented does **not** support the sentence served. Appellant states that this Court of review possesses the legislative authority to correct this grievous injustice and craft a remedy whereby the State may satisfy the penalty for assault and battery with a sentence commensurate with the offense committed, and Appellant may have the opportunity for restoration of his constitutional right to liberty before he reaches the ultimate end in this world. For this corrective intervention does Appellant ever pray.

The trial judge gave an erroneous jury charge regarding the upgraded indictment for attempted murder.

In the trial transcript, p. 415, l. 25 thru p. 416, l. 3, the trial judge gave the following charge to the jury: "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." Appellant states that the judge erroneously charged the jury with this instruction, and such error was visited by this Court previously this year in the case of State v. King, NO. 5513, __S.C.__, __S.E.2d__ (Ct. App. April 22, 2015). Before giving this erroneous instruction to the jury the judge had already addressed the jury with the admonition, "You must accept as correct the law which I charge and apply it to the evidence as you find it and then reach your verdict." In State v. King, this Court held that the jury instruction given here is erroneous, and cannot stand the test of legal review. Therefore, Appellant asks this Court to find that the jury instruction was erroneous, and that the error was not harmless, but prejudicial to Appellant by and through the conviction that resulted in Appellant being sentenced to life without parole. The jury deliberations that produced the guilty verdict were infected with the erroneous charge, and as such Appellants protections, guarantees, and right to a fair and impartial trial under the U.S.C.A. Fifth Amendment was violated. Appellant asks this Court to agree, and reverse the conviction and sentence,

which was obtained through this violation.

C O N C L U S I O N

For the foregoing reasons given in Appellants Pro Se Response, the supporting case law, and United States and South Carolina Constitutional mandates cited, Appellant concludes that because of the cumulative errors committed in this case his conviction and sentence should be reversed, and his case remanded to the lower court for resentencing in a proceeding that does not include the option of a life without parole aentence.

Respectfully submitted,

Stewart Randall Ard, Appellant

This 20th day of July, 2015
Bishopville, S.C. 29010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUL 22 2015
SC Court of Appeals

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEWART RANDALL ARD,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned Appellant, Stewart Randall Ard, hereby certifies by his signature that a true copy of his ANDERS Pro Se Brief has been served upon Salley R. Elliot, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of July, 2015, deposited in U.S. mail, first class, postage prepaid, through the institutional mailroom at Lee Correctional Institution.

S/ _____

Stewart Randall Ard

July 20th, 2015

Stewart Randall Ard, 217645
Lee Correctional Institution
990 Wisacky Hwy
Bishopville, SC 29010

RECEIVED
JUL 22 2015
SC Court of Appeals

SOUTH CAROLINA COURT OF APPEALS
JENNY ABBOT KITCHINGS, CLERK
POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

Re: Case No. 2014-001463; Filing Of ANDERS
Pro Se Response

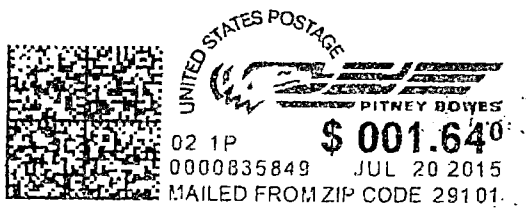
Dear Clerk,

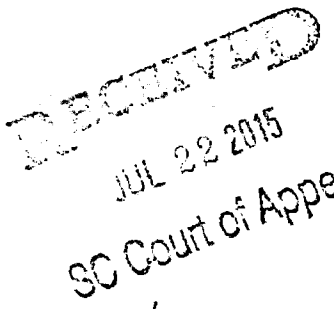
Enclosed please find for filing in your Court my ANDERS PRO SE RESPONSE, in accord with the ORDER filed in your Court, dated June 19, 2015, which granted your Appellant until July 30, 2015 to file this Response. Attached with the Pro Se Response is a CERTIFICATE OF SERVICE, showing proper and timely service of this Response upon the attorney for the State.

Will you please notify me by mail when the filing of this Pro Se Brief is complete? Thank you for your assistance in this appeal matter.

S/ Stewart Randall Ard
Stewart Randall Ard

X Ard #217645
rectional Institution
#1213
Sacky Hwy
ville, S.C. 29810





South Carolina Court of Appeals
Jenny Abbot Kitchings, Clerk
P.O. Box 11629
Columbia, S.C. 29211

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stewart Randall Ard, Appellant.

Appellate Case No. 2014-001463

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2016-UP-243
Submitted January 1, 2016 – Filed June 1, 2016

APPEAL DISMISSED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General John Benjamin Aplin, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.[1]

APPEAL DISMISSED.

HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

493

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Richland)

Stewart Randall Ard)
Plaintiff(s))
) CIVIL ACTION COVERSHEET
vs.) 2016 -CP- 40 - 6225

State of South Carolina)
Defendant(s))

Submitted By: E. Charles Grose, Jr. **SC Bar #:** 66063
Address: 404 Main Streeet, Greenwood, SC 29646 **Telephone #:** 864-538-4466
Fax #: 864-538-4405
Other:
E-mail: charles@groselawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

***If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

2016 OCT 19 PM 2:18
JEANETTE W. WALKER CLERK OF COURT RICHLAND COUNTY FILED

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** October 9, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2016-CP-40-_____
Stewart Randall Ard, SCDC #217645, Applicant,	)	
vs.	)	
State of South Carolina, Respondent.	)	

RICHLAND COUNTY FILED
2016 OCT 19 PM 2:18
JEANETTE W. McBRIDE C.C.P. & G.S.

The applicant, Stewart Randall Ard,[1] submits the following application for post-conviction relief:[2]

1) The place of detention is Lee Correctional Institution.

2) The Honorable James R. Barber, III, Court of General Sessions for Richland County imposed the sentences.

3) The co-defendants are Benjamin Geno and Jason Skaggs. Stephen Richardson was also involved in the incident, but the State did not charge him.

4) The State charged Mr. Ard with attempted Murder (Indictment No. 2014-GS-40-01777), three counts of second-degree assault and battery (Indictment No. 2014-GS-40-01756, 01766, 01767), and carrying a concealed weapon (Indictment No. 2014-GS-40-01771). The jurors convicted Mr. Ard as charged on all indictments, except Indictment No. 2014-GS-40-01756 where the jurors convicted him of the lesser-included offense of third-degree assault and battery.

---

[1] Mr. Ard's first name is spelled "Steward" on the Record on Appeal. The correct spelling is "Stewart."

[2] This pleading is based on SCRCPForm5, revised 3/2003, found on the South Carolina Judicial Department Website. Mr. Ard reserves the right to amend his application as provided by law.

5) Judge Barber imposed sentences on June 25, 2014. On Indictment No. 2014-GS-40-01777, for attempted murder, he sentenced Mr. Ard to life imprisonment without the possibility of parole. On Indictment No. 2014-GS-40-01776, for second-degree assault and battery, he sentenced Mr. Ard to three years to be served consecutively. On Indictment No. 2014-GS-40-1767, for second-degree assault and battery, he sentenced Mr. Ard to three years, to be served concurrent with his other sentences. On Indictment No. 2014-GS-40-01771, carrying a concealed weapon, he sentenced Mr. Ard to ninety days, with credit for time served for ninety days. On Indictment No. 2014-GS-40-01756, for third-degree assault and battery, he sentenced Mr. Ard to thirty days, with credit for time served for thirty days, plus coasts and assessments.

6) Judge Barber imposed the sentences following a plea of not guilty and a jury trial.

7) Mr. Ard appealed his convictions and sentences.

8) The South Carolina Court of Appeals affirmed the convictions and sentences on June 1, 2016. *State v. Ard*, (Ct. App. Unpublished Opinion No. 2016–UP–243) (Filed June 1, 2016). Westlaw Citation: *State v. Ard*, No. 2014-001463, 2016 WL 3093107 (S.C. Ct. App. June 1, 2016).

9) Not applicable because Mr. Ard appealed.

10) Grounds for Relief:

a) Mr. Ard was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during his jury trial.

b) Mr. Ard was denied the right to effective assistance of counsel—

guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during his appeal.

11) Supporting Facts:

a) Mr. Ard was denied effective assistance of counsel during his jury trial in the following manners:

(1) Trial counsel did not understand that attempted murder is a specific intent crime. S.C. Code Ann. § 16-3-29; *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) ("Attempted murder would require the specific intent to kill and conduct towards that end.). In South Carolina, attempt crimes are specific intent crimes. *E.g. State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime.") (citing *Sutton, supra*)). Mr. Ard was prejudiced because trial counsel's misunderstanding of the law influenced numerous acts and omissions during his jury trial.

(2) Trial counsel did not object to the trial court judge instructing the jurors, "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." Tr. 416, line 25 – 417, line 3. Mr. Ard was prejudiced because (1) this instruction deleted the specific intent requirement of attempted murder, (2) reduced attempted murder to the statutory offenses of assault and battery of a high and aggravated nature ("ABHAN") or first-degree assault and battery, S.C. Code Ann. § 16-3-600(B), and (3) prevented the jurors from considering lesser

included offenses of ABHAN and first-degree assault and battery.

(3) Trial counsel failed to object to the prosecutor arguing that attempted murder is a general intent crime and that the trial judge would instruct the jurors that specific intent is not an element of attempted murder. Tr. 374, line 5 – 377, line 2.

(4) Trial counsel failed to call witnesses that would have provided valuable testimony about the facts and circumstances of the underlying incident. Mr. Ard was prejudiced because these witnesses would have provided valuable information about Mr. Ard's state of mind, particularly as it related to the requirement that the prosecution prove specific intent to convict of attempted murder.

(5) Trial counsel advised Mr. Ard not to testify. Mr. Ard was prejudiced because his testimony would have provided valuable information about his state of mind, particularly as it related to the requirement that the prosecution prove specific intent to convict of attempted murder.

(6) Trial counsel advised Mr. Ard not to call character witnesses. Mr. Ard was prejudiced because these witnesses would have provided valuable information about Mr. Ard's state of mind, particularly as it related to the requirement that the prosecution prove specific intent to convict of attempted murder.

(7) Trial counsel failed to investigate, discover, and present evidence of video surveillance of the incident location from an angle different from the angle shown by the prosecution. In the alternative, trial counsel failed to call witnesses that had viewed video surveillance of the incident location from an angle different from the angle shown by the prosecution. Mr. Ard was prejudiced because the alternate angel was exculpatory evidence.

(8) Trial counsel failed to object to Courtney Walker testifying about saying a prayer for Jesse Patterson, the alleged victim of attempted murder. Mr. Ard was prejudiced because this testimony was not relevant, lacked any probative value, and highly prejudicial.

(9) Trial counsel failed to object to numerous witnesses—not qualified as to provide an expert opinion—testifying about Jesse Patterson, the alleged victim of attempted murder, having a collapsed lung. Mr. Ard was prejudiced because this testimony unfairly portrayed the injuries as more aggravated than they really were.

(10) Trial counsel failed to properly preserve for appeal the State presenting evidence that Mr. Ard had been to prison before an did not want to go back. Trial counsel failed to object to Scott Fleming testifying that Mr. Ard statement, "Well, I've been to jail. I don't want to go back." And Mr. Flemings response, "I said, 'Well, I don't want you to go back either.'" Tr. 256, lines 18-20. When the witnesses repeated this testimony, trial counsel also failed to preserve the mistrial motion. Tr. 268, line 4 – 272, line 3.

(11) Trial counsel failed to object to the prosecutor's closing argument asking the jurors to render a verdict that speaks the truth. Tr. 369, lines 6-9.

(12) Trial counsel failed to object to the trial judge entering the jury room during deliberations, tr. 438, line 2 – 439, line 13, which is structural error requiring a new trial. *E.g. State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1991).

b) Mr. Ard was denied effective assistance of counsel during his appeal in the following manners:

(1) In the alternative to 11(a)(10), appellate counsel failed to appeal the trial

court denying the motion for a mistrial after witness Scott Fleming testified that Mr. Ard had been to prison and did not want to go back. Tr. 268, line 4 – 272, line 3.

(2) Appellate counsel failed to appeal the trial court denying the motion to exclude the sentence of life without the possibility of parole based on arbitrary use of prosecutorial discretion. Tr. 448,line 24 – 452, line 4.

12) Prior to filing this application, Mr. Ard has not filed, with respect to these convictions and sentences, any application for post-conviction relief or *habeas corpus* in any state or federal court.

13) Not applicable because Mr. Ard did not answer "yes" to number 12 above.

14) None of the grounds set forth in number 10 above have been presented to any state or federal court.

15) Not applicable because Mr. Ard did not answer "yes" to number 14 above.

16) None of the grounds set forth in number 10 above have been presented to any state or federal court because this application is the first opportunity to present ineffective assistance of counsel.

17) Prior representation:

a) During the jury trial and sentencing, Aimee J. Zmroczek, A.J.Z. Law Firm, LLC, PO Box 11961, Columbia, SC 29211, represented Mr. Ard.

b) During the appeal, David Alexander, SC Commission on Indigent Defense, Appellate Division, 1330 Lady Street, Suite 401, P.O. Box 11489, Columbia, SC 29211, represented Mr. Ard.

c) Undersigned counsel assisted Mr. Ard in preparing this application for post-conviction relief.

18) Please see response to number 17 for the name and address of prior counsel.

19) Mr. Ard requests a new trial.

20) Mr. Ard is not under any sentence from any other court.

Respectfully Submitted,

By: 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for the Applicant Stewart Ard

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF LEE)

I, **Stewart Randall Ard,** 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.

Stewart Randall Ard

SWORN to and subscribed before me this
28th day of Sept, 2016.

(L.S.)
Notary Public

My Commission Expires: May 31, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE)
VS. Stewart Randall Ard)
AKA:)
Race: White Sex: Male Age:)
DOB: [redacted] SS#:)
Address:)
City, State, Zip:)
DL# * SID#)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014 -GS- 40 - 1766
A/W#: 2013A4021602617
Date of Offense: 7-28-13
S.C. Code §: 16-03-0600(A)1
CDR Code #: 3413

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: Assault & Battery - 2nd
In violation of § 16-03-0600(A)1 of the S.C. Code of Laws, bearing CDR Code # 3413
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:
D.J. Garfield — Solicitor; 13433 — SC Bar #; [signature] — Defendant; [signature] — Attorney for Defendant; 77193 — SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections** ☐ **County Detention Center,** for a determinate term of 3 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 6/25/14 2014-GS-40-1777
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** PTUP _____

Total: $ _____ plus 20% fee: _____ $ _____ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____ Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Recipient: _____ Substance Abuse Counseling ☐

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
§47.12 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$100	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§90.7(SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ Paid to Public Defender Fund

Other: _____

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation

Clerk of Court/Deputy Clerk Jeanette McBride gsp
Court Reporter: Young

Presiding Judge [signature]
Judge Code: 210
Sentence Date 6/25/14

SCCA/217 (11/2009)

ORIGINAL

WITNESSES

(S) Matthew David Mccoy
– Columbia Police Department

ARREST WARRANT NUMBER

2013A4021602617

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: APR 10 2014

VERDICT

Guilty

Foreperson of Petit Jury
Date:

DOCKET NO. 2014GS4001766

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2014

87

THE STATE
vs.

Stewart Randall Ard

Indictment for
Assault & Battery 2nd Degree

SC Code: **16-03-0600(d)1**
CDR Code: **3413**

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W. Walker
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

ARREST WARRANT

2013A4021602617

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

City of Columbia

THE STATE

against

Stewart Randall Ard

Address: 1171 Beulah Road

Leeville, SC -

Phone: SSN:

Sex: M Race: W Height: 6 5 Weight: 210

DL State: DL #:

DOB: [redacted] Agency ORI #: 04001

Prosecuting Agency: Columbia Police Department

Prosecuting Officer: Matthew David Mccoy - 22066

Offense: Assault / Assault & Battery 1st degree

Offense Code: 3412

Code/Ordinance Sec: 16-03-0600(C)(1)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Stewart R. Ard on 7-30-2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

AFFIDAVIT

505

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

STATE OF SOUTH CAROLINA)

☐ County/ ☒ Municipality of)

City of Columbia)

Personally appeared before me the affiant Matthew David Mccoy who being duly sworn deposes and says that defendant Stewart Randall Ard did within this county and state on or about 7/28/2013 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of City of Columbia) in the following particulars:

DESCRIPTION OF OFFENSE: Assault / Assault & Battery 1st degree

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On 07/28/2013 at 0058 hrs., while at 2107 Green St., City of Columbia, County of Richland, the def and 2 co-defs returned to the location after being removed from the bar, Group Therapy. Upon arriving, co-def Geno struck victim #1 (Paterson) in the head with his fist. The def then took a knife from his right pants pocket and stabbed victim #1 (Paterson) twice in the back, he then stabbed victim #2 (Fleming) twice (left chest & arm). Co-def Geno then struck victim #2 (Fleming) in the head & face. All defs fled the scene. As the def was fleeing, he offered and attempted to stab 2 additional victims (Molino & McDaniel) with his knife. Those victims escaped without injury. The incident was captured on surveillance video. A withness overheard the defs talking about coming back to the location and doing harm.

Signature of Affiant

STATE OF SOUTH CAROLINA)

☐ County/ ☒ Municipality of)

City of Columbia)

Affiant's Address #1 Justice Square

Columbia, SC 29201-

Affiant's Telephone (803)545-3500

CERTIFIED TRUE COPY OF ORIGINAL FILED, C.C.C.P.&G.S. RICHLAND COUNTY SOUTH CAROLINA

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 7/28/2013 defendant Stewart Randall Ard did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of City of Columbia) as set forth below:

DESCRIPTION OF OFFENSE: Assault / Assault & Battery 1st degree

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 7/29/2013

(L.S.)

Signature of Issuing Judge

City Of Columbia Municipal Court

Judge Code: 500

Judge's Address 811 Washington St

Columbia, SC 29201-

Judge's Telephone (803)545-3150

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE)
VS. Stewart Randall Ard)
AKA:)
Race: White Sex: Male Age:)
DOB: [redacted] SS#:)
Address:)
City, State, Zip:)
DL# * SID#)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014 -GS- 40 - 1767
A/W#: 2013A4021602618
Date of Offense: 7-28-13
S.C. Code §: 16-03-0600(D)1
CDR Code #: 3413

SENTENCE SHEET

In disposition of the said indictment, comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: Assault & Battery - 2nd
In violation of § 16-03-0600(D)1 of the S.C. Code of Laws, bearing CDR Code # 3413
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

DA Garfield	13433			77193
Solicitor	SC Bar #	Defendant	Attorney for Defendant	SC Bar #

WHEREFORE, the Defendant is committed to the ☑ State Department of Corrections ☐ County Detention Center, for a determinate term of 3 ~~days/months/years~~ or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____ ; provided that upon the service of _____ days/months/years and or payment of $ _____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** PTUP _____

Total: $ _____ plus 20% fee: _____ $ _____ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____ Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____
Recipient: _____ Substance Abuse Counseling ☐

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
§47.12 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$100	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§90.7(SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ Paid to Public Defender Fund

Other: _____

CERTIFIED TRUE COPY OF ORIGINAL FILED
Jeanette McBride
C.C.C.P&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk Jeanette McBride gpe
Court Reporter: Young

Presiding Judge James R. Barber
Judge Code: 2110
Sentence Date 4/25/14

SCCA/217 (11/2009)

ORIGINAL

WITNESSES

(S) Matthew David Mccoy
– Columbia Police Department

ARREST WARRANT NUMBER

2013A4021602618

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: APR 10 2014

VERDICT

Guilty

Foreperson of Petit Jury
Date:

DOCKET NO: 2014GS4001767

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2014

87

THE STATE
vs.

Stewart Randall Ard

Indictment for
Assault and Battery 2nd Degree

SC Code: 16-03-600(d)(1)
CDR Code: 3413

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette W. Bridges
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

ARREST WARRANT

2013A4021602618

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

City of Columbia

THE STATE 1323700

against

Stewart Randall Ard

Address: 1171 Beulah Road

Leeville, SC -

Phone: SSN:

Sex: M Race: W Height: 6 5 Weight: 210

DL State: DL #:

DOB: [redacted] Agency ORI #: 04001

Prosecuting Agency: Columbia Police Department

Prosecuting Officer: Matthew David Mccoy - 22066

Offense: Assault / Assault & Battery 1st degree

Offense Code: 3412

Code/Ordinance Sec: 16-03-0600(C)(1)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Stewart R Ard on 7-30-2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
City of Columbia)

AFFIDAVIT

508

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant Matthew David Mccoy who being duly sworn deposes and says that defendant Stewart Randall Ard did within this county and state on or about 7/28/2013 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of City of Columbia) in the following particulars:

DESCRIPTION OF OFFENSE: Assault / Assault & Battery 1st degree

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On 07/28/2013 at 0058 hrs., while at 2107 Green St., City of Columbia, County of Richland, the def and 2 co-defs returned to the location after being removed from the bar, Group Therapy. Upon arriving, co-def Geno struck victim #1 (Paterson) in the head with his fist. The def then took a knife from his right pants pocket and stabbed victim #1 (Paterson) twice in the back, he then stabbed victim #2 (Fleming) twice (left chest & arm). Co-def Geno then struck victim #2 (Fleming) in the head & face. All defs fled the scene. As the def was fleeing, he offered and attempted to stab 2 additional victims (Molino & McDaniel) with his knife. Those victims escaped without injury. The incident was captured on surveillance video. A witness overheard the defs talking about coming back to the location and doing harm.

CERTIFIED TRUE COPY OF ORIGINAL FILED, Jeanette W. Walker, C.C.C.P.&G.S. RICHLAND COUNTY SOUTH CAROLINA

Signature of Affiant

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
City of Columbia)

Affiant's Address #1 Justice Square
Columbia, SC 29201-

Affiant's Telephone (803)545-3500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 7/28/2013 defendant Stewart Randall Ard did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of City of Columbia) as set forth below:

DESCRIPTION OF OFFENSE: Assault / Assault & Battery 1st degree

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 7/29/2013

(L.S.)

Signature of Issuing Judge

Shirley J Daniels

Judge Code: 6353

Judge's Address City Of Columbia Municipal Court
Columbia, SC 29202

Judge's Telephone

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE)
VS. Stewart Randall Ard)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014 -GS- 40 - 1756
A/W#: 2013A4021602615
Date of Offense: 7-28-13
S.C. Code §: 16-03-0600(D)1
CDR Code #: 3413

AKA:
Race: White Sex: Male Age:
DOB: [redacted] SS#:
Address:
City, State, Zip:
DL# * SID#
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Assault & Battery - 3rd
In violation of § 16-03-0600(D)1 of the S.C. Code of Laws, bearing CDR Code # [redacted] 3414
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:
DJ Garfield — Solicitor; 13433 — SC Bar #; [signature] — Defendant; [signature] — Attorney for Defendant; 77193 — SC Bar #

WHEREFORE, the Defendant is committed to the ☐ **State Department of Corrections** ☑ **County Detention Center,** for a determinate term of 30 days/~~months/years~~ or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____, provided that upon the service of _____ days/months/years and or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered** PTUP _____

Total: $ _____ plus 20% fee: _____ $ _____ _____ days/hours Public Service Employment

Payment Terms: _____ Obtain GED ☐

☐ Set by SCDPPPS _____ Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____ May serve W/E beginning _____
Substance Abuse Counseling ☐

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1)(Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§56-1-286 (DUI Breath Test)	$25	$
§47.12 (Public Def/Prob)	$500	$
§14-1-212 (Law Enforce. Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$100	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§90.7(SCCJA Surcharge)	$5	$
3% to County (if paid in installments)		$
TOTAL		$

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ Beginning _____
$ _____ Paid to Public Defender Fund

Other: CERTIFIED TRUE COPY OF ORIGINAL FILED
Jeanette McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk: Jeanette McBride
Court Reporter: Young

Presiding Judge: [signature]
Judge Code: 2110
Sentence Date: 6/25/14

SCCA/217 (11/2009)

ORIGINAL

WITNESSES

(S) Matthew David Mccoy
– Columbia Police Department

ARREST WARRANT NUMBER

2013A4021602615

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: APR 10 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014GS4001756

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2014

87

THE STATE
vs.

Stewart Randall Ard

Indictment for
ASSAULT AND BATTERY 2ND DEGREE

SC Code: **16-03-0600(d)1**
CDR Code: **3413**

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette W McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

ARREST WARRANT

2013A4021602615

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

City of Columbia

THE STATE 1323700

against

Stewart Randall Ard

Address: 1171 Beulah Road

Leeville, SC -

Phone: SSN:

Sex: M Race: W Height: 6 5 Weight: 210

DL State: DL #:

DOB: [redacted] Agency ORI #: 04001

Prosecuting Agency: Columbia Police Department

Prosecuting Officer: Matthew David Mccoy - 22066

Offense: Assault / Assault & Battery by Mob, 2nd degree (Serious bodily injury results)

Offense Code: 3432

Code/Ordinance Sec: 16-03-0210(C)

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Stewart Ard on 7-30-2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
City of Columbia)

AFFIDAVIT

ORIGINAL 511

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant Matthew David Mccoy who being duly sworn deposes and says that defendant Stewart Randall Ard did within this county and state on or about 7/28/2013 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of City of Columbia) in the following particulars:

DESCRIPTION OF OFFENSE: Assault / Assault & Battery by Mob, 2nd degree (Serious bodily injury results)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On 07/28/2013 at 0058 hrs., while at 2107 Green St., City of Columbia, County of Richland, the def and 2 co-defs returned to the location after being removed from the bar, Group Therapy. Upon arriving, co-def Geno struck victim #1 (Paterson) in the head with his fist. The def then took a knife from his right pants pocket and stabbed victim #1 (Paterson) twice in the back, he then stabbed victim #2 (Fleming) twice (left chest & arm). Co-def Geno then struck victim #2 (Fleming) in the head & face. All defs fled the scene. As the def was fleeing, he offered and attempted to stab 2 additional victims (Molino & McDaniel) with his knife. Those victims escaped without injury. The incident was captured on surveillance video. A witness overheard the defs talking about coming back to the location and doing harm.

Signature of Affiant

CERTIFIED TRUE COPY OF ORIGINAL FILED, Jeanette W. McBride C.C.C.P.&G.S. RICHLAND COUNTY SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
City of Columbia)

Affiant's Address #1 Justice Square
Columbia, SC 29201

Affiant's Telephone (803)545-3500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 7/28/2013 defendant Stewart Randall Ard did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of City of Columbia) as set forth below:

DESCRIPTION OF OFFENSE: Assault / Assault & Battery by Mob, 2nd degree (Serious bodily injury results)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 7/29/2013

(L.S.)

Signature of Issuing Judge

Shirley J Daniels

Judge Code: 6353

Judge's Address City Of Columbia Municipal Court
Columbia, SC 29202

Judge's Telephone

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Stewart Randall Ard, #217645, Applicant, v. State of South Carolina, Respondent.	)	2016-CP-40-06225 **RETURN**

In response to the post-conviction relief application filed on October 19, 2016, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. Applicant was indicted by the April 2014 term of the Richland County Grand Jury for attempted murder (2014-GS-40-1777); three counts of assault and battery, second degree (2014-GS-40-1756, -1766, -1767); and carrying a concealed weapon (2014-GS-40-1771). Aimee J. Zmroczek, Esquire, and M. Wade Dowtin, Esquire represented him. On June 23-25, 2014, Applicant proceeded to trial before The Honorable James R. Barber, III and a jury. Applicant was found guilty as indicted on all charges, except he was found guilty of the lesser included charge of assault and battery, third degree (2014-GS-40-1756). Judge Barber sentenced Applicant to life without parole for attempted murder; three years for each count of assault and battery, second degree; thirty days for assault and battery, third degree (time served); and ninety days for carrying a concealed weapon (time served). The sentences were set to all run concurrent to each other, except one charge of assault and battery, second degree is to run consecutive to the life sentence for attempted murder (2014-GS-40-1766).

Applicant filed a timely notice of appeal. An appeal was perfected by David Alexander, Esquire. The South Carolina Court of Appeals dismissed Applicant's appeal after consideration of Applicant's *pro se* brief and a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Ard, Op. No. 2016-UP-243 (S.C. Ct. App., Filed June 1, 2016). The remittitur was returned on June 17, 2016.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Mr. Ard was denied the right to effective assistance of counsel- guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Sections 3 and 14 of the South Carolina Constitution- during his jury trial.
    a. Trial counsel did not understand that attempted murder is a specific intent crime. S.C. Code Ann. § 16-3-29; State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) ("Attempted murder would require the specific intent to kill and conduct towards that end.). In South Carolina, attempt crimes are specific intent crimes. E.g. State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime.") (citing Sutton, supra)). Mr. Ard was prejudiced because trial counsel's misunderstanding of the law influenced numerous acts and omissions during his jury trial.
    b. Trial counsel did not object to the trial court judge instructing the jurors, "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." Tr. 416, line 25 - 417, line 3. Mr. Ard was prejudiced because (1) this instruction deleted the specific intent requirement of attempted murder, (2) reduced attempted murder to the statutory offenses of assault and battery of a high and aggravated nature ("ABHAN") or first-degree assault and battery, S.C. Code Ann. § 16-3-600(B), and (3) prevented the jurors from considering lesser included offenses of ABHAN and first-degree assault and battery.
    c. Trial counsel failed to object to the prosecutor arguing that attempted murder is a general intent crime and that the trial judge would instruct the jurors that specific intent is not an element of attempted murder. Tr. 374, line 5 - 377, line 2.
    d. Trial counsel failed to call witnesses that would have provided valuable testimony about the facts and circumstances of the underlying incident. Mr. Ard was prejudiced because these witnesses would have provided valuable information about Mr. Ard's state of mind, particularly as it related to the requirement that the

prosecution prove specific intent to convict of attempted murder.

e. Trial counsel advised Mr. Ard not to testify. Mr. Ard was prejudiced because his testimony would have provided valuable information about his state of mind, particularly as it related to the requirement that the prosecution prove specific intent to convict of attempted murder.
f. Trial counsel advised Mr. Ard not to call character witnesses. Mr. Ard was prejudiced because these witnesses would have provided valuable information about Mr. Ard's state of mind, particularly as it related to the requirement that the prosecution prove specific intent to convict of attempted murder.
g. Trial counsel failed to investigate, discover, and present evidence of video surveillance of the incident location from an angle different from the angle shown by the prosecution. In the alternative, trial counsel failed to call witnesses that had viewed video surveillance of the incident location from an angle different from the angle shown by the prosecution. Mr. Ard was prejudiced because the alternate angel was exculpatory evidence.
h. Trial counsel failed to object to Courtney Walker testifying about saying a prayer for Jesse Patterson, the alleged victim of attempted murder. Mr. Ard was prejudiced because this testimony was not relevant, lacked any probative value, and highly prejudicial.
i. Trial counsel failed to object to numerous witnesses—not qualified as to provide an expert opinion—testifying about Jesse Patterson, the alleged victim of attempted murder, having a collapsed lung. Mr. Ard was prejudiced because this testimony unfairly portrayed the injuries as more aggravated than they really were.
j. Trial counsel failed to properly preserve for appeal the State presenting evidence that Mr. Ard had been to prison before an did not want to go back. Trial counsel failed to object to Scott Fleming testifying that Mr. Ard statement, "Well, I've been to jail. I don't want to go back." And Mr. Flemings response, "I said, 'Well, I don't want you to go back either.'" Tr. 256, lines 18-20. When the witnesses repeated this testimony, trial counsel also failed to preserve the mistrial motion. Tr. 268, line 4 - 272, line 3.
k. Trial counsel failed to object to the prosecutor's closing argument asking the jurors to render a verdict that speaks the truth. Tr. 369, lines 6-9.
l. Trial counsel failed to object to the trial judge entering the jury room during deliberations, tr. 438, line 2 - 439, line 13, which is structural error requiring a new trial. E.g., State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1991).

2. Mr. Ard was denied the right to effective assistance of counsel- guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Sections 3 and 14 of the South Carolina Constitution- during his appeal.
   a. In the alternative to 1 1 (a)(l 0), appellate counsel failed to appeal the trial court denying the motion for a mistrial after witness Scott Fleming testified that Mr. Ard had been to prison and did not want to go back. Tr. 268, line 4 - 272, line 3.
   b. Appellate counsel failed to appeal the trial court denying the motion to exclude the sentence of life without the possibility of parole based on arbitrary use of prosecutorial discretion. Tr. 448,line 24 - 452, line 4.

Respondent denies Applicant is entitled to relief on any of these claims and demands strict proof thereof. For the purpose of this return, Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Applicant's PCR application claims ineffective assistance of counsel. Respondent contends that Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged as a ground for relief, 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 669. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 466 U.S. at 688). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 52 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record, a question of fact is raised which can only be resolved by an evidentiary hearing. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983). If the court does determine that Applicant's alleges specific instances of ineffective assistance which are not conclusively refuted by the record, then Respondent would request an evidentiary hearing to fully resolve this issue.

IV.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was

prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. The Respondent requests an evidentiary hearing on this allegation.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, the Respondent requests that an evidentiary hearing be held solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

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July 12, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	**2016-CP-40-06225**
	)	
STEWARD RANDALL ARD, #217645,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
Post Office Box 1015
Rock Hill, SC 29730

DATED this the 12th day of July, 2017.

Felicia V. Hayes, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	) IN THE COURT OF) COMMON PLEAS
COUNTY OF RICHLAND	) OF THE FIFTH) JUDICIAL CIRCUIT
STEWART R. ARD, Applicant, vs. THE STATE OF SOUTH CAROLINA, Respondent.	) TRANSCRIPT OF RECORD) 2016-CP-40-06225

December 13, 2017
Columbia, South Carolina

B E F O R E:

HONORABLE CLIFTON NEWMAN, Judge.

A P P E A R A N C E S

E. CHARLES GROSE, JR., ESQUIRE
For The Applicant

JESSICA E. KINARD, ASSISTANT ATTORNEY GENERAL
For The State

Julie A. Ashbrook,
Circuit Court Reporter
Seventh Judicial Circuit

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STEWART R. ARD VERSUS THE STATE OF SOUTH CAROLINA

MS. KINARD: And that leaves us with the matter of Stewart Ard.

MR. GROSE: Your Honor, can he have one of his hands loose so he would be able to communicate in writing if he needs to?

THE COURT: All right. Is that okay with you, Officer?

THE DEPUTY: It's up to you.

THE COURT: All right. Just one hand.

MS. KINARD: If it pleases the Court, Your Honor?

THE COURT: Yes.

MS. KINARD: This is the matter of Stewart Randall Ard versus the State of South Carolina. It's Case Number 2016-CP-40-06225. We're before the Court on an application for postconviction relief filed October 19th, 2016. Mr. Ard is presently incarcerated at the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's order of commitment.

He was indicted in the April 2015 term with the Richland County grand jury for attempted murder, three counts of assault and battery second degree, and carrying a concealed weapon. He was represented at the trial by Aimee Zmroczek and Wade Dowton. From June 23rd

to 25th, 2014, he proceeded to a trial before the Honorable James R. Barber, III and a jury.

He was found guilty as indicted on all charges, except he was found guilty of a lesser included charge of assault and battery third degree on one count. Judge Barber sentenced him to life without parole for attempted murder, three years for each count of assault and battery second degree, 30 days for assault and battery third degree where time served and 90 days for concealing -- excuse me, carrying a concealed weapon, time served.

The sentences were all set to run concurrently, except one charge of assault and battery second degree was to run consecutive to the life sentence for attempted murder. Mr. Ard filed a timely notice of appeal, which was perfected by David Alexander pursuant to the filing of an Anders brief. After consideration of that brief, the South Carolina Court of Appeals dismissed it in a non-published opinion filed June 1st, 2016, and a remitter issued June 17th, 2016.

The State is present and ready to proceed. Mr. Ard is present and represented by Charles Grose.

THE COURT: All right. Mr. Grose.

MR. GROSE: Your Honor, we are prepared to proceed. Although, initially I wanted to let the Court

know that with regards to paragraphs 11(a), 5, 6, and 7 of the PCR application, we're not proceeding on those, but we will be proceeding on everything else in the application.

THE COURT: 5, 6 and 7; is that right?

MR. GROSE: Yes, sir, 5, 6 and 7.

THE COURT: And 11(a)?

MR. GROSE: And 11(a), yes, sir.

THE COURT: All right. So 5, 6 and 7 of the 11(a), I got ya.

MR. GROSE: Unless you want to hear anything in opening, I'm prepared to call witnesses.

THE COURT: Well, it's usually beneficial to have some sort of context of who the people are and what happened. I mean, something about it before calling it.

MR. GROSE: Yes, sir. And I intend -- I'm gonna call Ms. Zmroczek as my first witness and I intend to at the beginning have her give a little bit of background about the facts.

THE COURT: That's fine.

MR. GROSE: And then we'll move into some of the issues that arise and list facts.

THE COURT: Sounds good to me.

MR. GROSE: All right. So at this time I would call Amy Zmroczek.

(Whereupon, witness comes forward.)

THE CLERK: Do you swear or affirm the testimony you will give this Court will be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

THE CLERK: And just have a seat there and state your full name for the record and spell your last.

THE WITNESS: My name is Aimee Zmroczek. And my last name is spelled Z-M-R-O-C, as in cat, Z, as in zebra, E-K.

AIMEE J. ZMROCZEK,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GROSE:

Q. Amy, are you a lawyer that practices here in Columbia, South Carolina?

A. I am. I practice throughout the state, but I also practice in Columbia.

Q. Okay. I get you. Your office is here and that's what I meant to suggest. And were you the attorney for Stewart Ard in the case we're here to talk about today?

A. I was.

Q. Okay. And if you could, can you tell us how Stewart came to you for representation after the incident that gave rise to the charges?

A. Sure. So I actually had previously represented Stewart's brother, Joseph Ard, and was able to maintain and have maintained and still maintain contact with him since he's been released from death row. And one night he -- it was about -- it was late and he, Jody, texted me and said that his brother needed an attorney right then. And so he came and I met with Stewart.

There was a bar fight and Stewart was trying to cooperate, do everything that he could. So -- and I happened -- the lead investigator was someone who's on another case that I had, so I was able to contact him and let him know that, that I was representing Stewart and Stewart wanted to turn himself in, bring the weapon and sit down with the police.

Q. Okay. You said that there was a, a bar fight; is that correct?

A. Yes. That's how it was described to me.

Q. And which bar was that at?

A. I believe it was Group Therapy.

Q. Okay. And is that in the Five Points area of Columbia?

A. It is.

Q. Okay. Now, do you remember the, the general actual allegations of the case?

A. I do. Well, from what I was told,

so Mr. Ard had gone out with some other of his friends and he was a passenger in the vehicle. They had been drinking at the establishment for quite some time or they had been playing cards earlier and then they went out to Five Point and then they left.

And while they were there the bouncers were giving his friend a really hard time, just saying some really inappropriate things and, and just treating them very disrespectfully, so they left. And when they left they had, one of the co-defendants realized that he had -- so there was a squirmish or there was -- when they were leaving there was some sort of disagreement with the bartenders.

And one of the co-defendants had lost his watch and that watch was important to him. And so they had gone back to get it. And when they went back a bigger fight ensued.

Q. Okay. And when this bigger fight ensued, did any of the employees at -- or owners, people associated with Group Therapy, were any of them injured?

A. Yes. So one of the bouncers, I believe his name was Jesse ---

Q. Jesse Patterson?

A. Jesse Patterson. He -- and he is the one who was really running his mouth. And there is some question as

to whether or not he had a weapon as well, but he and the other person really started to get into it and Stewart stepped in at that time.

Q. Okay. And did Mr. Patterson end up being cut?

A. Yeah, he was stabbed.

Q. Okay. There was also a Mr. Fleming, who I believe is an owner or was an owner at the time with Group Therapy.

A. At the time he was the owner.

Q. All right. And was, was he also cut or stabbed?

A. I think he received a minor injury, yes.

Q. Okay. And when you look at the transcript there was four victims in this case. We talked about Mr. Patterson and Mr. Flemming. Were there two other individuals that law enforcement got warrants for and brought charges?

A. There were. So where Group Therapy is, it's right down the pathway from -- it's right at the corner of where the courthouse is, so there were two bouncers or workers or people that were outside of the courthouse that saw the commotion going on that ran down. And, also, I think tried to chase Mr. Ard and the people. And I don't believe that they -- I think one of them fell, quite honestly, but, but they also got warrants.

Q. Okay. And those warrants may have been based

more on the assault fact, as opposed to the battery aspect of our statutory scheme. Is that fair to say?

A. Correct.

Q. Okay. Now Mr. Ard, Stewart, was not the only one charged. I believe there was a Benjamin Geno that also had charges, right?

A. And that was the, that was the co-defendant who had lost his watch.

Q. Okay. And also somebody by the name of Jason Skaggs was charged.

A. Uh-huh. Correct.

Q. All right. And then there was another person, a Stephen Richardson, that was with Mr. Ard, Mr. Geno and Mr. Skaggs at Group Therapy, but he didn't get charged; is that right?

A. That's my understanding.

Q. Okay. Now, I think that you said that Mr. Ard, that Stewart got in contact with you through his brother, Jody?

A. Correct.

Q. And that would have been the same day or early the next morning; is that right?

A. Correct. So because it was Five Points and they had just -- this was right at the time where they had -- they have more cameras there now, but they had several

cameras down there. And so immediately the police were releasing these images. And so as soon as those images came out that's when I was contacted.

Q. Okay. And I believe you said that Stewart went in and cooperated.

A. Correct. Well, I contacted Matt McCoy, who was the lead investigator at the time.

Q. Okay. I'm gonna show you -- it's not been marked yet, but I'm gonna show you a document, front and back. So it's one page, but it's really two pages.

A. And I have one that's two pages.

Q. It doesn't matter.

A. Okay.

Q. And is that from your file?

A. Yes, it is.

Q. And what is that?

A. It's the statement that Mr. Ard hand wrote. I believe it was recorded as well, in my presence and with Investigator McCoy.

Q. All right. And did that statement talk about one of his companions losing a watch?

A. Yes.

Q. All right. And who was that person who lost the watch?

A. They call him Geno, but I believe it's Benjamin

Geno.

MR. GROSE: Okay. Your Honor, at this time I would move Mr. Ard's statement into evidence as Applicant's Exhibit one.

MS. KINARD: Yes, sir. Checking if you were present when this statement was created?

THE WITNESS: I'm sorry?

MS. KINARD: You were present when this statement was created?

THE WITNESS: I was.

MS. KINARD: No objection, Your Honor.

THE COURT: All right. So admitted.

(Whereupon, Applicant's Exhibit Number 1, Statement Of Mr. Ard, was marked for identification.)

(Whereupon, Applicant's Exhibit Number 1 was entered into the record.)

BY MR. GROSE:

Q. Now, in parts of discovery did you receive some notes from a police officer and a statement from Stephen Richardson?

A. I did. I received initially, I think, about 89 pages of discovery. The day of or the morning before trial I received a bunch more medical records.

Q. And we'll talk about medical records a little bit later.

THE COURT: Did you want me to read that statement or were you gonna have someone else read it or...

MR. GROSE: You're welcome to read it now, but I think it'll become more apparent later on and that might be when you want to read it. But it's for you to read, sir.

THE COURT: Well, you offered it into evidence and then put it over there, so...

MR. GROSE: Okay. Well, I tell you what, let me, let me introduce these two and then I'll hand all three up to you.

THE COURT: All right.

MR. GROSE: Okay. Can you mark this as number two and this as number three.

(Whereupon, Applicant's Exhibit No. 2, Summary Of Investigation, was marked for identification.)

(Whereupon, Applicant's Exhibit No. 3, Four-Page Handwritten Police Statement Of Mr. Richardson, was marked for identification.)

BY MR. GROSE:

Q. I'm gonna hand you what's been marked as Applicant's Number 2 and Applicant's Number 3. Applicant's Number 2 is a two-page typed document. Is that a document that came to you in discovery?

A. It is.
Q. All right. And does that summarize some of the investigation of interviews that were taken of Mr. Ard's companions?
A. It does.
Q. Okay. And does that also document the issue of the watch?
A. It does.
Q. Okay. And if you could look at Applicant's Exhibit Number 3, which is a four-page handwritten police statement.
A. Correct. Well, it's a handwritten statement. It was also audio recorded.
Q. Okay.
A. Of Mr. Richardson, who was, I believe, the driver.
Q. Okay. And he was the companion who was there and not charged?
A. Correct.
Q. And does that statement also document the, the issue about losing the watch?
A. It does.
Q. Okay. So would it be fair to say that the police investigation corroborated that Stewart and his companions had a reason to go back to Group Therapy?

A. It did.
Q. Because of the watch?
A. Correct.
MR. GROSE: At this time I would move Applicant's 2 and 3 into evidence.
MS. KINARD: Ms. Zmroczek, has any of these documents changed at all since you've seen them in discovery?
THE WITNESS: No. The only thing is, so I convert when I close my files, I scan everything and convert them to digital. So -- and I'd actually given Mr. Ard numerous copies of his file, but I eventually just gave him my file. So this is not the original statement, obviously, it's just -- but it's an exact printed copy of it.
MS. KINARD: Thank you. No objection, Your Honor.
THE COURT: So admitted.
(Whereupon, Applicant's Exhibits Number 2 and 3 were admitted into evidence.)
MR. GROSE: And at this time, Your Honor, I would hand up Applicant's Exhibits 1, 2 and 3. Do you want time to read it now or --
THE COURT: No, I'm good.
MR. GROSE: Okay.

BY MR. GROSE:

Q. All right. Now, initially I believe Mr. Ard had five charges, five arrest warrants; is that right?

A. That's, that's correct.

Q. All right. And do you remember what those were for?

A. I believe that he had two assault and battery by a mob second degree, two assault and battery first-degree charges and carrying a concealed weapon. That would have been denied.

Q. Okay. All right. And then those were the arrest warrants that were served at the beginning of the case; is that correct?

A. That's correct.

Q. All right. Now, at some point did those charges change?

A. Yes. And the -- there were a lot of discussions and inquiries between myself and the Solicitor at the Solicitor's office. This case was prosecuted by Dolly Garfield. She's since retired from the office, but she -- and I believe there are actually several e-mail communications. For whatever reason, she felt like the charges were not appropriately charged and decided to upgrade the charges.

Q. Okay. And so what was Stewart ultimately

indicted for?

A. He had attempted murder. And I believe that that was on Mr. -- on Jesse Patterson. He had -- he maintained the concealed weapons charge. And then there were three just assault and battery second. I don't believe that they were by mob. I think that she just changed those two.

Q. All right. The assault and battery, first, second and third-degree statute?

A. Correct.

Q. Okay.

A. And that was, that was the first time, I think, that all of these lesser included's had come out, so it was -- I think it was a little bit confusing for everybody, but...

Q. Okay. So based on the charges being changed and your having been in trial, what was the State's theory on this case?

A. Well, so -- well, that's not all that changed. So Mr. Ard -- what I was hoping Ms. Garfield and me were trying to discuss whether or not she would make any plea negotiations, we had several plea negotiations. I even had Jody speak with Stewart about what I believed he should probably accept. And Mr. Ard, Stewart Ard, was just, wanted a bond.

And so, as is customary practice in this county at least, when I filed for bond, we usually get trial notice. But in this case I got a trial notice as well, as like when he rejected the plea offer a life without the possibility of parole was there as well, so... I'm sorry, I wandered from your original question.

Q. Yeah. The original question was the -- and I think my question had -- said that the charges had changed.

A. Right.

Q. I think you also indicated that one of the changes that went with it was the life without parole notice after Mr. Ard requested bond.

A. Correct.

Q. The rest of the question, what was the State's theory?

A. Oh, what was their theory? So their theory was that Jesse Patterson, the bartender, was simply an innocent hard-working bartender who was viciously and savagely attacked by the gentleman that had left the bar and got really mad that he disrespected them and came back to, to beat him up.

Q. Okay. And we've been referring to Mr. Jesse Patterson as a bartender.

A. Oh, he's a bouncer, sorry.

Q. He -- and he was actually working one of the doors, one of the entrances.

A. The front door, yeah.

Q. Checking IDs and that sort of thing.

A. Correct. Sorry, I keep calling him a bartender but, yeah, he's a bouncer.

Q. All right. And, and so I guess the State's theory was -- is that Stewart and his companions came back for the purpose of trying to inflict injury on Mr. Patterson or somebody else?

A. Right.

Q. Okay. Now, was there ever an issue that Stewart was present and that he had a knife and that he had cut Mr. Patterson and Mr. Fleming?

A. Yes. I mean, he -- I mean, he drove the knife in.

Q. Okay.

A. He absolutely came back. And, and, like I said, it was all on video, but they -- so when they came back the car can be seen pulling into a parking area right down the street from -- or not even right down the street, just like right down the road from Group Therapy. And Geno gets out.

And Geno, the co-defendant, had, in addition to losing his watch -- the reason he lost his watch in the

first place is because he was basically thrown down, so he was pretty heated. And Stewart was trying to keep him, I believe, from doing something that was gonna end up bad for everybody.

Q. Okay. And in your opening statement in this trial, you can see he was mad and that Stewart was guilty of some offenses.

A. Oh, absolutely. It was always my -- it was always my strategy in his defense that, that he certainly -- I mean, he called and turned himself in and brought them the weapon. I mean, he had certainly conceded that he had engaged in some assault and battery, but they were of a very lesser degree than what he was facing.

Q. Okay. And, in fact, your closing argument to the jury pertained to the lesser degree; is that right?

A. Right. That was always by strategy. So initially, or when he was indicted on these higher charges, I was always trying to seek the lesser included's because that's what I believed and still believe he's absolutely guilty of.

Q. And Judge Barber was the trial judge; is that correct?

A. He was.

Q. And did Judge Barber instruct the jurors about

any lesser included offenses?

A. He did. And, in fact, I believe that's probably one of the longest charges that I ever sat through, but it, it -- we had, all the way down to, I believe, assault and battery second degree. So we had from attempted murder and then every lesser included underneath that.

Q. Okay. And so just so that we're clear on what we're talking about, we're talking about the attempted murder charge that pertains to Jesse Patterson?

A. Correct.

Q. And the charge in the indictment was attempted murder?

A. Correct.

Q. And Judge Barber charged assault and battery of a high and aggravated nature as a lesser included.

A. He did.

Q. And that was the statutory offense, not the common law offense that's under appeal?

A. Correct.

Q. And then as a lesser included, Judge Barber also charged assault and battery first degree.

A. Correct.

Q. And additionally assault and battery second degree regarding Jesse Patterson?

A. Correct.
Q. And, of course, your argument was that there was evidence that would support the lesser included, including assault and battery second degree.
A. Absolutely.
Q. And I think ---
A. I thought at worse that it would fall under assault and battery first degree.
Q. Okay. So, so the defense wasn't anything about identity.
A. No.
Q. It was about which was the appropriate charge?
A. Correct.
Q. Okay. Do you have a copy of the transcript there?
A. I do.
Q. Okay. If you could, could you turn to page 373.
A. Okay.
Q. All right. Now, you've been talking about Ms. Garfield as being one of the prosecutors. Did other lawyers in the office assist her?
A. Oh, yes. So typically when I have a trial in this county, Ms. Kathryn Campbell finds a way to, to sit in some chair. So I know that Luck was on this trial. And, also, they had a third chair as well, so they had

three solicitors. Ronnie Shalevy (phonetic), who is no longer with the office.

Q. Okay. And the part that I've directed you to at page 373, is that part of the State's closing argument?

A. It is.

Q. All right. And was that argument given by Ms. Campbell?

A. It was.

Q. Okay. And at line 11, it's where she begins her discussion of attempted murder; is that correct?

A. Correct.

Q. All right. And between 11 and 20 she gives a definition of attempted murder, which seems to be relatively close to what's in the statute, right?

A. Correct.

Q. I ---

A. And so prior to, one of the things that I always do for myself mainly, but also for just the record, is we -- especially the judges here in Richland County, they are very open to us submitting our proposed jury charges.

Q. Uh-huh.

A. And so I had submitted some jury charges and the State had. And I remember we had several discussions about, about the different charges that would occur, so,

yeah.

Q. Okay. Also on 373, looking at line, I guess, the beginning of 21, she can give us the talk about malice of forethought. And at line 24 it says: If a person had died as a result, and luckily for Jesse Patterson, he got help immediately. She talks a little bit about his condition.

But then at 374 she says: But if he had died as a result of this defendant's action, would that be murder? And she believed that it would be.

And then at line 5, she states: We must prove that it was an attempt to kill or an attempt to injure another person with malice of forethought. Do you see that?

A. I do.

Q. And would you agree that she's kind of transitioning the attempt to kill to an attempt to injure?

A. I, I -- yes.

Q. Okay. And she goes on for a good bit talking about what malice is; is that right?

A. Oh, yes.

Q. All right. And that continues on 374 to 375. And then on 376 at line 13 through 20, she states: The judge will also instruct you in considering the charge

of attempted murder and specific intent to kill is not an element of attempted murder. We don't have to show that he actually meant to kill him. Do you see where it says that?

A. I do.

Q. Okay. She expresses her belief that Mr. Ard did intend to kill him, but that was something that was in dispute; is that correct?

A. Correct.

Q. All right. And then she says at line 17: But there must be a general intent to commit serious bodily injury. And intent means intending to resolve, which actually occurs by accidentally or voluntarily. So, again, she's doing two things here. She's pulling the jurors away from specific intent; is that right?

A. Absolutely.

Q. And towards general intent.

A. Correct.

Q. And she's also transitioning away from the intent to kill to the injuries.

A. Correct.

Q. Is that right?

A. Yes.

Q. Okay. And then she continues to make what could be characterized as a general intent argument on 376

going into 377; is that right?

A. Correct.

Q. And then at the bottom of 377, line 23, so -- she says: So if you find, however, if there is malice then you don't get to a lesser included. Listen to the judge. If you find the State didn't prove that his acts were -- it goes to the next page -- malicious, evil intent, attempt to do one serious bodily injury, then you may consider assault and battery of a high and aggravated nature.

A. Right.

Q. Is that right?

A. That's correct. And also, not only was she saying this, but they have giant boards.

Q. Right.

A. With all of this. I mean, she was literally just reading what was written on the boards because it was also placed in front of the jury.

Q. Okay. And we'll get to that in a minute. But she had all of that sort of written out so that she could emphasize the point?

A. Correct.

Q. Okay. And this issue of no specific intent, was that on the boards?

A. I'm sure it was.

Q. Okay. And then also on page 378, at lines 22 to 24, she says: At the very least, if you were to find for some reason that his actions weren't malicious, it is assault and battery of a high and aggravated nature. Do you see that?

A. I do.

Q. All right. Now, did you make any objections to any of those arguments?

A. I did not.

Q. Okay. I sent you some cases to look at. Was one of them the Pilgrim case?

A. Yes.

Q. Okay. And did that case involve the issue of malice under the common law assault and battery with intent to kill and common law assault and battery high and aggravated nature case?

A. It did.

Q. Okay. And is it fair to say that that case recognized that an assault and battery of a high and aggravated nature be committed with malice?

A. Yes.

Q. And would you agree that under our current statute any of the degrees of the assault and battery could be committed with malice?

A. I do.

Q. Okay. I want to direct you to page 415 of the transcript. If you could look at line 15.
A. Uh-huh.
Q. This is -- this portion of the transcript is Judge Barber's jury instructions; is that correct?
A. It is.
Q. And so on page 414 -- I may have said 415, but his charge starts on page 414 where he starts talking about attempted murder; is that correct?
A. Correct.
Q. And at lines 15 to 19 he gives what is more or less the statutory definition; is that correct?
A. That's correct.
Q. All right. And then if you go to -- well, through the rest of that page and the next page he does talk about malice.
A. Yes.
Q. Okay. And he never adopts the State's argument that malice only applies to murder.
A. He does not.
Q. But he also doesn't clear that up.
A. No.
Q. Okay.
A. I mean, he gives -- and it may have been in here. I know he said it at least at some point in the trial he

said, you know, what the lawyers say is not ---

Q. Right. It's not the law.

A. It's not the law, right.

Q. All right. So he neither adopted the State's theory that malice only applied to attempted murder nor corrected it?

A. Correct.

Q. Okay. On page 415 at line 25 beginning at the last two words, going over to 416, Judge Barber charged as a specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury; is that right?

A. That's what it said.

Q. All right. And then he goes into explaining general intent, right?

A. Correct.

Q. And that also focuses on the injuries as opposed to the act or --

A. To the intent.

Q. -- to the intent.

A. Correct.

Q. Is that right?

A. Yes.

Q. Okay. And if you go over to page 429. And the discussion starts a little bit before that, but it's on

page 429 when Judge Barber asks you whether or not you have any objections to his jury instructions.

A. Yes.

Q. And you did not make any objections?

A. I do not.

Q. Okay.

A. But I should have.

Q. Okay. We'll come back to that in a second. But before we do that, let's go over to page 430, lines 4 through 18. And the discussion actually extends a little bit further than that, but take a moment and take a look at 4 through 21.

A. Okay.

Q. Are you familiar with that?

A. I am.

Q. Okay. And at this point the jurors had asked Judge Barber a number of things, including for the definitions of some of the, the charges.

A. Right.

Q. And, again, this goes back to the dispute in the case as to what the right charge would be?

A. Correct.

Q. Okay. And rather than giving the jurors a copy of the charges, by agreement the jurors are allowed to get these posters that had been used during the State's

closing arguments.

A. You're right.

Q. Okay. And these are -- they'd be the same posters that you talked about a couple minutes ago?

A. Correct.

Q. With the charges and the elements?

A. Correct.

Q. Okay. Including malice and the lack of specific intent?

A. Right. And, actually, and I had done some posters as well.

Q. Okay.

A. Because I remember I had the last closing, which I rarely get, and so it was not just the State's that went back.

Q. Okay.

A. I had some as well.

Q. All right. And would it be fair to say that the State was emphasizing the assault and battery with intent to kill and the assault and battery of a high and aggravated nature?

A. Yes. Well, no, they were emphasizing attempted murder and ---

Q. Oh, I'm sorry.

A. Yeah.

Q. Yeah. Attempted murder and assault and battery with a high and aggravated nature.
A. Right. And I was emphasizing the --
Q. The lesser.
A. -- assault and battery first and below.
Q. Okay. And then that's, in fact, how you both argue those cases?
A. Right.
Q. All right. Now, a minute ago you said that you should have made an objection.
A. I did.
Q. And what should that objection have been?
A. So that's an absolute misstatement of the law that, in fact, attempted murder does require a specific intent to kill and I just didn't object to that.
Q. And, well, not only a specific intent to kill, but a specific intent to complete the crime of murder.
A. Correct.
Q. All right. Now, I, in some of the cases that I asked you to look at, and three of these are cited in paragraphs 11(a)1 of the application, there was *State versus Sutton*; is that correct?
A. Yes.
Q. Now, that ---
A. I don't have the application in front of me, but

I'm assuming.

Q. Okay. I can show you this. That's the first paragraph?

A. Uh-huh.

Q. All right. And so Sutton was in there and Thompson was in there and Nesbitt was in there, right?

A. Yes.

Q. Okay. And did you look at all three of those cases?

A. I did.

Q. All right. And all three of those cases they were decided prior to Mr. Ard's trial; is that correct?

A. That is correct.

Q. Um --

A. They were -- Sutton was -- yes, and they dealt with, when they did the Ominous Act, I was -- you know this, but they, they used to just be ABWIK or --

Q. Uh-huh.

A. And so they renamed the charges.

Q. Well, they actually repealed the common law, didn't they?

A. Right. And they repealed the common law. Uh-huh.

Q. Yeah. And created a new statutory case law.

A. Right. Which is how we ended up with so many

lesser included's this time.

Q. Right. And the Sutton's case -- and by the way I asked you about the Pilgrim case earlier. Pilgrim was also decided long before Mr. Ard's trial.

A. Right.

Q. Okay. The Sutton case, in that case the State -- the prosecution in that particular case, one out of the two, advanced the concept of attempted murder, right?

A. Right.

Q. And in Sutton, you know, they -- and, again, this was prior to the statutory scheme. They said that South Carolina at that time didn't have a crime of attempted murder.

A. Right.

Q. But if, but if we did attempted murder is a specific intent crime.

A. Correct.

Q. And we have this weird, I call it weird now, but this unique, that's probably a better word, common law scheme of assault and battery with intent to kill and assault and battery of a high and aggravated nature. And in Sutton they said assault and battery with intent to kill was not equal to attempted murder and, therefore, it didn't have to have a specific intent.

A. Right.

Q. Okay. They also -- well, the other cases that I cited in there that I asked you to look at, Thompson and Nesbitt, those were cases that dealt with -- examples of cases that dealt with other intent crimes in South Carolina; is that correct?

A. That's correct.

Q. And in Thompson, the attempted armed robbery requires a specific intent to commit the crime of armed robbery; is that right?

A. Correct.

Q. All right. And then in Nesbitt the Court of Appeals said that intent crimes are ones of specific intent such that the act constituting the intent must be dealt with the intent to amend that particular crime; is that right?

A. That's correct.

Q. And they cited to Sutton?

A. Yes.

Q. Which is the case we just talked about regarding attempted murder being a specific intent crime.

A. Right.

Q. Okay.

A. If we would have had it when Sutton was, was cited.

Q. I'm sorry?

A. If Sutton -- obviously Sutton was prior to that, but yes.

Q. Right.

A. We would have it separate. It would be a specific intent crime.

Q. Okay. And so I believe your testimony is, is that you should have objected to Judge Barber charging that a specific intent is not a requirement of attempted murder?

A. Correct.

Q. And, therefore, you also should have objected to parts of the solicitor's closing argument that stated the misstatement of the law?

A. Correct.

Q. As well as other portions that tended to produce their burden of proof.

A. Right.

Q. And if the jurors had been correctly instructed that attempted murder was a specific intent crime, that would have helped with your argument regarding first and second degree assault and battery.

A. Right. It was always my strategy to, to shoot for the, for the lack of a better term, to encourage the jury to find him guilty of a lesser included, which is what I believed was always the case.

Q. All right. And the fact, I think, you argued at some point, you know, with regard to the lesser included to the assault and battery of a high and aggravated that even though there were knife wound injuries, the definition of great bodily injury that we have as part of the statute, you argue that hadn't been met.

A. Right.

Q. Okay. All right. I want to talk about Courtney Walker's testimony for a second. Could you turn to page 160 of the transcript, please.

A. Yes.

Q. And I believe Courtney was a female in this particular instance; is that right?

A. Yes.

Q. Okay. And she was called by the State; is that correct?

A. That is correct. I didn't call any witnesses so, yes.

Q. Okay. And Courtney, is it fair to say that she was a patron at Group Therapy?

A. Yes.

Q. So she was not a part of the group that Stewart was with?

A. Right. And actually she was friends with the -- so the Group Therapy was under that bold management, was

more -- it was, it was a lot of the same people hung out there.

Q. Okay.

A. So she was one of those people.

Q. All right. She was there with her group of friends?

A. Yes.

Q. Okay. Now, the State calling her as a witness, did she actually see the, the stabbings?

A. No, she didn't. So not only was there video, a lot of video, of the outside occurrences, but the same company also had video inside. And so, you know, she could be seen sitting inside. She didn't see anything.

Q. All right. And she didn't claim to see anything?

A. No.

Q. Although she did become aware of it after it happened?

A. Yes.

Q. And I think there was multiple phone calls to 9-1-1 in this instance.

A. Correct.

Q. And was she one of the 9-1-1 calls?

A. She was.

Q. Okay. And as part of that I guess she described what she saw once she became aware that there had been

an incident?

A. Correct.

Q. And she authenticated the 9-1-1 tape that's -- or her 9-1-1 call anyway.

A. Her 9-1-1 call, yes.

Q. Okay. And I believe that at one point on page 165 they asked Ms. Walker about an opinion regarding Mr. Patterson's condition; is that right?

A. Correct.

Q. And you objected, but she was allowed to give an opinion as to what she observed; is that right?

A. Yes.

Q. But she didn't give what would be characterized as a medical opinion.

A. No.

Q. Okay. At the bottom of page 165 at line 21, Ms. Campbell asked Ms. Walker at some point did you say a prayer?

A. Yeah, I see that on line 21.

Q. And she answered: Yes, ma'am, I did. Ms. Campbell asked: Who were you saying a prayer for? And Ms. Walker said for Jesse.

A. Correct.

Q. So that would be Jesse Patterson?

A. Yes.

Q. And then you go over to the next page, then that's where Ms. Campbell completes her direct examination.
A. Yes.
Q. And then you don't ask any questions of this witness.
A. No.
Q. And there's no objection to the question about prayer, is there?
A. No, there is not.
Q. All right. Was that relevant to this case?
A. It was not.
Q. All right. And should you have made an objection there for lack of relevance?
A. I should have.
Q. Okay. All right. In the application we raised some issues about Mr. Patterson and testimony on whether or not he had a collapsed lung.
A. Right.
Q. All right. I want to direct you, I guess, to several witnesses testimony on this issue. If you would turn to page 97 of the transcript.
A. Uh-huh.
Q. Are you there?
A. I am.

Q. Okay. And this was a witness named Rhett Babcock?

A. Yes.

Q. All right. And what was his connection or role during this case?

A. He was another either, I think, a co-worker or a friend of Mr. Patterson. So, so the bar had kind of a fluid friend/employee, like, the employees all hung out there, like even when they weren't working. So it's easy to kind of get them lost, but he was another one of the boys that hang out at the bar.

Q. Okay. And he was -- he ended up giving some first aid to Mr. Patterson; is that correct?

A. He did.

Q. All right. And if you look at page 97 at lines 1 through 13.

A. Uh-huh.

Q. Do you see that?

A. Right. Yes. I remember he was, he was in the military and so he had received some sort of medic training.

Q. Okay. Well, and he said, the way he described it, he say in the military you're trained for first aid and other things such as that.

A. Right.

Q. Okay. So he doesn't actually state that he's a medic.

A. No. No. No.

Q. Okay. And at line 8 he gives an opinion that Mr. Patterson either had a collapsed lung or he needed to prevent a lung from collapsing; is that right?

A. Right. But he said that he was -- he just described what he was doing. And I believe on line six he goes: I could hold the pressure of the towel because it's better to stop a collapsed lung or it could collapse a lung if you had an extra pressure seal around it.

Q. All right. Was Mr. Babcock, was he ever qualified as an expert?

A. Oh, no.

Q. And other than that statement on line one of page 97 that he'd been trained in first aid, we know nothing about his qualifications, do we?

A. Correct.

Q. And this testimony could have been presented about what he did without having to give a medical opinion, couldn't it?

A. Right. And I don't -- I -- yeah, that's correct. I didn't necessarily see that as giving a medical opinion. I think he was just trying to say what he was

trying to prevent. I don't believe he was saying that Mr. Patterson had a collapsed lung, but --

Q. Well --

A. So I mean, that is a point of contention because I -- I think right, literally, like right as the trial was starting I had got dumped about 400 or so pages of medical records.

Q. Okay. Well, we'll talk about the medical records in a little bit. If you could turn to page 107. Following up about whether or not he was giving an opinion about a collapsed lung, did you ask him about that ---

A. At the beginning of line 8, yes.

Q. Yes. Line 8 through about 12.

A. Right.

Q. Okay. And so at that point you clarified that he wasn't giving that opinion.

A. Correct.

Q. Okay. Another witness that testified was Theodore MacLaughlin and that's spelled M-A-C-L-A-U-G-H-L-I-N. I believe that was a police officer, wasn't it?

A. Um, let me look. It looks to me he is a, yes, an officer.

Q. Okay.

A. With CPD, Coleman Police Department.
Q. Okay. And at page 171, lines 14 through 16, he indicates that he had been an Army medic; is that right?
A. Right. He had 23 years. On page 169 at the bottom, beginning on line 23, he says, he was asked about if he had any military experience. And he indicated that he had 23 years at the United States Army and that his duties were -- and it goes on to talk about his -- yes.
Q. Okay.
A. And he became a medic in '85.
Q. All right. And he also had worked at some point for Richland County EMS.
A. Right. But that, I believe his certification had expired.
Q. His EMS certification had expired?
A. Right.
Q. Okay. And on page 172 at line 3, Ms. Garfield asked Officer MacLaughlin: And based on your experience, what did you think about his wounds when you first saw him? Do you see that?
A. I do.
Q. And at lines 5 and 6, the officer responds: I believe he had a collapsed lung due to the wheezing.
A. Right.

Q. And that would be more in the nature of a medical opinion, wouldn't it?

A. Right. They were asking what he believed it to be. I don't believe that they were -- I think really what they were asking what, you know, what his juries were, but he said just based on the wheezing, but he thought it would be a collapsed lung.

Q. Okay. But he didn't actually, Officer MacLaughlin, didn't actually render any first aid, did he?

A. No.

Q. Okay. And you didn't object to the testimony of either Mr. Babcock or Mr. MacLaughlin, did you?

A. No.

Q. Okay. Now, the State spent a lot of time -- prosecution, spent a lot of time talking about the injuries, didn't they?

A. Yes.

Q. Did they spend a lot of time trying to make this an emotional case?

A. Oh, absolutely. And it -- the histrionics that occurred in the courtroom, and oftentimes I'm sure the State would say that I'm guilty as well, but they -- yes, they really liked to make these Federal cases, for lack of a better word, they try to turn them into

something that they're not.

Q. All right. They turn them into something emotional?

A. Right.

Q. Okay. The reason for asking about the prayer?

A. Right.

Q. And the reason that they asked so many questions about the juries.

A. Correct.

Q. Now, there was a couple of doctors that testified in this case; is that right?

A. There were.

Q. Okay. And Jeremy Reeves was one of them; is that right?

A. I believe so, yes.

Q. And he works at Palmetto Richland Hospital?

A. Yeah.

Q. And he's a trauma surgeon?

A. He is.

Q. And he was actually qualified as an expert.

A. He was.

Q. And I don't know whether to ask this, but other than where Mr. -- Officer MacLaughlin had worked and that his EMS certificate had expired, you don't know anything about disqualification?

A. Right. Right.
Q. Okay. All right. Now, on page 206, lines 1 to 21, were you able to ask Dr. Reeves about a collapsed lung or a pneumothorax?
A. Yes.
Q. Okay. And were there ever any x-rays or ultrasound or CTs or other imaging that confirmed that Mr. Patterson had a collapsed lung?
A. Not that I could find.
Q. Okay. And he certainly agreed with that on page 236; is that right?
A. Yes.
Q. Okay. Now, I don't mean to talk light of Mr. Patterson's juries because he did spend some time in the hospital; is that correct?
A. He did.
Q. But the nature of the juries are part of the more objective analysis that the jurors were supposed to give under our assault and battery scheme?
A. Right.
Q. And how Judge Barber charged it in this case?
A. Correct.
Q. All right. And so in context of what Dr. Reeves was able to confirm in more of an objective manner, it makes the testimony of Mr. Babcock and Officer

MacLaughlin look a little prejudicial, doesn't it?

A. Right. And actually, I know I don't think I even questioned Officer MacLaughlin because it -- to me it seemed like they were trying so hard that I knew that when the surgeon would come up, that he was the actual expert that what he would say -- and so I didn't -- and I even think I referenced that later on, you know, that they tried to put all of this in, but, you know, the doctors are the experts and this is what they said.

Q. Well, now --

A. Or didn't say, as back and forth.

Q. And I think you also argued that they tried to make it into more of an emotional case?

A. Right.

Q. And, certainly, this testimony from Mr. Babcock and Officer MacLaughlin fell into that category.

A. Yes.

Q. Okay. I want to ask you about Scott Fleming's testimony. And just to kind of refresh --

A. What page is that? I'm sorry.

Q. I'm going to direct you, and it doesn't begin there, but I'm gonna direct you to page 256. And just to kind of remind everybody, Mr. Flemming was the owner of Water Field --

A. Oh, yeah. Yeah, okay --

Q. -- or Group --
A. -- yes.
Q. -- Therapy.
A. I remember him. I remember him. Uh-huh.
Q. All right. And he was the one --
A. He got stabbed in the shoulder, I think.
Q. All right. And also somewhere else on the torso I think.
A. Right.
Q. I think he had two stab wounds.
A. Yes.
Q. And the jurors did find Stewart was responsible for the stabbing to create --
A. Right.
Q. -- assault and battery on Mr. Fleming.
A. Right. Which was lesser than what he was charged with, right.
Q. Okay. And so also to kind of put this into context, there was the situation where Mr. Ard, Stewart, and his friends were asked to leave and escorted out of Group Therapy.
A. Right. And, actually, Mr. Ard actually --
Q. He was trying to get people to --
A. He was -- yeah. And he was not escorted out and he was trying to get his friends out. He was actually

trying to remedy the situation and not make it worse.
Q. And that's a good point because one of the, one of the companions had hit the wall or something --
A. Correct.
Q. Right?
A. Uh-huh.
Q. And they had gotten, I think one of the bouncers got upset when that companion touched him.
A. Right. The co-defendant, right.
Q. Yeah. And I think that that bouncer said over and over again that he doesn't like to be touched.
A. Right.
Q. And they were escorting him out. And when this exchange happened at the door, Stewart was actually trying to get everybody to leave.
A. The first time, right.
Q. The first time.
A. Yes.
Q. Right. You could almost say he was trying to defuse the situation.
A. Absolutely he was.
Q. Okay. And so I don't think Mr. Fleming was actually working that night --
A. No.
Q. -- but he came up to speak with Mr. Patterson.

A. Yes.
Q. And so he was at the door?
A. He was.
Q. All right. And then when everybody was leaving, if you look at 256 at line 11, you know, he talks about there being commotion and yelling. And he talks about Mr. Geno and Mr. Scabs -- I'm sorry, Skaggs, S-K-A-G-G-S, trying to instigate more.
A. Correct.
Q. All right. And he specifically says Mr. Ard stood back.
A. Correct.
Q. Right?
A. Yes.
Q. And talks about who would ask him to leave, we don't want any trouble, right?
A. Right. That's what -- yeah. Yeah. Yes.
Q. Right. And so and then at line 18 to 20, Mr. Fleming states -- at that time he stated: Well, I have been to jail. I don't want to go back. I said, well, I don't want you to go back either. Do you see that?
A. I see it.
Q. All right. And so Mr. Fleming is talking about Mr. Ard saying he doesn't want to go back to jail.

A. Right.
Q. Okay. And there's no objection at that point, is there?
A. No, there isn't.
Q. Okay. If you turn to page 268. Before we do that, Ms. Campbell was doing this direct; is that right?
A. Yes.
Q. Is that right?
A. It was, yes.
Q. Okay.
A. Sorry.
Q. I think my hearing is going. At 268 we're into your cross-examination of Mr. Fleming at this point; is that correct?
A. Yes.
Q. And you were -- and we're still talking about this first, for lack of a better word, situation when Mr. Ard and his friends were leaving.
A. Right.
Q. And what was exchanged at that point?
A. The first -- the first encounter.
Q. Okay. And at that point you asked: And he -- you're referring to Stewart's rights?
A. Correct.
Q. Was saying: Come on let's get out of here. And

that's when Mr. Fleming said, after he made the statement, that he had been to prison and he didn't want to go back. And I think that's why he was standing back. That's what he said to me. I'm sorry.

A. Yes.

Q. And then at that point you asked to take up the matter of law outside the presence of the jurors; is that correct?

A. That is.

Q. All right. And you moved for a mistrial.

A. I did.

Q. And there was a discussion between you and Ms. Garfield and Judge Barber about whether or not this testimony was expected.

A. Right.

Q. Okay. And were you aware prior to trial that this testimony was gonna be -- would come up?

A. I don't recall. And I even went back because one of the things that I've learned to do with certain solicitors in this county is to document everything in writing because we had different recollections. And now that I'm looking at it -- so when we -- we may have been in the courtroom, but if we were, we were sitting at that table where Ms. Kinard is and the witness was put up here and the acoustics in here are sometimes really

bad. And this is early on ---

Q. But I would rather it be the acoustics than my hearing.

A. Right. Right. I mean, but just when I said yes and then you couldn't hear me. So I think what happened the first time it was said is quite honestly I probably just didn't hear it.

Q. Okay.

A. And so -- but that said, because I knew, I mean that's exactly what I stated on the record, but I never recall being advised about this testimony or the potential of the testimony.

Q. And that's what you stated to judge Barber; is that right?

A. That's correct. Because this, this witness never had a written statement or an interview with the police, so...

Q. And even though Ms. Campbell had done the direct examination, Ms. Garfield was the one who had handled discovery matters.

A. Right. Right. I mean, it was her case, right.

Q. Right.

A. She was the lead.

Q. And, you know, you mentioned different recollections. And Ms. Garfield claimed to have a

different recollection; is that right?

A. Certainly. I'm sure she did.

Q. Okay. But even under, under her recollection she says that she told you -- and I'm looking at page 270, lines 9 through 17 -- or, actually, through 15 at this point.

A. Right.

Q. She recalls telling you that and you saying that requesting her to instruct the witness is not talked about, right?

A. Right. And I recall this specifically because she was looking at me having a conversation.

Q. Uh-huh.

A. And so Ms. Garfield and I had several high profile cases with Ms. Campbell sitting as first or second chair, generally second chair.

Q. Uh-huh.

A. And so that's why I got into this habit of only communicating with them via e-mail because, because they always had claimed to tell me things before. And so, and so -- and I already filed a previous motion, which had upset Ms. Garfield. So I remember she was like I told you this. And I remember the judge stepping in and telling her to talk to, to him.

Q. Okay. Well, and regardless of which one of you

were correct about the recollection, Ms. Garfield agreed that that testimony was not admissible, right?

A. She did, yeah. She said even if she had told me, she knows that that shouldn't have been elicited.

Q. And she even said that she had instructed Mr. Fleming not to talk about that.

A. Correct. And, and on page 270 the clerk says that there is -- there was no emotion.

Q. Right.

A. And if there's one thing that I do is file a boat load of pretrial motions. And that's certainly something I would have addressed.

Q. All right. Well, and, you know, we, we don't know. Through discovery we have an idea of what's gonna happen in trial, right?

A. Right.

Q. And -- but we don't know everything that's gonna be said, do we?

A. No.

Q. Okay. It almost appears, you know, that Judge Barber was ruling against you because there had not been a motion in limine.

A. Right.

Q. And that's at lines 16 and 17 on page 270, right?

A. Correct. And that's something that I absolutely

would have filed a motion in limine had I had that information.

Q. All right. And one of the cases that I asked you to look at was the Jeter case, I believe.

A. Uh-huh. Yes.

Q. And that case talks about when it's not appropriate for a defendant's prior record to come in; is that right?

A. That's correct.

Q. Or prior incarceration actually.

A. Yes.

Q. Because the prior incarceration implies bad character?

A. Yes.

Q. And I think that they even in Jeter talk about Rule 404 and cite to that in *State versus Lott*, right?

A. Yes. Correct.

Q. And in this case, not to belabor the point, but the first time it came up on page 256 at line 18, Mr. Patterson was talking about jail; is that correct?

A. Mr. Fleming.

Q. I'm sorry, Mr. Fleming.

A. Yes.

Q. Okay. And then they, the second time it came up on 268 at line -- well, on line 5, Mr. Fleming's

testimony is about prison, correct?

A. Right.

Q. And so, again, not the belabor the obvious, but prison implies a much more serious record than having spent some time in jail.

A. Yes.

Q. Okay. All right. So when you make this objection the second time, Judge Barber -- I mean, when you make a mistrial motion after the second time the testimony comes out, Judge Barber denies that motion; is that correct?

A. He -- that is correct.

Q. All right. And then on page 271, Judge Barber gives a curative instruction, lines 13 through 25; is that right?

A. That is correct.

Q. And then on 272, Judge Barber says: Is it all right? And you don't make an objection to the curative instruction.

A. I do not.

Q. All right. And an objection to the curative instruction can preserve that issue for an appeal.

A. That's correct.

Q. And this was something that you thought was serious enough to have asked for a mistrial; is that

correct?
A. Yes.
Q. All right. And then you should have also objected to the curative instruction not being adequate.
A. To preserve that issue, yes.
Q. All right. And, of course, you can't un-ring the bell.
A. Right.
Q. You know, I've heard people say you want somebody to think about a pink elephant, you tell them don't think about a pink elephant and then that's the image that they have.
A. Right.
Q. Right? Okay. I want to go back to Ms. Campbell's closing argument. If you could turn to page 369.
A. 369?
Q. 369, yes.
A. Okay.
Q. At lines 6 through 9, she states: Verdict comes from a Latin phrase, it simply means to speak the truth. And that is the only thing that the State asks for in this case is a verdict that speaks the truth. And then she adds: And seeks justice; is that right?
A. Correct.

Q. And there's no objection to that?

A. Right. Well, and I specifically remember not making an objection to that because at this point I, you know, I was trying to seek justice under the lesser included's.

Q. All right. And they were trying to make it more emotional.

A. Right.

Q. Well, and the issue with this -- and the *State versus Daniel* or Daniels was one of the cases that I asked you to look at, right?

A. Yes. He gave me more home homework than my first year of law school, I think. Yes.

Q. I'll take that as a compliment. That had to do with a jury instruction, didn't it?

A. It did, yes.

Q. And it had to deal with both truth seeking and seeking justice, right?

A. Right. That, that dealt -- yeah, I remember specifically a specific judge used this, improperly used this, yes.

Q. All right. And, in fact, there was charges in the Court Administration charge book for a long time that probably should have been removed.

A. Right. And, in fact, I believe in this Justice

Toal specifically ordered that they be taken out.

Q. The concern is about lowering the burden of proof, right?

A. Right. Or shifting it, yes.

Q. And shifting it because a verdict that speaks the truth may not be consistent with the State's burden of proof in proving each element of the crime.

A. True.

Q. And a verdict that seeks justice doesn't necessarily also comport with the State meeting the burden of proof to prove each element beyond a reasonable doubt; is that correct?

A. Correct.

Q. Okay. And that's why that instruction is objectionable, right?

A. Yes.

Q. And why those arguments by prosecutors are objectionable; is that right?

A. Correct.

Q. Okay. If you could turn -- we talked about 369. If you could turn to 384, at lines 18 and 19. Ms. Campbell says again, she says: And, again, all the State is asking for is a verdict that speaks the truth. Is that correct?

A. Yes.

Q. And then on page 394 at line 11, she makes an argument: All we ask is that you reach a verdict that speaks the truth, hold him responsible, don't let him win those charges. Hold him responsible for what he did.

A. Yes. And, in fact, when I was looking back at 384, right before she had made the second statement about -- or she made the same statement a second time about seeking the truth, I had just objected because she -- she was basically pursuing attacking me, saying I was gonna get up in my closing and ask for a lesser included and not be ---

Q. Okay.

A. Yeah.

Q. And then she -- that's a good point. She did kind of personally attack you several times during this argument, didn't she?

A. Oh, yeah.

Q. And she would ---

A. That wouldn't be just this case, though.

Q. And here she was attacking you, anticipating that you were gonna argue for the lesser included.

A. Correct.

Q. And there was no secret that you were gonna argue for the lesser included's because you would have, in

fact, said that in your opening statement.
A. Right.
Q. And so the holding accountable and speaking the truth, she's actually tying that to what she anticipates your argument to be?
A. Correct. And that's why -- that's why I had objected.
Q. Yeah.
A. Well, among other reasons, but yes.
Q. Okay. I want to also direct your attention back to not so much the, the jury instructions but after the jury had begun their deliberations.
A. Uh-huh.
Q. If you could go to page 437.
A. Uh-huh. Okay.
Q. And at the bottom of that page, I guess at line 21, this is kind of, I guess, wrapping up the discussion about sending the poster boards back.
A. Right. Yeah, because I know, I know at least one of these is mine. So what I remember in the closing is the -- so I was trying to lay out, without emotion, the testimony. So I had a list of witnesses written on a poster board.
Q. Okay.
A. At least one of my poster boards.

Q. All right. And so -- and we already talked about the poster boards going back.

A. Right.

Q. And then at line 25 it says: Deliberations resumed at 12:12 p.m.

A. Correct.

Q. And then on that line going over to page 438, it says at 1:06 p.m. the trial resumed; is that right?

A. Correct. Meaning they would resume their deliberations.

Q. Well --

A. I thought ---

Q. Well, I take this to mean that they resume their deliberations at 12:12 and at 1:06, you're back on the record.

A. Oh, yeah. Oh, yeah, yeah. Okay. Yes.

Q. Okay.

A. Oh, yeah. They had sent a note. Uh-huh.

Q. Right. And the, the note is described -- well, apparently they may have sent more than one note, but it says on 438 it says: And the first note said we would like to hear the recording of the charge to the jury. Is that possible? It was signed presumably by the foreperson; is that right?

A. Correct.

Q. And then Judge Barber goes on to report a discussion or what had transpired while the lawyers were at lunch, right?

A. Right.

Q. And without going through it word for word, the upshot of all of this is, is that he went into the jury room and had a conversation with the jurors.

A. Yes. Judge Barber did, yes. And, like, we weren't even there.

Q. Right. And at line 16, you know, he reports that he had asked -- well, they had said, well, can we ask you a question. Then he instructs them about that. I guess they said that they may not want to hear the whole thing. And then he instructs them about what they could request; is that right?

A. Yes.

Q. Okay. And on 439 there's, you know, no objection to him having gone into the jury room, right?

A. That is correct.

Q. Okay. The lawyers were at lunch, right?

A. Right.

Q. And there's nothing to indicate Mr. Ard was present when Judge Barber is having the conversation with the jurors.

A. Correct.

Q. In fact, it implies the exact opposite that he wasn't because it was in, I assume, the jury rooms and the secure area of the courthouse and Mr. Ard was in custody.

A. Correct.

Q. Okay.

A. He was in holding downstairs, yeah.

Q. Okay. And back to your homework, one of the cases that I had asked you to look at was *State versus Elmore*; is that correct?

A. Yes.

Q. All right. And that was a case where the trial judge went into the jury room; is that right?

A. Yes.

Q. And in that case the lawyers were actually present, but the client was not.

A. Right.

Q. And the Supreme Court in that case granted Mr. Elmore a new trial without a finding of prejudice.

A. Right.

Q. And the concern, I think, that was expressed in that case is about a defendant's right to be present at critical stages of the trial.

A. Right. And when I actually went back and read this section last night, because -- because I had some

confusion about it too. So how this courtroom -- courthouse is set up, is that the judge's chambers are behind, you know, behind locked doors, which is also where the jury deliberates. Obviously not in the same room.

Q. No.

A. And the bailiff sits out there. Now, when I went back and looked at it last night, one of the things that was a tad bit confusing is, is whether this exchange occurred, like, in the -- I'm still a little bit -- I mean, we weren't there and he wasn't there. So, yeah, the exchange concerned -- occurred behind these walls, so, yeah.

Q. All right. And so, and so when you say we weren't there, you mean you and the prosecutors.

A. Correct. None of the lawyers were there.

Q. And when you say he wasn't there, you mean Mr. --

A. Mr. Ard, correct.

Q. -- Ard wasn't there?

A. Yes.

Q. And there's nothing in the record that indicates -- well, this does indicate that this happened during a period of time when the jury was excused from the courtroom for deliberations.

A. Right. They were -- they were --

Q. Right.
A. -- places where I couldn't get to.
Q. Okay.
A. Yeah, and Mr. Ard couldn't get to.
Q. Okay. And there's no additional inquiry into some of these things that you say are confusing about whether it was in the room or --
A. Right.
Q. -- wherever.
A. Absolutely.
Q. And actually ---
A. Yeah. And on page 439 he says: I went into the jury room. At the bottom, yes.
Q. Yeah. So, so he did. And, again, there's no objection after that.
A. Right. Right. Right.
Q. Okay. Based on the, the Elmore case, I mean, this appears to be a structural error.
A. Right. A structural error, yes.
Q. Yeah. And you couldn't move for a mistrial at that point?
A. Right.
Q. And the Elmore was decided prior to Stewart Ard's trial.
A. Correct.

Q. And, in fact, I don't know if I'm going through that with every case, but all the cases that we have discussed today were decided prior to Mr. Ard's trial.
A. Right. All the ones so far.
Q. Okay.
A. Not all the ones I was assigned.
Q. All right. And I think the only one that we really haven't talked about was the State versus --
A. Pete, right.
Q. Which, which came out this summer, right?
A. Correct.
Q. And, and that holding was that as Sutton. And that's what our other attempted crimes in South Carolina has attempted murder a specific intent crime.
A. Correct.
Q. And in reaching that conclusion they looked at Sutton, right?
A. Correct.
Q. They looked at other cases that had been decided for Mr. Ard's trial.
A. Yes.
Q. They looked at the statute, correct?
A. Yes.
Q. The legislative intent of the statute.
A. Yes.

Q. All right. And the opinion stated that the fact that attempted murder was a specific intent crime was something that was clear from all of these things?

A. Yes.

Q. Okay. Now, I promised you several times we'd eventually talk about the medical records.

A. Oh, thank you.

Q. And I think you got some records on the eve of trial; is that correct?

A. That's correct. I believe I handed an e-mail about that, but yes.

Q. Okay. The -- I believe there was some, also some testimony between the investigator officer and the various lawyers about whether he prepared search warrants for that.

A. Correct.

Q. And those search warrants had been prepared in the fall of 2013?

A. And those search warrants, I believe, were the search warrants themselves were included in the 89 pages that I initially received, but, but not the records. And this is a systemic problem in a lot of counties that I try, but very specifically to this county.

Q. Uh-huh.

A. And, in fact, I probably pulled more motions to

compel than I should because they have -- they, the solicitor's office -- but this circuit solicitor's office has a -- it almost appears as a policy at this point ---

MS. KINARD: Your Honor, I'm gonna object to the line of this questioning. Not only did it lead for a commentaries about the prior appeal, but there's also no allegation regarding medical records that has been filed.

MR. GROSE: Well, this is gonna -- this is setting up for the Motion to Quash the LWOP notice as vindictive. And we do have an issue about that with regard or whether that should have been appealed.

MS. KINARD: That seems a bit strung out as far as reasoning goes to me, Your Honor. I'm not sure how the medical records go to the LWOP notice, but I'll defer to you, of course.

MR. GROSE: Well, there was testimony from the officer that the medical records were used to determine what the charge should be and it was the attempted murder charge that was used to impose the LWOP sentence. And so -- and Ms. Zmroczek's claim argument at trial was that the LWOP notice served as persecutory or vindictiveness. And I think that the timing of releasing the records to her has supported their

decision to make that charge is relevant to the Motion to Quash.

THE COURT: Was that motion before me?

MR. GROSE: That was a motion that Ms. Zmroczek made.

MS. KINARD: It is a pretrial motion in the case, Your Honor.

MR. GROSE: Well, it was a pretrial motion but it became ripe when Mr. Ard was convicted of attempted murder and that's when the motion was actually argued was at the sentencing.

THE COURT: I interpreted your response as you gave to the original question about the circumstances under which she received medical records, a large stack of notes right before the start of trial, and she was in the process of answering that question in a roundabout way.

MR. GROSE: Okay. So...

THE COURT: I overrule the objection.

MR. GROSE: Okay.

MS. KINARD: Thank you, Your Honor.

THE WITNESS: But anyway, so that -- these are things that I tried to avoid because obviously my clients all deserve to, a, have the evidence ahead of time, but so do I to properly prepare for trial.

BY MR. GROSE:

Q. And just for the chronology, the records were requested in the fall of 2013, correct?

A. Correct. By the officers, right.

Q. By the officers. Obtained by the officers in the fall of 2013, right?

A. That's my understanding. And provided to the solicitor's office.

Q. In the fall of 2013?

A. Correct.

Q. You get them in June of 2014?

A. Correct.

Q. And the trial is a couple weeks later when you --

A. Well, I was actually scheduled for trial the day that I got them.

Q. Okay.

A. And I believe the administrative judge was Judge Robert Hood, gave me two weeks maybe, I think.

Q. Okay. All right. And there was some testimony from the officer that the reason for getting the records was to determine the nature of the injuries and to help determine what the charge should be.

A. Correct.

Q. Okay. Now -- and, of course, we talked earlier about this becoming an attempted murder charge regarding

Jesse Patterson.

A. Right.

Q. And as I understand it, your opinion is, is that seeking that charge and seeking the LWOP notice was vindictive?

A. Absolutely.

Q. All right. Can you explain that to Judge Newton.

A. Yeah. So as I had said previously, I mean Mr. Ard had always taken responsibility. I mean, he turned himself in. He gave them the knife. He was always very up front and candid about what he had done and it was always my goal -- and I believe what he was charged originally, none of those charges would have -- would have instigated or qualified for the life without parole.

And then as Mr. Ard, through me, was doing negotiations and then requested a bond hearing, that's when all of a sudden I start getting e-mails about direct presentments of the LWOP notice and the increase in charges, which there's nothing else to call it. I mean, it was absolutely, okay, you're not gonna do what we want and he's not gonna do what we want, which is plea, so we're gonna do this instead.

Q. Okay.

A. And he had, Mr. Ard did have a prior record, but

they were from, it was like 20 years or so earlier. In the '80's. It was --

Q. Well...

A. -- the qualifying, the qualifying --

Q. The predicate.

A. -- predicate, yes.

Q. And it's, I guess it's fair to say that at some point because they had made offers, the solicitor's office concluded that Mr. Ard didn't necessarily require a sentence of life without parole to accomplish objectives at sentencing.

A. Yeah. I mean, they specifically offered a 15-year negotiated --

Q. Right.

A. -- sentence at one point.

Q. Okay. And if the Motion to Quash hypothetically would be granted, what would the remedy be?

A. It's a Motion to Quash the LWOP notice?

Q. Yes, ma'am.

A. Oh, then, I mean, then he would just be subjected to, to the penalties for whatever crimes he was convicted of.

Q. All right. Whatever the range is without --

A. Correct.

Q. -- the enhancement.

A. Right.
Q. Okay. Um...
A. I think that, I think that the emotion -- it's my opinion that the emotion and wanting to get the LWOP was really ramped up after they served that notice.
Q. Okay.
A. I think that that, um...
MR. GROSE: And if I could beg the Court's indulgence for a moment. Okay. Four pages that I'd like to mark as applicant's exhibit, I believe, it would be 4.
(Whereupon, Applicant's Exhibit Number 4, Four-Page Document Of E-Mails, was marked for identification.)
BY MR. GROSE:
Q. Before I hand you these, you said the desire to seek LWOP got ramped up.
A. I believe the emotion that the -- I believe that their, they being the State or the prosecutors, their histrionics, their desire to seek a conviction and those appealing by emotional appeals increased after the notice was served.
Q. Okay.
A. If that makes sense.
Q. And earlier in your testimony I think you said

that one of the solicitors wasn't happy that you filed that motion.

A. For bond, correct.

Q. Okay.

A. Correct.

Q. And how about the Motion to Quash?

A. Oh, yeah. No. I mean, there was whenever it was argued, I believe that she even told Judge Barber that she took issue with me putting what I put in the motion, which is why I made the motion to pardon the record.

Q. And that motion is in the record on appeal.

A. It is. It is.

Q. I will hand you, it's two sheets, but they're double sided and they're e-mails marked as Applicant's Exhibit Number 4 and ask you if you've seen those before.

A. I have.

Q. And what are those?

A. So these are copies of e-mails that between myself and the lead Solicitor Dolly Garfield, like I said, I tried something else. From having trouble remembering or having trouble finding a common ground about what was discussed, I tried to put most things in writing with certain solicitors.

Q. Okay. And were those e-mails that you exchanged

after filing a Motion to Quash the LWOP notice?

A. Yes.

Q. Okay. Now, in your view is the Motion to Quash, is it also intertwined with the solicitor docket control issues?

A. Oh, absolutely.

Q. And how so is that?

A. Because so the way that the sitting judge now, the sitting administrative judge now, does it, so we, as any attorney, State or defense attorney, we e-mail a copy of whatever motions we want filed or we want heard. We e-mail that to the administrative judge and her -- and we have a deadline, which we all know is we have to do it the Wednesday before. And then she or her law clerk comes up with a motions roster.

So every Monday, regardless of who requested the motion, whether it's a motion to revoke bond or a motion to set bond, they're set by the administrative judge. That is new with this -- and it's Judge Jocelyn Newman is our administrative judge now, but I believe that she implemented that either based on length or just based on what she saw to be efficient.

Because prior to, prior to that we couldn't -- I couldn't get a motion heard. I would file the motion and I would serve it and I would do the cover letter

that says please have him brought over. Him being the client, because obviously this motion for bond they're in the detention center.

I can't call the detention center. I can't call the sheriff's department. I can't called downstairs. I can't even get them brought up from downstairs to hear. It all comes from the Solicitor. So I couldn't get Mr. Ard a bond. I couldn't even get him a bond hearing. And so I think what I did was I started to cc the administrative judge at the time, who I think then probably had some -- I don't know what happened. But anyway, all of a sudden I got a trial notice.

Q. And so the right to bond is to make the amendment right, but also you have a right under the state constitution.

A. Correct.

Q. And I believe earlier you said that there was a practice in the circuit that if you ask for bond, then that draws the trial judges.

A. No doubt.

Q. And in this case did it draw the change in the charges?

A. Yeah. Not only did it draw the trial notice, it drew the upgraded charges. And then it also drew the LWOP notice.

Q. Okay.

A. Because of the -- the previous charges that he was charged with originally would not have qualified to, to generate an LWOP notice. So once the charges were upgraded, they then also added the extra tax of the LWOP.

Q. And this was the two strike LWOP?

A. Correct.

Q. Okay. And attempted murder is most serious and that's what made it a two strike LWOP?

A. Right. That's what changed it.

Q. Okay. And there's also, you know, Sixth Amendment right to a jury trial and a state constitutional right to a jury trial. And do you believe that there was some vindictiveness with regards to Mr. Ard exercising those rights?

A. Absolutely. And I put it very plainly in my -- I mean, I put it very plainly in my motion. It's easy for me to always write things out because I tend to get sidetracked if I don't.

Q. All right. And do you -- do you feel that the motions and quash the indictment based upon prosecutorial vindictiveness, do you feel that that was -- I'm sorry, not quash the indictment, quash the LWOP notice, do you believe that that was preserved for

appellate review?

A. Absolutely. The research that I had done in preparing that motion and writing it out to argue it, and arguing it, it was that once I made that allegation that the burden then shifts to the State and they must show that it was not vindictive. And I recall specifically during that argument that the State said, well, the statute says we can. And I agree that the statute does say it can.

The judge agreed that such could -- but that wasn't the issue that I was raising. The issue that I was raising was but you can't do it just because you want to get your way and you want to bully somebody. And that's exactly what they were doing.

Q. Um, now...

A. And did do.

Q. Huh?

A. And did do.

Q. All right. Anything else on that?

A. No.

Q. Okay. I want to transition back to the witness statements about the, the watch.

A. Yes.

Q. This is Benjamin Geno's watch?

A. Yes.

Q. The prosecution tried to dispute that there was a lost watch, didn't they?
A. Right.
Q. And at one point there was a question about a watch versus a piece of pizza.
A. Correct.
Q. And I believe you testified earlier and the record reflects that you didn't -- did not call any witnesses.
A. Correct.
Q. Certainly Mr. Geno was a witness to the lost watch.
A. He was. He was also a co-defendant and I know that his counsel -- I believe it was Stanley Myers, but I can't remember off the top of my head -- I know that all of the co-defendants had counsel and I was not allowed to talk to them.
Q. Okay. And that includes Benjamin Geno?
A. Benjamin Geno and Jason Scaggs.
Q. Okay. Now, I believe it was Mr. Richardson --
A. The driver, yes.
Q. -- the driver who was there. His statement is, written statement, is in evidence today.
A. Yes.
Q. The summary of the notes are in evidence today?

A. Yes.
Q. And he was not charged?
A. Correct.
Q. And he confirmed the law school action.
A. Correct.
Q. And the significance of the lost watch is that it gives Mr. Ard and his companions a reason to be back at Group Therapy.
A. To return, right. So there was that first incident and then they returned.
Q. All right. Without the intent to then commit a murder?
A. Correct.
Q. And you didn't -- and you note Mr. Scaggs and Mr. Geno did not testify.
A. No.
Q. All right. And Mr. Richardson did not testify either?
A. He did not.
Q. Okay. And by that it's also, I think, implied that you didn't call any of those three.
A. Correct.
Q. Okay.
A. Nor did I call them.
MR. GROSE: Beg the Court's indulgence for a

moment, please. That's all of the questions I have at this time. Please answer any questions that the Attorney General's office might have.

THE COURT: I think we'll take a break for about 10 minutes.

(Whereupon, a recess was had from 11:45 a.m. - 12:11 p.m.)

THE COURT: Okay. You may proceed.

MS. KINARD: Thank you, Your Honor. May it please the Court?

THE COURT: Yes.

MS. KINARD: I'll start the cross-examination of Ms. Zmroczek.

CROSS-EXAMINATION

BY MS. KINARD:

Q. Ms. Zmroczek, you were retained to represent Mr. Ard before he was even arrested in this matter; is that correct? I understand I said arrested, he turned himself in.

A. I was contacted, yeah. There was an issue with funding, but yeah. I represented him pro bono, but yes.

Q. You were in the case?

A. Yes.

Q. So I want to get to that. I mean, you talked briefly about the original charges. Those included

assault and battery by a mob?

A. Second degree, yes.

Q. Second degree, okay. Do you know how those charges were determined and what led to them being increased?

A. As I've discussed before, I believe that the charges were determined by the circumstances that, that occurred. There were three co-defendants that were arrested. And so, I mean, that would fit under the element of mob.

And I believe, and I believe that the police believe that the -- that injuries and the proper charges were assault and battery by a mob second degree. And I believe I've already discussed why I think that those were enhanced, but I can go through it again if you need me to.

Q. No, you did. And I should clarify what I was trying to get from that is, do you know how the solicitors, the charging agents, determined who got which charges and why? Did it come from the video testimony? Any guess?

A. Well, I know it definitely didn't come from the testimony because it was done before trial, but I have no independent knowledge, just my suspicions so, no, I don't know the answer to that.

Q. Okay. In preparing for trial did you meet with Mr. Ard?
A. Oh, yeah.
Q. Do you have any idea how many times?
A. I do not. Like I said, all my file is digital now, but it was numerous times. But not only that, his brother and I maintained constant contact. And I believe I was in contact with his wife, his momma, his other brother. He has two brothers and I know them both. So, yeah, there was, there was constant communication.
Q. During those meetings did Mr. Ard have a chance to tell you his version of events?
A. Oh, absolutely. It's always been the same.
Q. And that was just generally that there was an altercation or they got kicked out of the bar?
A. Well, his friend got kicked out and so he went with them.
Q. Yes.
A. Yes.
Q. And during that, someone lost a watch, they went back to retrieve it and a further squirmish ensued?
A. Correct. One of the things that got me, one of the things that also I was upset about in the medical records, and I don't know if I said this before, but so

when I did get the medical records the victim that was the victim of the attempted murder had a positive cocaine, as well as alcohol and, I think, marijuana as well. But he definitely had a positive cocaine reading.

And to me that was significant because of his -- he -- what -- and I proffered that testimony, even though it wasn't allowed to go in front of the jury because I believe that his behavior also probably elevated, escalated what happened. And he possibly instigated it. And I felt like that, that was a significant piece of information.

Q. Okay.

A. But that was not allowed to get in front of the jury, I don't think.

Q. Understood. Did you -- did Mr. Ard understand the different elements of the offenses that y'all were defending?

A. He did. I think you can see, as the number of the jury questions and the discussion, I think what got confusing for probably everybody. And we have law degrees, so especially probably the jurors were, were just -- there were so many lesser included's that, yeah.

Q. And the lesser included's were the bulk of your strategy?

A. Absolutely.

Q. Is that fair?
A. Yes.
Q. And, if anything, was to get anything lesser on any of the charges?
A. Well, I mean, what I believe was appropriate at worst for the attempted murder charge was assault and battery first. I felt like that was the appropriate charge. And so the other ones, I mean, assault and battery second for, for the bar owner. And then I believe assault and battery third for the two people that came to help.
Q. So the strategy was to try to get a lesser included that may have led to some confusion. Mr. Grose questioned you extensively on the different elements and the way they were presented. And then whether malice received a specific intent was properly defined and things like that. So I don't intend to question you further on that.

However, I do want to make sure I understood and point out a couple of things. You testified that the elements of the different offenses were on poster boards in the courtroom in front of the jury.
A. Yes. But not -- so they weren't -- they were just like written out like paragraphs. I mean, they weren't like bullet points or anything, that I recall.

But the solicitor's office uses these for almost every file, so yeah.

Q. Were those correct statements of the law?

A. I couldn't say. I mean, if she argued -- I couldn't say without looking at them because, I mean, I don't have pictures of them it's been so long. But if they said that it didn't require specific intent then, no, those were not correct statements. But I don't know what they said because I don't, I don't know.

Q. You simply don't recall?

A. No. I mean, I have no idea. They don't, they don't let me take pictures of them.

Q. Understood. You also had your own poster boards written out.

A. I did. I don't put the law on there. What I had were other demonstrative poster boards that included various pictures. Obviously what the point of contention for me and for everybody was that Mr. -- they look -- they returned for the watch.

And so when you watch these videos some of them are grainy, some of them are black and white, some of them are color. But for my closing to demonstrate my point I had -- when the State had already introduced the videos, I had screen shots of, of clearly what was the watch, in my opinion, on the ground. I recall that.

And then, and then I remember and one of them was different witnesses and their testimonies.

THE COURT: Were those boards preserved? I mean, marked in records as exhibits or anything?

THE WITNESS: That I don't recall, Your Honor. I don't know that I have them. So, I mean, I think that anything that goes to the jury is generally. I know I don't have them, so maybe Mr. Truitt has them in the clerk's office. I'm not sure. I don't know the answer to that question.

MS. KINARD: I'm certainly happy to look into that, Your Honor. I don't recall from the transcript whether they were marked or merely demonstrative.

BY MS. KINARD:

Q. So the bulk-- well, the portion of what you had to consider was the extent of the injuries sustained by Mr. Khan (phonetic) and Mr. Patterson?

A. Well, that's what the Stated wanted to focus on, but I think that that's kind of where this issue gets lost with all these different assaults because it's not just yes for the level of the injuries, but -- so it's not just focusing on that. I think it's also focusing on the intent that Mr. Ard had.

Q. Do you believe through cross-examination that you were able to rebut the theory that he intended to commit

a murder?

A. Well, clearly not by the verdict. I mean, that was my intention. That's what I certainly was trying to do. And clearly it worked because some of the charges were -- some of the verdicts were lesser included's, but not the one that, that I was focussing on.

Q. Now, to dive into the medical just a little bit. Mr. Grose brought up several examples of witnesses who testified that they thought Mr. Patterson had a collapsed lung.

A. Right.

Q. And your response to most of those were we didn't object because you didn't believe they were medical opinions.

A. No.

Q. So, therefore, those people did not need to be qualified as experts.

A. Right.

Q. However, two doctors were qualified as experts and testified to the extend of injuries; is that correct?

A. That is correct.

Q. If I could turn your attention to page 206.

A. Two and six?

Q. 206.

A. Okay, thank you.
Q. I'm sorry.
A. No, that's okay.
Q. This page was pointed out by Mr. Grose. I believe he questioned you of whether x-rays or CT scans confirmed a collapsed lung.
A. Correct.
Q. However, if you'd please look further down on the page, lines 13 through 21. If you read those to yourself. Would you agree that the summary of that was, say, in the last line it did not show evidence of a pneumothorax, which it should not have because he had a chest tube.
A. Right.
Q. So in other words, the collapsed lung would not show up on those tests because remedial measures had been taken.
A. Right. Well, and that was -- yeah, that's correct. And that was specific to the -- I was looking for any kind of documentary evidence cause, cause not only did the x-rays and CTs not show it, which they wouldn't, as he explained, because of the chest tube. But in the diagnosis I had a hard time understanding in the indictments whether or not they ever found a collapsed lung. And, again, I had gotten those so late

that I was just working with what I had at that point.

Q. Understood. Regarding the allegation about whether you should have objected to the solicitor's comments about seeking justice or searching or for the truth, did I understand your testimony correctly that you actually wanted the jury to feel like they were seeking justice in finding the lesser included charges?

A. That was my trial strategy the whole time, yes.

Q. Okay. And so that would speak to why you didn't object to any time seeking justice was mentioned?

A. Right. And I had objected the second time. Prior to the second time it was mentioned, but I don't know that it was on that issue though.

Q. Mr. Grose submitted a case to you on Elmore. And then that was regarding the issue of the judge going back to the jury. In that case do you recall what kind of case Elmore was?

A. It was a murder case.

Q. Was it a death penalty case?

A. Originally, yes, it was.

Q. And do you recall when in the case the judge went into the jury room? What phase?

A. This is turning into first year law school.

Q. It is.

A. I don't.

Q. Was it his penalty phase?
A. Right.
Q. And do you believe that fact could be used to draw a distinction between that kind of incident and when Judge Barber visited the jury room?
A. Well, I mean, it's certainly a distinction. This was not a death penalty case. I mean, although an LWOP case could draw some similarities. I mean, one's not getting killed, but both will die in the company of the State.
Q. You testified a good deal about your Motion to Quash the LWOP notice and about your feelings that both the LWOP notice and attempted murder charge were vindictive on the part of the solicitor's office. Do you think you could have done anything else to help mitigate those actions taken by the solicitor's office?
A. No. I mean, I made my position very clear in the e-mails. I made my motion very clear in the e-mails. I made my position very clear in th motion and I believe on the record. And I felt like the State did not rebut it properly.
Q. Can you explain that, please.
A. I'm sorry?
Q. Can you explain that further.
A. Absolutely. Like I explained before, I had done

a lot of research into this. And, actually, this issue had come up just recently as -- you know, this year or last year were kind of -- former Justice Toal, who is now sitting and she actually heard a piece in here that Mr. Harpootlian had raised the same issue. And so my understanding was correct that once the defense or someone raises an issue of vindictiveness by the prosecution that the burden then shifts to them to prove that their actions were not vindictive.

Q. And you don't feel that burden shifted prior to today provided you ---

A. Oh, absolute -- no. Their only response was, well, he meets the statutory requirements and we can do it. So that was I felt like that that was a very weak response. I mean, sure, that's what -- but that didn't respond to what my argument was.

Q. Do you believe argument was -- sufficient argument was placed on the record there?

A. Yes.

Q. Okay. And do you believe all this was preserved for trial?

A. Not only that, I -- yeah, I actually made the memo a part of the record, yes.

Q. And to your knowledge is that -- did that become a part of the record on appeal?

A. Well, I mean, it was part of the record. I mean, I know I put it in, so I'm sure it was part of the record.

Q. Bottom line Mr. Alexander is part of the record?

A. I haven't checked the Anders brief.

Q. I know. I understand you have not seen that. Now, during your representation I want to talk a little bit more about how this progressed. Was this always going to be a trial?

A. No.

Q. Did you discuss from the beginning the possibility of pleading guilty with this charge?

A. Absolutely.

Q. Can you describe how the negotiations went in that respect?

A. Yeah. I mean, the -- at the time -- so one of the things that the lesser charges, and I believe it was assault and battery first, is maybe what carries the 15. I can't remember which one it was. Or maybe it was like that carried ten and another one carried 15. Like the weapons charge carried five.

So that -- so I think that's where I came up with the 15. But so they wanted him to plead straight up to that amount of time and not let me present any, you know, mitigation or whatever. Basically enter into a

negotiated sentence so he knew what he would be getting and I couldn't argue for anything lesser.

The thing with Mr. Ard is not only did he take responsibility from almost immediately after it happened. I mean, by turning himself in and turning in the weapon and giving a statement, he actually believed he encouraged the other co-defendants to turn themselves in as well, but he -- he had been a very active, functioning member of society. He had recently -- not recently, but had been here and had young children. Had been clean. And by clean, he was not drinking. He had somewhat of a record but it was so long ago that this was not Stewart Ard anymore.

And so in attempting to get -- to convey this to the solicitor's office, that's, I mean, that's just where it broke down. And then since we couldn't -- we were still trying to negotiate on some sort of plea, but that's when I requested bond and that's when everything went downhill quickly.

Q. So after you requested bond and got notice for a trial, the solicitor stopped negotiating?

A. Oh, yeah. And not only -- well, not only stopped negotiating, I believe took a more aggressive approach into almost trying to force the plea, trying to bully some sort of plea by saying now he has a charge that

carries a most violent strike that would strike him out and we're gonna put him on notice that we're striking him out.

Q. What was the best plea offer that was reached? Was it, I believe you said 15 years negotiated?

A. That's what I recall. And I believe it was a straight up to assault and battery first and a weapons charge. And I think the others would just be consumed under that. That's my, that's my recollection.

Q. Did you provide Mr. Ard any advice on his plea?

A. I did.

Q. Whether to take it or not?

A. I did.

Q. What was the advice?

A. That he should take the plea.

Q. And do you recall his reasoning for not taking the plea?

A. Honestly, I -- honestly, I believe that he was considering it, but he had been in jail for so long I think that he wanted to get out on bond to maybe kind of look at it. So a lot of this case was on video, and so it was hard to show him all the videos in the jail. And so I think he just wanted to get out on bond.

I don't think that he was opposed to some sort of plea. I think he just wanted the opportunity to get out

of jail to be able to think straight. When you're in there you can't really make good decisions.

You can't -- even though we go into a room where he can talk to me, our conversations, you know, can certainly be overheard. And he can't see the video. So I think he just wanted to get out on bond to explore that possibility a little bit more. That's what I really believe.

Q. And had all things gone according to the normal course of events, do you believe he would have been granted bond?

A. I have no idea. Under this administration, yes. But I have no idea. There's just no way to know. This was prior to the Bakery murder, so I absolutely think that it was -- that was the case that kind of shut down the bonds. So I think that, I think that it certainly was a possibility.

Like I said, his record was from the '80s, as I recall. Maybe early '90s. But, I mean, he had been clean. He had a job. He had children. He was a functioning member of society. So there was a lot of -- I mean, his whole family was here. He wasn't a flight risk. There was a lot of -- there were a lot of elements to under the statutory requirement for bond that I think a judge, any reasonable judge, would have

considered.

Q. And you certainly had enough confidence in his ability to get a bond to file the motion and ask for the hearing.

A. Yes. I think his family would have stepped up, yes.

Q. Okay. Now, in the plea negotiations he understood what he would have been giving up and all of that, but as you said, he thought he, he wanted to take the chance to get out and see the evidence for himself?

A. Right. I think he -- I mean -- and I want to be clear, when the plea negotiations, when we were talking about pleas, there was no attempted murder, no LWOP. So there was no, once I filed for that bond, it really, there was no more discussions about pleading because he was trapped at that point really.

Q. Is there anything, is there anything -- this might seem like a silly question, but is there anything you could have done to try and get his charges back to where they were or were you stuck with those?

A. Well, I mean, I had no control over that. It seemed like everything I was doing was just making it worse for him.

Q. Regardless, you did everything that you had to do.

A. Oh, I mean, I filed a bond. I did everything that, you know, he asked me to do.

Q. And so once you received the attempted murder LWOP notice, your professional decision and certainly with the advice of counsel of him was that you would go forward and try to prove a lesser included rather than attempted murder?

A. Absolutely.

Q. Okay. Did you ever develop an opinion of the evidence in this case?

A. Oh, absolutely. Especially once I got the medical records.

Q. And what would that be?

A. That would be that this was a mutual fight, likely instigated by Mr. Patterson. He -- I didn't know this at the time, but he had pending drug charges. And not that it matters now, but has subsequently been continuously arrested for drug charges. But the pending drug charges had actually been Nolle prossed, so I couldn't bring that up obviously in attacking his credibility. But I know that since then he's picked up several more drug charges.

Q. Well, knowing what you did at the time of trial, whether that was when you got the late medical, your opinion at that time was that it was mutual?

A. It was absolutely. And likely instigated by Mr. Patterson and escalated, yes.

Q. Regardless, though, this altercation and the actual stabbing was caught on video?

A. It was.

Q. On several angles to video?

A. Oh, yeah.

Q. And he turned himself in?

A. Oh, yeah.

Q. And he had the knife that he gave over to the police?

A. Absolutely. He was always cooperative.

Q. Okay. And there were injuries that required emergency medical attention?

A. Yes.

Q. Did Mr. Patterson receive surgery for his injuries? Do you recall?

A. I don't recall.

Q. Okay.

A. I don't, I don't, I don't know that. I mean, I think they might have put stitches. I don't -- I mean, he didn't have any wipes even in ICU. In fact, I remember, I mean, he was all over social media and he was, you know, posting pictures of himself in the hospital. I mean, he was clearly functioning.

Q. Okay. I would just going to point to page 167, line 5. It says Mr. Patterson was taken straight to surgery.

A. Right. And they did insert a chest tube, which would require surgery, so...

Q. Okay.

A. But I dont know that. I mean, again, I don't know that I had an opportunity to fully explore what that was.

Q. Understood. And one of your arguments was that the injuries did not rise to the level of great bodily harm?

A. That was certainly one of my arguments to keep it out of ABHAN.

Q. So overall do you believe that you presented the best possible case regarding each of these various charges to get a lesser included offenses when you were seeking them?

A. I did. I mean, I proffered what I thought was relevant testimony regarding his -- the cocaine in his system, but that did not get in front of the jury. So I attempted to present the best possible case.

MS. KINARD: Beg the Court's indulgence.

BY MS. KINARD:

Q. Just to make sure I talked to you about all the

allegations very briefly. The issue about the, the witness -- excuse me, not witness but patron of the bar, said a prayer for Mr. Patterson.

A. Right.

Q. Do you believe that was ultimately injurious to this case?

A. No. I just think it was, it -- with just the continuous tactics by the State to try and make this something bigger than it was.

Q. And you testified very thoroughly on the statement I've been to jail I don't want to go back --

A. Yes.

Q. -- in the motion you made regarding that and the curative instruction. During the trial do you believe you did everything that was necessary when you were in the moment to handle that issue?

A. Well, sure. I mean, hindsight is 20/20. I know that I have to remember to preserve that. I never renew my motions, but I know that not objecting to a period of argument does not preserve the issue. And also, one thing I would have done differently -- and maybe -- I don't know. I've read so many things by now.

But one of the things that, especially when testimony is stricken, for example, when the judge told him to disregard it during his curative instruction, I

typically ask for a jury instruction on -- I know that the judges say if any testimony was stricken, you must not consider that. I don't know if that's in there or not. I didn't have the envelope. I just didn't take the time to look. Sorry.

Q. And lastly, your decision not to have Mr. Ard testify in the case, can you describe the thinking behind that, please.

A. Sure. So Stewart and I talked about it a lot, him testifying. So the problem with that was obviously his record, 'cause I think that, even though it was out of time, I think that it somehow, it could have possibly be Lyled in because they were, I think there was at least one assault on there, I'm pretty sure.

And at this point Mr. Ard had been sitting in the county detention center and he's -- he's like older. And I say older. He's like around my age. Not too old. But, but he was in this facility with these young annoying kids. And his demeanor had changed when the State really started to, to just mess with him and up these charges and LWOP him. And I feel like that, that would have been difficult for him to handle. And he and I talked about that.

And, certainly, Ms. Campbell, for all of her experience, would have gone after him extremely hard.

It wouldn't have been this garbled. It would have been mishandled. And so we, we talked about that a lot.

And I felt like the videos, you know, they showed what they showed. And I felt like this is a case that I didn't want to voice last argument. And I don't make that decision often. But in this case, especially arguing for the lesser included's I felt like it was a good strategy.

I know that the two co-defendants couldn't have testified or they wouldn't have testified. They would have taken the Fifth. And I don't recall -- I don't recall what -- why I didn't discuss or find the other witness. I don't know if he couldn't be found.

I don't know if I just didn't have the time and resources because, like I said, once I got put on the trial, it wasn't like I got put on the trial docket and it just was on the trial docket. It was like I got put on the trial docket and it was called. So that escalated very quickly.

Q. And you said other witnesses. Do you mean Mr. Richardson?

A. Yes. The one who read the four-page statement, yes.

Q. Okay. And based on your research and investigation, there weren't any other witnesses you

could find that could have been helpful?

A. No. I mean, there were, you know, a certain group. There were just the people that were involved, so...

Q. So is that -- and so the other people who testified on the State's side?

A. Right. I mean, just the people who were involved in the tussle. It wasn't -- and that's the thing. The videos show it wasn't Mr. Ard just didn't walk up with a knife and start stabbing people. That's not how it happened.

In fact, when it started, he wasn't even there. I mean, he was there, but Geno, Mr. Benjamin, wasn't ahead of him. And he was trying to -- I mean, he knew that Mr. Benjamin was upset. I think he's, again, trying to defuse the situation.

So, you know it would -- and that played out on the video. I mean, it wasn't like he just walked up and just started, you know, attacking people because that's not what happened.

Q. Though there was testimony that someone in the group was saying things like we're gonna go back and show them what happened or show them what they get or at least someone said, pardon my language, we're gonna go fuck them up.

A. There was -- that testimony came from, yeah, Mr. Patterson's friend, so I don't -- and, again, and I believe that those, if I recall, if anybody had made those statements it would have been Benjamin. So, again, Mr. Ard was trying to stop that from happening and not going to encourage it.

Q. And you did question them about their relationships with each other?

A. I did.

Q. But they were all friends?

A. Oh, yeah.

Q. I think that the guys from the courthouse said we're all a big family.

A. Correct.

Q. And do you believe that, that helped influence their credibility or...

A. Well, I don't think it helped influence. I mean, I think it ---

Q. It influenced it negatively?

A. It helped -- right. Right. I think it influenced their testimony.

Q. Yes. Thank you.

A. Yeah.

Q. Is there anything else you'd like the Court to know about the representation of Mr. Ard?

A. No. I mean, obviously, I try a lot of cases. And in hindsight there are things that you would always go back and do differently, but I really felt like the State made a conscious choice to, to go after him because he, he simply wanted to exercise a constitutional right to get out on bond. And, and then by withholding or delaying their disclosure in the medical records, I mean, I do, I do think that that effected the outcome of the case.

MS. KINARD: Thank you. I have nothing further.

THE COURT: Redirect.

MR. GROSE: And I will try to be very brief, Your Honor.

REDIRECT EXAMINATION

BY MR. GROSE:

Q. She asked you about the poster boards.

A. Yes.

Q. And I think you said that the solicitor's office uses those regularly.

A. They use -- I mean, they use poster boards all the time. But in closing, they -- and I don't know if they use the same ones. I mean, I look at them, but since they don't go back, you know, I don't, I don't recall. And I've tried so many cases and so I don't know exactly what they said.

Q. Right. And I think you also testified that they won't let you take pictures of it.

A. Oh, no. Yeah, I'm not allowed to.

Q. Do you know why they won't let you?

A. I don't.

Q. Of course, if we had pictures of them, that could have been made exhibits for the record.

A. Yes. And, again, I don't know where the -- I don't know that they're not in evidence because I don't have a list of that. I don't know.

Q. Okay. Do you still have the transcript up there?

A. I do.

Q. The Attorney General asked you about plea negotiations.

A. Yes.

Q. Can you turn to page 8, please.

A. Yes.

Q. And look at the, I guess, that whole page really.

A. Right. Right. Because one thing -- yeah, because one thing that -- so I'm getting better in the digital age but, like I said, I typically write a lot of things down on a lot of different note pads. And I scan them in, but I like to put things on the record just for the protection of the client and everybody.

Q. And so is it fair to say looking at page 8 that

the offer at the time of trial was for attempted murder straight up with the other charges to be running concurrent?

A. Correct.

Q. And that would have been without the LWOP?

A. Right. And that was the plea negotiations, again, after ---

Q. Okay.

A. After they were enhanced. So there were negotiations prior to that.

Q. Okay. And I want to ask you about that. If you look over at page 13, lines 3 through 10, I guess.

A. Right. And that's what I'm talking about because March is when I filed for my bond.

Q. Okay. And the plea negotiates they were to plead as charged ---

A. To the assault and battery seconds.

Q. And do the warrants?

A. Yes. The warrants, right.

Q. Which included the, also the assault by a mob violence.

A. Assault by mobs. Two assault by mobs seconds, yes.

Q. Okay. And those were assaults by mob second degree serious bodily injury.

A. Right.
Q. And then, of course, that's the same as the great bodily injury under the statutory assault and battery of a high and aggravated nature.
A. Right. Right.
Q. And there were some questions as to whether or not those elements were ever met.
A. Right.
Q. Okay. And there were a lot of questions that I guess went to Stewart accepting responsibility for the actions. Would you agree there's a difference between accepting responsibility for the conduct and then as opposed to what charge that conduct falls under?
A. Oh, absolutely. And I want to be very clear. I think his conduct, I never thought his conduct rose to a specific intent to kill anybody.
Q. Okay. And Mr. Ard never thought that he was guilty of attempted murder?
A. No. No, and he -- I don't think he should have been.
Q. And the Attorney General asked you if you had done everything in your ability to try to convince the jurors that it was not -- that Mr. Ard did not have any intent to commit a murder.
A. Right.

Q. Okay. And you would agree that under the argument and the charge in this case, the jurors could have believed that Mr. Ard did not intend to commit a murder --

A. But still found him, right.

Q. -- but still found him guilty of attempted murder because of the incorrect argument and incorrect charge?

A. Incorrect charge, absolutely.

Q. Okay. And then the issue that we get into is, you know, that essentially lowered what the prosecution had to prove.

A. Right.

Q. And it's never about a strategy for a defense lawyer to allow the burden of proof to be reduced.

A. Oh, no.

Q. Okay. Whether that comes from a jury charge --

A. Or an argumentative, yeah. Correct.

MR. GROSE: That's all I have, Your Honor. When we took the break, the court reporter pointed out to me that I had not moved Applicant's Exhibit Number 4 into evidence. I would do that at this time.

MS. KINARD: Without objection.

THE COURT: It's admitted.

(Whereupon, Applicant's Exhibit Number 4 was entered into the record.)

Any further questions of this witness?
MS. KINARD: No, Your Honor.
THE COURT: You may step down.
THE WITNESS: Thank you. Your Honor, I have two pleas, may I go downstairs or am I needed in the courtroom?
THE COURT: No, I think you're done here.
MS. KINARD: No objection.
THE WITNESS: Thank you.
(Whereupon, witness leaves witness stand and courtroom.)
MR. GROSE: I would call David Alexander.
(Whereupon, witness comes forward.)
THE CLERK: Do you swear or affirm the testimony you shall give this Court will be the truth, the whole truth and nothing but the truth so help you God?
THE WITNESS: I do.
THE CLERK: Please have a seat there, sir. State your full name for the record.
THE WITNESS: David Alexander.

DAVID ALEXANDER,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GROSE:

Q. Mr. Alexander, are you an attorney?

A. I am.
Q. And where are you employed?
A. Appellate Defense.
Q. And that's part of the South Carolina Commission on Indigent Defense?
A. It is.
Q. And how long have you been employed there?
A. About five-and-a-half years.
Q. It's been that long already?
A. (Nods head up and down.)
Q. You were the lawyer that represented Mr. Ard on appeal?
A. Correct.
Q. Okay. And did you file a record on appeal in this case?
A. I did.
Q. And did that include the motion that we've heard about to quash the notice of intent to seek life without parole?
A. It did.
Q. All right. And did you file a brief in this case?
A. I did.
Q. And was that an Anders brief?
A. It was.

Q. All right. What was the -- if you could just briefly describe what the procedure is when you file an Anders brief.

A. We look for any issue of merit in the case. And the standard for filing an Anders brief is whether an issue would be wholly frivolous or not. And if we can't find an issue that passes that test, then we file an Anders brief which essentially tells the Court there's no merit to the appeal.

Q. Okay.

A. And that's why the Court conducts his own independent review. And occasionally we'll find an issue that they think should be briefed and issue an order to that effect.

Q. Okay. Did you raise an issue in the Anders brief?

A. I did.

Q. All right. What's the purpose of raising an issue in the Anders brief?

A. Well, that's essentially what the Court tells you to do in the Anders procedure is find the, the least bad issue to raise in the brief.

Q. Okay. And, of course, there's got to be an issue that's preserved, correct?

A. No. It should be. It should be, but sometimes

there aren't any preserved issues so you just do the best you can.

Q. All right. What issue did you raise in Mr. Ard's appeal?

A. I raised the LWOP issue.

Q. Okay. And what did you think of that issue with regards to the underlying facts of the merits of that issue?

A. Well, I mean, obviously by filing the Anders brief I didn't think it had any merit at all.

Q. Is the law particularly helpful in that area?

A. Not at all.

Q. And is that the reason why you did not appeal that?

A. It is.

Q. Okay. Do you have a copy of your brief with you?

A. I do.

Q. All right. If you could look at page 6, there's footnote number one there.

A. I see it.

Q. Okay. Could you tell the Court what footnote number one is.

A. Yes. When I review a record sometimes I see issues that were missed by trial counsel that may be fruitful in PCR and to alert whoever may represent that

client in a PCR. Sometimes I will put a footnote in the brief to that effect with the hope that PCR counsel would see it and will raise that issue, at least explore it when he investigated the PCR.

Q. Okay. And could you read footnote one into the record, please.

A. (Reading.) Should this Court elect to disregard its error preservation rules in favor of judicial economy, they should address the erroneous jury charge given by the trial court. When explaining attempted murder, the trial judge told the jury a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury. (Ends reading.)

And then there's a cite for the record. I cited page 415. I said: This is error and I cited *State versus King*.

Q. And that was the Court of Appeals case in King that had come out in 2015?

A. Correct.

Q. All right. And the Court of Appeals case was, you know, they essentially said that our law -- well, let me back up.

The Supreme Court has also spoken on that now, the State Supreme Court.

A. It has. That case, as I understand, it is on rehearing some things for it, but they had affirmed the Court of Appeals ruling on that issue.

Q. All right. And they looked at the precedent in South Carolina prior to Mr. Ard's trial as part of that decision.

A. They did.

Q. All right. And, of course, *State versus Sutton* was one of those cases.

A. I believe so. I don't have King in front of me.

Q. Okay. And they also looked at the fact that under South Carolina law the intent, an attempt to commit a crime is considered a specific intent crime.

A. That was my understanding of the reasoning of King was that all intent crimes are specific intent crimes and the legislature passed the attempted murder statute. The language of the statute indicated they were willing to preserve that common law rule that attempted murder and intent crimes have a specific intent with the language they used.

Q. And that was also in the legislative history of the sentencing reform provision?

A. I'm not sure of that.

Q. Okay. Now, going back to footnote one, you start that off: Should this Court elect to disregard as an

error of preservation rules. What error of preservation rules were you concerned with when you put that in your footnote?

A. All of them, to be quite candid. There was no objection made whatsoever. Without any objection at all, our court's not gonna consider it on appeal.

Q. Okay. And so to preserve an issue for the appeal, is it fair to say that issue has to be raised to the trial judge through an objection or motion of some sort?

A. Evidently.

Q. Yeah. And that the judge has to rule on the issue before an appellate court can consider it?

A. Yes, sir, at a minimum.

Q. And that's in part fairness to the trial judge so that the issues are properly presented to the trial judge for his or her consideration?

A. Correct.

Q. Okay. And so I believe you said that without -- there was no objection in this record either to the charge or the argument and so that was something that an appellate court would not consider under those circumstances?

A. I mean, as I understand the Anders procedure, the Court of Appeals only looks at preserved issues.

They're not gonna conduct a claim of error just because it's an Anders case.

Q. Okay. And do you have the record on appeal with you?

A. I do.

Q. Okay.

A. Although, if you're -- hold up, Mr. Grose. If you're going to refer me to specific pages in the ---

Q. I'm gonna do that.

A. Okay.

Q. I was just trying to locate them myself. I want to refer you to Scott Fleming's testimony, starting at page 256.

A. Okay, I'm there.

Q. All right. And you're quicker with your technology than I am. At lines 18 through 20, that was where the issue came up about Mr. Ard having been in jail and not wanting to go back; is that right?

A. Yes.

Q. And there was no objection there; is that correct?

A. That's correct.

Q. And if you could scroll forward to 268, please. That's where the issue came up again, but this time it was about him not wanting to go back to prison; is that

correct?

A. Correct.

Q. And that the point there was a motion for a mistrial that was denied, correct?

A. Correct.

Q. And then there was a -- there was some discussions about that. And then on page 268, lines -- I'm on the wrong page.

THE COURT: Take a break for a moment and come back.

MR. GROSE: Yes, sir.

THE COURT: We'll be at ease for a few minutes.

(Whereupon, a recess was had from 12:57 p.m. - 1:04 p.m.)

THE COURT: All right. You may proceed.

BY MR. GROSE:

Q. I think right before we broke I was looking for the curative instruction. That was actually on 271 beginning on line 14 at the beginning of that page.

A. I see it.

Q. And then on the next page questioning resumed without any objection to the instruction.

A. Correct.

Q. All right. Do you consider this issue about Mr. Ard's prior jail and/or prison incarceration to have

been preserved for appeal?

A. I do not.

Q. And why is that?

A. Two reasons. Certainly the Attorney General would make the argument it was unpreserved for the reason that she failed to object when it was initially brought up. But to preserve a mistrial motion is very difficult. You have to almost thread a needle.

You have to not only ask for the mistrial and have it denied, you have to also argue that no curative instruction can cure the error. You have to object the Lindsey instruction. You know, essentially argue that the bell cannot be unrung.

Q. Right.

A. And that was not done.

Q. And had this issue been -- so really there's two reasons why it wasn't preserved in your opinion.

A. Correct.

Q. The initial statement without an objection, correct?

A. Correct.

Q. And in the absence of the objection, the curative instruction.

A. Correct. I think the curative instruction portion of that is by far the most serious error, but

I'm certain the Attorney General would argue the first one as well.

Q. Okay. If this issue had been preserved, is it an issue you would have presented on appeal?

A. I would have raised that.

Q. Okay. And why is that?

A. Better than the issue that I did raise.

Q. And certainly it injects an element of character of Mr. Ard in the trial that would have been in there otherwise?

A. It does.

Q. Okay.

THE COURT: Let me ask, was the problem with mentioning his record or a curative instruction or both?

THE WITNESS: Well, I think mentioning his, his prior record places his character in evidence before the jury. I think that would have been objectionable under 404 and 403. But the problem with the preservation is Ms. Zmroczek did not object to the curative.

And in appeal, the way the Appellate Court looks at it is that the trial judge gives a curative instruction. The jury is presumed to follow the judge's instructions. Therefore, the curative works unless there's some argument made that the curative did not work and did not cure the error, I can't complain about

it on appeal.

THE COURT: And what was wrong, if anything, is the -- what page is it on again?

THE WITNESS: Curative instruction, Your Honor ---

MR. GROSE: It's 271, Your Honor, beginning at line 14.

THE COURT: Okay. What were you saying, something was wrong with the curative instruction?

THE WITNESS: I don't think anything is wrong with the curative instruction that Judge Barber gave. The argument would have to be that no curative instruction at all could have cured the error.

THE COURT: And that's what she should have done here in your view or that's ---

THE WITNESS: In my view that would have, that would have been the best argument to make.

THE COURT: As opposed to asking, simply asking for a curative. Isn't that what she did or that's what the judge suggested or what?

THE WITNESS: The judge gave a curative. And I think the lady Attorney General would likely argue is that she would acquiesce in the giving of the curative. But regardless, there's no argument that a curative will not work. And our appellate courts won't consider it

unless you make that argument.

THE COURT: Okay, I understand.

BY MR. GROSE:

Q. Mr. Alexander, I'm gonna ask you to turn to page 347. I guess -- I'm sorry, 337.

A. Yes, sir.

Q. Going through 339.

A. Okay. I'm at 337.

Q. Okay. And that's the part of the transcript where -- and I think you were here earlier when we discussed that Judge Barber had gone into the jury room.

A. 337?

Q. I'm sorry, 437. I guess I'm transposing numbers in my mind. I need to get done so we can all get to lunch, so I'm trying to get us there.

A. I'm with you, now. I'm on page 438.

Q. Okay. So starting at the bottom of 437 to 438 and even on 439, that's where there's discussion with the lawyers and then with the jury after they re-enter the courtroom about the judge having gone into the jury room.

A. I see it.

Q. Okay. And, again, there was no objection to that, right?

A. No objection.

Q. Okay. Is that something that if it had been objected to, you would have appealed it?

A. Very likely. There was some discussion, I think, that you and Ms. Zmroczek had about *State versus Elmore*. In that case it was found to be structural error and it even conducted a prejudice analysis. And I think the stay in this case on appeal had it been a merits brief would have argued harmless error.

The structural error is the holy grail in appellate court. If you can get a structural error, then that would be something you would almost always want to appeal because it would eliminate the possibility of a harmless error finding by the Court.

Q. Okay. And if it's -- basically meaning if it's error then a new trial follows without that prejudice analysis.

A. Correct. You don't have to put any prejudice at all.

Q. And then certainly in a case like this when there was a question about dispute or a question about what charge was appropriate and dispute over that, you could argue that that's why an error is not harmless.

A. I'm not sure I understand your question.

Q. Okay. The State tends to argue that error is harmless, correct?

A. Yes.

Q. All right. If there's a dispute whether or not if there's facts that would support a greater or lesser included offense, one or the other, you can use that as an argument to rebut that.

A. Correct.

Q. But in a structural analysis, structural error analysis, you don't even need that, correct?

A. You don't have to do anything.

MR. GROSE: That's all the questions I have at this time.

THE COURT: Can you just ask about the connection with Judge Barber going into the jury room. Did he -- okay, everyone's gone. Lunchtime. The jury is waiting for lunch and they want to hear testimony and he tells them it'll take a while to hear this testimony and you all are waiting for lunch and we'll take this up after lunch. And that's his purpose of going -- saying that, is he still, is he okay so far or not okay? Or any entrance in the jury room is not good?

THE WITNESS: The language in Elmore, Your Honor, is very prohibitive. I mean, it says any entrance into the jury room is improper. It uses very strong language.

In fact, in Elmore the attorneys went back with

the judge in that case. And in my mind, this case would be an even stronger one because the attorneys didn't go back, the judge just did it by himself. But, of course, no objection here is made, so we really don't know what, what happened.

THE COURT: All right.

MR. GROSE: That's all I have at this time. Thank you.

MS. KINARD: Very briefly.

THE COURT: I've never been back there, by the way.

MS. GROSE: You really don't see this coming up. I mean...

THE COURT: All right.

MS. KINARD: I had a case involving this matter actually.

CROSS-EXAMINATION

BY MS. KINARD:

Q. You testified that the reason you didn't appeal the denial of your motion for a mistrial after the "I didn't want to go back" statement is because it's not good.

A. Correct.

Q. And you testified that the LWOP motion that you briefed was the strongest of the potential issues that

you saw.

A. I think I said the least bad preserved issue.

Q. I believe that was your term regardless. And so that is why you chose that for the Anders brief?

A. Correct.

Q. And you believe that the case law such that you cited and that exists in this State, prevent that LWOP issue from having any teeth?

A. Correct.

Q. And that's what led you to file the Anders brief rather than to brief the case law?

A. Correct.

Q. Do you believe the courts have fully made up their mind then, it had no way to assess this?

A. Well, I didn't. The way I wrote it in the Anders brief is some of the more recent case law, Miller has shown a little bit of hostility towards LWOP from the United States Supreme Court. Of course, the older cases were encouraged. In an Anders brief you can sometimes hope that the law's direction may change in related to the favor of your client, but the Bordenkircher law unfortunately is not favorable as it currently stands.

THE COURT: I'm sorry, to interrupt, but it's the last time it'll happen. I'm missing what the problem was that's being contended with regard to the LWOP

issue. Tell me again.

THE WITNESS: Yes, sir. The case law from the United States Supreme Court is very unfavorable on that issue. A case that I cited in the Anders brief, which is, I think, Bordenkircher or Borgeture (phonetic), in that case, if my memory is right, I think the solicitor threatens increased charges if you don't plead guilty.

THE COURT: Right.

THE WITNESS: And it was a 5-4 decision from the U.S. Supreme Court. The U.S. Supreme Court said that was okay. And as I understood the argument in this case, Bordenkircher would have controlled the result.

THE COURT: As I understood the argument in this case against LWOP, I believe Bordenkircher would have controlled the results. I understood the argument was that Mr. Ard didn't plead guilty, so they threatened him with increased charges, LWOP.

THE COURT: Right.

THE WITNESS: And as I understand Bordenkircher, the State can do that.

THE COURT: Bordenkircher.

THE WITNESS: Let me make sure I've got that right, Your Honor. I'm sure Mr. Grose will correct me if I'm wrong. Bordenkircher. I'll give you the cite. It's 434 U.S. 357.

THE COURT: All right. All right. So Bordenkircher says it's okay that they elevate the charges. So what's the problem?

THE WITNESS: Well, the problem is that since Bordenkircher is adverse to my client's position, there is no merit to that issue.

THE COURT: Okay.

THE WITNESS: As I saw it on appeals. That led me to file an Anders brief instead of a merits brief.

THE COURT: Okay. I thought the Attorney General's question that you thought that this was the most serious, most egregious error.

THE WITNESS: My testimony is that in an Anders brief I tell the Court that there's no merit to appeal and so...

THE COURT: On the LWOP issue.

THE WITNESS: No merit to the LWOP.

THE COURT: Okay.

THE WITNESS: This is the least bad of my issues to raise.

THE COURT: Okay. I guess I thought she asked it in the reverse, that it was a most serious and you're saying the least.

MS. KINARD: Well, the least it's the ones that's preserved and the one that would be most likely to have

merit if it were to go forward.

THE WITNESS: I have to brief one issue in an Anders case, Your Honor. And so, I picked the preserved issue and that ---

THE COURT: Even though it wasn't a good issue, therefore, you filed an Anders brief?

THE WITNESS: Correct. Correct, Your Honor.

THE COURT: All right. I understand.

MS. KINARD: Thank you. That's all I have.

REDIRECT EXAMINATION

BY MR. GROSE:

Q. And just so it doesn't get lost in that, the three other issues that we talked about, the specific intent, the prior incarceration and the judge entering the jury room, none of those were preserved?

A. That's correct.

Q. Okay. That's all I have.

THE COURT: All right, thank you.

THE WITNESS: Thank you, Your Honor.

(Whereupon, witness leaves witness stand.)

MR. GROSE: And at this point we would rest.

THE COURT: All right.

MS. KINARD: No witnesses from the State. Although, I would ask that Mr. Alexander be allowed to leave.

THE COURT: Oh, certainly.

THE WITNESS: Thank you, Your Honor.

MR. GROSE: I have no objection to that.

THE COURT: I always wondered who these guys were and I see.

THE WITNESS: Thank you for having me, Your Honor.

(Whereupon, witness leaves the courtroom.)

MR. GROSE: Can I, in lieu of final arguments, I would propose that we either each submit briefs or proposed orders, whatever your discretion might be.

THE COURT: All right.

MS. KINARD: I'll certainly leave it to the, to the Court's discretion. I believe that submitting briefs before proposed orders is a typification of effort a lot of times.

THE COURT: Okay.

MS. KINARD: So I'd prefer proposed orders and submit argument through that or I am ready to argue if Your Honor would like to hear that.

THE COURT: Well, I've got to acknowledge Mr. Grose's arguments through his questions. I don't know. I haven't gotten yours.

MS. KINARD: No, sir. Would you like it?

THE COURT: Yes.

MS. KINARD: I'm happy to -- okay, thank you.

Based on the way that, you're correct the witnesses fell out in this case, the State's position as that typically go, there may have been a few potential errors in this case. There is no question that this is a case of overwhelming evidence. Mr. Ard was caught on video from multiple angles. There were multiple eye witnesses that saw him and his friends engaged in several different altercations that happened through the night. He never denied the stabbing incident.

THE COURT: Yeah. I know there's overwhelming evidence that he's guilty of something, but the, I guess, the whole issue is whether there's overwhelming evidence that he's guilty of attempted murder. And if the judge gives a long law to the jury on that issue, then, then they obviously, they were struggling with it. And how can it be harmless? How can I agree with you on that point?

MS. KINARD: That is certainly a fine distinction to make. I believe that in this case the evidence that the State presented was overwhelming to the charge of attempted murder.

THE COURT: Now, this whole on the, you know, when the ABWIK and the attempted murder and that swap took place and the new crime and the bill that was

passed, what year was that?

MS. KINARD: I believe it was 2010.

MR. GROSE: That's correct.

THE COURT: That long ago?

MR. GROSE: Time flies.

THE COURT: I'm telling you. And so I know when it occurred originally then were we were all still given a whole a specific intent to kill is not an element of assault and battery with intent to kill. But when it became attempted murder then things changed. And so this is four years later.

MS. KINARD: Yes, Your Honor.

THE COURT: Both the Solicitor and the judge is giving the jury the law that was changed in 2010?

MS. KINARD: It does appear that way, yes, Your Honor. And as Ms. Zmroczek testified, I believe part of that is the confusion of the introduction and request for all the lesser included offenses. And that is something that does seem to have confused a few people. I'm not sure if it confused the jury or not. In fact, I would argue that it didn't because they did find lesser included offense.

THE COURT: The PCR issue is that Ms. Zmroczek in all her busyness and self-proclaimed to be such a heavy, busy trial lawyer, that not only the solicitor and the

judges, that she didn't recognize it.

MS. KINARD: That is the allegation, Your Honor. And ultimately it would be our argument that there is no ultimate prejudice to Mr. Ard because of that. He received the sentence the jury found fair. He received it after a full and fair trial.

The other issues that we can bring up -- well, as part of that, is that, you know, we should defer to the trial court's finding, including the jury's verdict as a sign that we should defer to their, their ability and their opportunity to bring the evidence before them and certainly judge on credibility on the testimony or evidence that was presented to them.

THE COURT: Well, have they found on the lesser degrees they wouldn't -- the judge couldn't give life with abuse with attempted murder and LWOP notice. The judge had no discretion in the sentence at that point.

MS. KINARD: That's ---

THE COURT: Whether he, of course, told the defendant that in advance of the actual trial ---

MS. KINARD: I'm sorry?

THE COURT: He tells the defendant that he was facing life without the possibility of parole.

MS. KINARD: He did. And plea discussions were heard on the record, as is evident. And Ms. Zmroczek

testified to the earlier plea negotiations and the fact that they were kind of stuck between a rock and a hard place when it came to plea negotiations at the time of the trial.

It would be the State's case that Ms. Zmroczek did her best when it came to taking on this new medical information, presenting testimony and -- excuse me, not presenting testimony, but presenting -- eliciting cross-examination testimony to bolster her client's case that there was an issue of LWOP, it is not a divisive issue to go back to ---

THE COURT: Well, she said she was triple teamed. They had three angry prosecutors at her.

MS. KINARD: Yes, Your Honor, that, that is the case. Including Ms. Campbell and Ms. Garfield. Also I believe the record reflects this, they're personally difficult toward her. There is some argument, especially on some of these motions, that I personally believe was borderline on professionalism in this. And it did seem like a personal attack against Ms. Zmroczek and her client.

I believe the Court in a PCR certainly should take in the tenner of the courtroom as can be presented in testimony here and the evidence on the record, and allow that to play into the considerations under

Strickland versus Washington and now allowing us to distort things through hindsight. An attorney should be judged on their performance during the trial and plea as it stood then.

And Ms. Zmroczek's testimony surely bolsters what's in the record and in the transcript that it was a difficult situation. She was facing great hostility from the solicitor's office as a whole, in her perspective, both through denial of the -- well, they didn't even get to the matter of bond. But the quick set of the trial date, the late discovery, the triple teaming, the LWOP notice, the lack of negotiations.

And so she was, she was facing a tall order with all of this coming from the solicitor's office and she did her best to, to try and fight that and to present a very nuanced case to the jury of these aren't the elements we have, but these are the elements we have. And ---

THE COURT: Considering the defendant did not testify -- he didn't testify, did he?

MS. KINARD: No, sir.

THE COURT: Considering the fact that he didn't testify, how could she not have done something to keep this jury from knowing about his criminal history?

MS. KINARD: I don't follow. How could she ---

THE COURT: Either through a motion in limine. The judge was suggesting well if you knew about this, is where they, you know, Dolly Garfield said, well, I told you that he said in the prison and I don't care if I go back or don't want to go back or something.

I mean, those were oral statements that the solicitor complained that she told Ms. Zmroczek about, which she obviously would have asked the judge to limit that. So there's a debate as to whether or not she told her and that's why she said she puts things in writing. But when it came in -- well, she did object.

MS. KINARD: She did object. And there ---

THE COURT: Belatedly on the criminal record issue.

MS. KINARD: And there's testimony she does not recall hearing it the first time. She objected as soon as it came to her attention and immediately ---

THE COURT: Okay. So she did object to it, at least object to that question and then there was the curative instruction.

MS. KINARD: Yes, Your Honor. And then we get into whether that was preserved or not. But she did object.

THE COURT: Okay.

MS. KINARD: She did ask for a curative

instruction. And there is a little bit of back and forth on the record about whether or not that information had been presented to her.

THE COURT: All right. So I got ya. I understand.

MS. KINARD: Thank you. In terms of a few other issues regarding the, certainly regarding the prayer from the bystander, the issue regarding the testimony from the witnesses, those things they would submit do not have any outcome. They are not prejudicial in terms of this matter. Those are inconsequential issues.

Regarding appellate counsel and Mr. Alexander's performance, I believe goes to the testimony elicited was regarding the preservation and essentially whether Ms. Zmroczek did her job or not. But looking ---

THE COURT: Well, is there an accusation that the appellate counsel didn't do a good job as well?

MS. KINARD: Yes, Your Honor. There are two allegations against Mr. Alexander. Those are on page -- the end of page five and going on to page 6 of the application.

THE COURT: All right. Let's see what those are about. End of five and six. Beginning?

MS. KINARD: Subsection one, in the alternative appellate counsel failed to appeal the decision and the

Court denied the motion for a mistrial after witness Scott Fleming testified as to already being in prison and did not want to go back.

I believe based on testimony that's clearly satisfied. It was not preserved and it was not possible for ---

THE COURT: He's answered all those questions basically.

MS. KINARD: Okay. Thank you, Your Honor. And I defer to the testimony about that. I believe that he testified satisfactory.

So overall, based on the multitude and the volume of evidence in this case, the finalized that Ms. Zmroczek had to walk in trying to get these different levels of, excuse me, offenses before the jury, she succeeded in getting them all before the jury. They were all charged and they were all present before the jury. They had all the information to look at and to consider this.

THE COURT: Well, a multitude is not that great, so you've given me everything in a small box in this one. The others aren't.

MS. KINARD: It was a contest trial, Your Honor. What can I say? But in this case the testimony, you know, it was a -- a multitude of evidence is not

necessarily a multitude of pages. And in this case we had video from the different angles. We have a knife in possession because he turned himself in, never denied it. And it was just a level of degree.

So based on the evidence, the actual battle was justified against the solicitor's office, we argue that her conduct was certainly well within the professional norms. She did not make any deficient errors. And if the Court decides to find that she was deficient in any aspect, it did not cause any prejudice to Mr. Ard. So for those reasons we ask that the request be denied.

THE COURT: Now, on these PCR's, is it the State's position that you all oppose all of them and there was never a ground or do you have some other -- do you sometimes agree that there's -- with a PCR? I'm just kind of wondering.

MS. KINARD: It is the office's position to oppose all of them.

THE COURT: To oppose all of them?

MS. KINARD: Yes, Your Honor. If a PCR is granted, we do have a relatively new appellate review committee that looks at it to decide if we will appeal it or not, but generally on this level we oppose all of them.

THE COURT: So there's no longer it's an

automatic appeal.

MS. KINARD: No, sir. We do not have an automatic appeal anymore.

THE COURT: Well, all right.

MS. KINARD: Thank you, Your Honor.

THE COURT: Mr. Grose, what do you think about all that?

MR. GROSE: Well, based on your questions, I think you understand the issues. And I just feel like I'd be remise if I didn't point out that the State has almost made a pretty convincing argument of prosecutorial misconduct that Ms. Zmroczek had to go up against. And I don't know how that can just be excused if that's the case.

But regardless, I think when it comes to the attempted murder, just getting all these lesser included's in front of the jury without getting the correct law in front of the jury, I think that's deficient and prejudicial. And I don't think prejudice would be required for the Elmore issue. And other than that, I would just stand on the arguments and the questions we've made on the other issues.

THE COURT: Well, I'm sure the prosecutors would love to be here to respond, to give their version of things in regard to their battle with Ms. Zmroczek as

well.

MR. GROSE: And they could have called them, so...

THE COURT: Yeah.

MR. GROSE: I would question them if they were called and so...

MS. KINARD: He could have also called them if he wanted to produce a finding of prosecutorial misconduct.

THE COURT: All right. Very good. I think if you all will give me an objectively written proposed order and not one that, that's not supported by something that's in here.

MR. GROSE: From both sides?

THE COURT: From both sides.

MR. GROSE: Yes, sir. Okay.

THE COURT: How much time do you all need with that?

MS. KINARD: I request 60 days, Your Honor.

THE COURT: 60 days?

MR. GROSE: I won't object to that. I hopefully can get it done sooner than that.

THE COURT: All right. If you all will e-mail it and mail a hard copy.

MR. GROSE: Yes, sir.

THE COURT: E-mail it to my law clerk. All

right, very good.

(Whereupon, hearing concluded at 1:32 p.m.)

--- THIS ENDS REQUESTED TRANSCRIPT ---

COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 13th day of December, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A. Ashbrook.
Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT FORM

Page 1 of 2

Date: 07-24-2013 Time: 1130 Place: 1 Justice Sq

I am Stewart Randall Ard . My birthday is 04-27-1975

My address and phone number are: 1171 Beulah RD, Leesville, SC / 803-653-1494

I am giving this statement concerning Incident at 407 Green St on 07-28-2013

to Inv. McCoy who has identified himself as a Police Investigator

We were at Gene's drinking (moonshine, Vodka Sweet tea, beer and playing cards, then we were all going out to 5 points, then same thing happ in the car where Lawrence was saying that Steven had to leave & one of them was trying to man handed him, then Gene got involved then that same Lawrence slaped his drink out his hand, and I was trying to get them to leave and we left then we pull again go home (back to Gene's) but he said his watch was lost back there and he wanted to go get it, and we went to get it and I assumed he was going to get it and I that that was why we was going back and he said same thing then I that that the one guy said he

Sworn and subscribed to me this
29 day of July 2013.

/S/ Stewart R. Ard

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 08-22-2022

/S/

Stewart Ard received a copy of this statement consisting of 2 pages
from Inv. McCoy

/S/

Form 34:91

PENGAD 800-631-6989 Applicants 1 97 12-13-17

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

had a knife and reached for it, so I defended him and don't remember much after that

I had a lot to drink that night but every thing I said in a recorded interview is every thing I remember

Sworn and subscribed to me this 29 day of July 20 13.

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 08-22-2022

/S/ Stewart A Ard

/S/

, Stewart Ard received a copy of this statement consisting of 2 pages

from Jan McCoy. /S/

88POL03

- When they were on the way home, Geno realized his watch was missing. He wanted to go back for it (this was similar to what Ard had said in his statement).
- According to Richardson, Geno told everyone to stay in the car while he went to retrieve his watch
- When they arrived, Ard got out along with Geno. Jason got out and followed behind them (after a several minute delay).
- After a short amount of time (less than a minute) Richardson got out of the vehicle to see what was going on. He observed Ard running back to the vehicle. They then fled the scene.
- Geno told Richardson he punched someone. Richardson stated that Geno was mad that Ard got out of the car to follow him.
- When they got back to their residence, Stewart began crying and stated, "Take care of my kids man."
- Skaggs called Richardson on 07-28-2013 at 1230 hours and advised him that Ard had stabbed someone.
- Richardson states they never discussed going back to fight anyone.

07-31-2013

1122: Benjamin Geno came to HQ with his attorney (Matthew McGuire) for an interview. He was Mirandized. Geno provided me with an oral statement, which was audio recorded. He gave a similar account of what occurred. Geno claimed there was a conversation between him and the bouncer prior to the physical altercation that led to the stabbing. According to surveillance video, this was untrue. He also claimed he had been punched in the head, which was also false. Geno claimed he did not know Ard had a knife, and he did not know anyone had been stabbed until several hours later. Several of Geno's statements were inconsistent and not backed by the video evidence. The details of the actual assault were fuzzy; however, he could give me detailed accounts of what happened before and after the incident. I then showed Geno the surveillance video from that morning. After viewing it, he decided to stop answering questions.

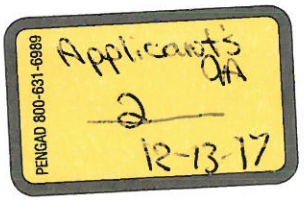
08-06-2013

0930: I received the requested information for Columbia/Richland Communications. The documentation and audio recordings were added to the case file.

09-03-2013

1044: I made contact with Amethyst Ganaway at her residence, 1041 Marion Street, Apt. 5H. She was listed in the initial incident report as a witness. According to Officer MacLaughlin, Ms. Ganaway had overheard the defendants talking about returning to the location and doing harm. I obtained a sworn, written statement from Ms. Ganaway. She is an employee at Grilled Teriyaki on Harden Street. She was standing outside and overheard the defendants talking about coming back to the bar and fighting the individuals. She specifically remembered the, "Tall, baldheaded one." She identified them after seeing the news and observing security video from that night. Surveillance video confirms that the defendants did stop near Grilled Teriyaki and have a brief conversation.

-----Further Investigation to Follow-----



1748: Officer Czeladko picked up the knife used in the assault (as identified by Ard and his attorney) from Ms. Zmroczek's office. Ard had brought the weapon to her office before coming to HQ.

1930: I prepared the following arrest warrants for the subjects:

- Stewart Ard
  - 2013A4021602615 – A&B by a Mob 2nd Degree
  - 2013A4021602616 – A&B by a Mob 2nd Degree
  - 2013A4021602617 – A&B 1st Degree
  - 2013A4021602618 – A&B 1st Degree
  - 2013A4021602619 – Carrying Concealed Weapon
- Benjamin Geno
  - 2013A4021602620 – A&B by a Mob 2nd Degree
  - 2013A4021602621 – A&B by a Mob 2nd Degree
- Jason Skaggs
  - 2013A4021602622 – A&B by a Mob 2nd Degree
  - 2013A4021602623 – A&B by a Mob 2nd Degree

The warrants for Mr. Ard were served on him in bond court. Mr. Geno and Skaggs agreed to turn themselves in the following morning at HQ.

07-30-2013

0500: Geno and Skaggs turned themselves in at HQ. They were served with their arrest warrants and transported to ASGDC.

1100: I interviewed Stephen Richardson at HQ. It was audio recorded. He voluntarily came to HQ and was not in custody. He was not implicated in the incident by the defendants; however, he was with them when the incident took place. Richardson also provided me with a sworn, written statement. The following is information gained from Richardson during the interview:

- Geno is Richardson's best friend and next door neighbor
- Skagg is Geno's cousin
- Ard and Geno are coworkers (construction)
- According to Richardson, they met at Geno's residence (104 Rose Drive) to play cards and consume alcohol.
- Skaggs is the owner of the red in color Mazda CX-7 seen on the video
- He indicated that they went to 5-points in Skagg's Mazda CX-7
- Richardson punched a wall at the back of the bar (Group Therapy). This was the reason he was being led out of the bar by security. Richardson indicated that he cooperated (the video confirms this), however, his friends got involved in a verbal altercation with security staff. They were then all asked to leave
- A physical altercation took place outside, however, Richardson was unclear who started it (the video appears to indicate that Jason Skaggs pushes a bouncer, which starts the altercation). Richardson confirms that Skaggs pushed someone during the altercation.
- Geno and one of the bouncers had "heated words"

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT FORM

Page 1 of 4

Date: 07-30-2013 Time: 1218 Place: 1 Justice Square

I am Stephen Richardson . My birthday is 07-20-1983

My address and phone number are: 108 Rose Dr, Columbia, SC 29205 / 803-397-4622

I am giving this statement concerning Incident at 2107 Green St on 07-28-2013

to Inv. McCoy who has identified himself as a Police Investigator

Around 8:00pm on Sat. we (Jason Skaggs, Ben Geno, Stewart, Stephen) planned on playing cards. We started playing a game called Trunk. In the game, if you know the rules, when you lose your hand you take a shot. Along with budlight as a drink. It seemed like we played that for a while then started to play spades. I brought a pizza, someone order wings. Having a good time. Michelle which is Ben Geno's fiancée was there, Jason Skaggs brought his wife Charlene, and Stewart brought over his wife and daughter. The women were in the TV room and the were in the Kitchen. We played cards for awhile and I remember what started as joke someone said lets go downtown. I think everyone in my opinion had too much to drink to start with. We went downtown to Group Therapy where we (Ben, Jason - occasionally and myself) use to go frequently. We (Stewart, Ben Geno, Jason Skaggs and me) went inside got some drinks and were having a good time. A lot has changed since I was last in there I didn't know or see any of my friends. Anyway we were outside inside Group. I was drunk and hit the wall. Not hard or to break my hand or to damaged property or whatever, I was drunk. ~~I~~ One of the bouncers came up to me and said "You've had enough

Sworn and subscribed to me this 30 day of July 2013.

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 08-22-2022

/s/ Stephen Richardson

/S/

Stephen Richardson received a copy of this statement consisting of 4 pages

from Inv. McCoy . /s/ Stephen Richardson

PENGAD 800-631-6989 Applicant's 3 PN 12-12-17

Form 34:91

(2)

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

you need to leave." I complyed with the bouncer, you can even as that particular bouncer, he didn't force me out or kick me out. I was leaving. I proceed to leave. We (Jason, Ben Stewart, myself) were out front. I was in the back behind Ben and everyone seemed to be talking. I dont know if it was trash talking or not. Next thing I know is Ben Gene was shoved into me and to the ground. Rolling around and all I tried to help him up. After that we left. Im really suppised nothing "a fight" didn't happen then. I was thinking thank god lets go home. We proceeded home up harden street and Ben looks at me and said "did I have my hat" and I said "no you, I dont think you brought it." Then he said "oh no my watch." Stewart turn around from passenger seat and said and this is how much I know how much the watch cost he said "Not that $700 watch I bought you". After that Stewart opened the car door which caused Jason to stop and got out. At the top of the hill and proceeded back to get the watch. It took [redacted] awile to get him back in the car. We finally got Stewart back in the car. Ben said "if everyone stays in the car we'll go back and I (Ben) will go ask for it. We all agreed cause even Jason said that "if we all go back and ask for it, it will cause a fight". So then we drive back to Group Therapy park in Tanning Saloon parking lot. Ben got out and was going to ask for his watch. Stewart immediatly jump out passenger side.

Sworn and subscribed to me this 30 day of July 20 13

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 08-22-2022

/S/ Stephen Richardson

/S/

, Stephen Richardson received a copy of this statement consisting of 4 pages

from Investigator McCoy for Stephen Richardson

88POL03

6

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

Right after I specifically remember Jason Staggs saying/yelling "Stewart get back in the car, Stewart". Jason was looking to see were Stewart was going. I then looked at Jason and said "what is he doing" Refering to getting out of Car. Jason said "I dont know" Then Jason either put car in park or turn car off Im not sure about that action. Jason proceeded to try to get Stewart back in car. I stayed in car cause I Knew that if, like We said, all of us went for his watch a fight could occur. I waited in car like was planned to wait. Then I was curious to see what was happening. Were they talking, another trash talking episode, what I dont know. When I got to back of car to peek around corner I saw Stewart running at me saying "get in car." So I did. We were backing up to leave and Stewart wasn't in the car. Then he got in. We were heading to Ben house and Ben yelled at Stewart "Why the f did you get out." "I told ye'll to stay in the car." At this point Im trying to see what happened from Ben. He said "I thought he was gonna hit me so I poached him." I'm thinking great a fight. Glad I stayed in car. On the way home it seemed quiet. Ben seemed pissed that Stewart got out. Went home went to bed. Jason called me the next day around 12:30. He said "You not gonna believe this, Stewart didnt just fight

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30 day of July 20 13

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MY COMMISSION EXPIRES: 08-22-2022

/s/ Stephen Richardson

/s/

Stephen Richardson received a copy of this statement consisting of 4 pages

from Ian McCoy /s/ Stephen Richardson

88POL03

(4)

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

those guys he stabbed somebody. It's on the morning news. I went to Ben's house kinda pissed at him for hanging out with someone like that. And said to him " What the hell man, he stabbed somebody." Ben said " I just found out myself man". I said " You know there's cameras down there." Me, Jason, Ben all know about the cameras by the way. I dont believe Stewart did cause he's not from this area. At this point I'm saying not serious injuries to person. Telling Ben a fight is one thing, Stabbing is another. He's (Stewart) gonna get us in trouble. I went home, then went to parents house and told my story to them. The next day after the news and everything It was time to turn in. The truth will come out and this statement is how I seen it and how it happened.

Sworn and subscribed to me this
30 day of July 20 13

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 08-22-2022

/s/ Stephen Richardson

/s/

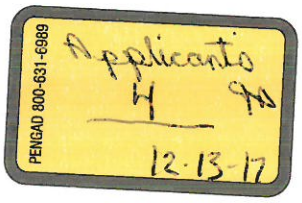
, Stephen Richardson received a copy of this statement consisting of 4 pages
from Det. McCoy

/s/ Stephen Richardson

88POL03

Phone: 803.576.1838 • Fax: 803.576.1718

From: Aimee Zmroczek [mailto:ajzlawfirm@gmail.com]
Sent: Wednesday, June 04, 2014 2:06 PM
To: DOLLY GARFIELD
Subject: stuart ard



Here are my concerns:

1. that he is being punished for asserting his constitutional rights (bond reduction)

2. that I having to try an LWOP case (that I have not been paid $1 for) that I think I could get him to plead to if we could have had any sort of meaningful plea negotiations

3. that I feel like I am being bullied and backed into a corner because of the two things above

4. That I haven't had time to set up witnesses send subpoenas or talk to anyone bc i 1) haven't gotten paid and have to do all these things myself, 2) am in practice by myself and had other cases working on (or trying to work on)

5. That I will spend all weekend getting ready for an LWOP case instead of getting ready for a case in which my guy is legit guilty of assault by mob 2nd instead of getting packed for going out of the country-

yes I know none of these are your problems but that is where my frustration comes from. I don't know who or what was said, but yes I sat in the lobby for 30 min for someone who doesn't introduce themselves to come out and say if you are here for dolly she is busy working on something and doesn't have time to meet with you. SO I said yes- a trial with me, then I walked out.

If you can just send me a list of the evidence then I am sure I have everything-

--

Aimee J. Zmroczek, Esq.
A.J.Z. Law Firm, LLC
Mailing Address:
P.O. Box 11961
Columbia, SC 29211
Physical Address:(new)
2003 Lincoln Street
Columbia, South Carolina 29202
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E-mail: *ajzlawfirm@gmail.com*

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ajzlawfirm@gmail.com <ajzlawfirm@gmail.com> Thu, Jun 5, 2014 at 11:04 AM
To: DOLLY GARFIELD <GARFIELDD@rcgov.us>

Thanks for that. How about you tell me when we can meet I have to be in Aiken at 2:30 but I can reschedule if you can meet this afternoon

Sent from my iPhone

Aimee J. Zmroczek, Esq.
A.J.Z. Law Firm, LLC
Mailing Address:
P.O. Box 11961
Columbia, SC 29211

those charges.

I never heard back from you. I began to prepare the case for trial, and I assume at that time that Ard was not interested in a plea deal. Judge Nettle ordered the bond to be reduced if not disposed of by July 1st. I began to prepare accordingly. I indicated on the record on May 8th that when I served Ard that I would be trying this case in the next few weeks. I served you notice May 23rd. I also obtained three certified convictions for previous armed robberies. LWOP is appropriate at this point if I am going to trial. It is my duty to the victims to not allow July 1st to come and give Ard the opportunity to get back on the streets. This is not personal, this is my profession.

I never heard from you regarding any plea negotiations further than this conversation in March. I do not know how I have backed you into a corner. I was unaware of any vacation scheduled until you carbon copied me on an e-mail to the Judge, with an attached order or protection request dated after my notice to you.

I would still like to meet with you regarding discovery. I know that you do not have everything, as I have documents that I have recently obtained (medical records that you refer to, EMS report, maybe 911 incident reports). I also have witnesses that I have found that were in the bar that were never interviewed at the time of the incident.

And yes, I was working on a 9 count indictment sentencing with Jennifer Davis yesterday afternoon. I was not ignoring you. I too have many other cases.

I would like to start over on a good note with all of this. I do not know where this is all coming from.

I look forward to meeting with you.

djg

Physical Address:
2003 Lincoln Street
Columbia, South Carolina 29201
Phone: (803) 400-1918Fax: (803) 403-8005
E-mail:*ajzlawfirm@gmail.com*
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On Jun 5, 2014, at 10:48 AM, "DOLLY GARFIELD" <GARFIELDD@rcgov.us> wrote:

Aimee:

I am quite perplexed by your e-mail. We had a phone conversation back in March where I told you I thought the proper charge should be Attempted Murder. The was based on my review of the evidence (video and medical records). The assault laws are quite confusing and I am constantly changing the charges after review of the entire case, and normally medical records/conditions are not available obviously at the time of an arrest warrant. I told you I would be sending the case to the Grand Jury in April. I indicated that if Ard was indicted, it was possible that he would be LWOP eligible, but I was not sure as I did not have certified convictions and was relying solely on his rap.

However, I indicated that If he wanted to plead guilty as charged before the Grand Jury convened, I would not object to him entering the plea. You had a disagreement over the two charges regarding Molino and McDaniels, and I said I could would be open to talking about

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2016-CP-40-06225
Stewart Randall Ard,	)	
Applicant,	)	
	)	**ORDER GRANTING APPLICATION**
	)	**FOR POST-CONVICTION RELIEF**
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

This matter is before this Court on Stewart Randall Ard's ("Applicant") application for post-conviction relief ("PCR"). After reviewing the procedural history, this Court makes the following findings of fact and conclusions of law. For the reasons set forth below, this Court grants Applicant's PCR application.

I. PROCEDURAL HISTORY.

The State initially charged Applicant with four counts of assault and battery by mob, second degree. R. 468. On April 9, 2014, the Richland County Grand Jury indicted Applicant for attempted murder, three counts of second-degree assault and battery, and carrying a concealed weapon. R. 468. On May 23, 2014, the State noticed its intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45.

From June 23-25, 2014, the State tried Applicant before the Honorable James R. Barber, III and a jury. Kathryn "Luck" Campbell Hubbird, Dolly Justice Garfield, and Ramie Shalabi represented the State. Aimee J. Zmorczek and M. Wade Dowtin represented Applicant. The jurors found Applicant guilty of attempted murder, two counts of second-degree assault and battery, third-degree assault and battery as a lesser-included offense of second-degree assault and battery, and carrying a concealed weapon. R. 442-43. Judge Barber sentenced Applicant to life

SCANNED

imprisonment without the possibility of parole for attempted murder, a consecutive term of three years for second-degree assault and battery, and concurrent terms of three years for second-degree assault and battery, ninety days for carrying a concealed weapon, and thirty days for third-degree assault and battery. R. 456-57.

Applicant appealed his convictions and sentences. David Alexander represented Applicant on appeal and filed an *Anders*[1] brief, briefing this single issue on appeal:

> Whether appellant's due process rights and right to a jury trial under the federal and state constitutions were violated when the solicitor threatened appellate with increased charges and a mandatory life without parole sentence if he did not accept a plea offer?

The Court of Appeals affirmed Applicant's convictions and sentences. *State v. Ard,* Unpublished Opinion No. 2016-UP-243 (filed June 1, 2016).

On October 19, 2016, Applicant, through counsel, filed a PCR application asserting twelve grounds of ineffective assistance of trial counsel and two grounds of ineffective assistance of appellate counsel. On July 13, 2017, the State filed its return. On December 13, 2017, this Court convened an evidentiary hearing. Charles Grose represented Applicant. Jessica Kinard represented the State. At the call of the case, Applicant informed the Court he was proceeding on the following grounds of ineffective assistance of counsel contained in his PCR application:

> 10(a) & 11(a)(1) Trial counsel did not understand that attempted murder is a specific intent crime. S.C. Code Ann. § 16-3-29; *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) ("Attempted murder would require the specific intent to kill and conduct towards that end.). In South Carolina, attempt crimes are specific intent crimes. *E.g. State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must

[1] *Anders v. California.*, 386 U.S. 738 (1967).

be done with the intent to commit that particular crime.") (citing *Sutton, supra*)). Mr. Ard was prejudiced because trial counsel's misunderstanding of the law influenced numerous acts and omissions during his jury trial.

10(a) & 11(a)(2) Trial counsel did not object to the trial court judge instructing the jurors, "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." Tr. 416, line 25 – 417, line 3. Mr. Ard was prejudiced because (1) this instruction deleted the specific intent requirement of attempted murder, (2) reduced attempted murder to the statutory offenses of assault and battery of a high and aggravated nature ("ABHAN") or first-degree assault and battery, S.C. Code Ann. § 16-3-600(B), and (3) prevented the jurors from considering lesser included offenses of ABHAN and first-degree assault and battery.

10(a) & 11(a)(3) Trial counsel failed to object to the prosecutor arguing that attempted murder is a general intent crime and that the trial judge should instruct the jurors that specific intent is not an element of attempted murder. Tr. 374, line 5 – 377, line 2.

10(a) & 11(a)(8) Trial counsel failed to object to Courtney Walker testifying about saying a prayer for Jesse Patterson, the alleged victim of attempted murder. Mr. Ard was prejudiced because this testimony was not relevant, lacked any probative value, and highly prejudicial.

10(a) & 11(a)(9) Trial counsel failed to object to numerous witnesses—not qualified as to provide an expert opinion—testifying about Jesse Patterson, the alleged victim of attempted murder, having a collapsed lung. Mr. Ard was prejudiced because this testimony unfairly portrayed the injuries as more aggravated than they really were.

10(a) & 11(a)(10) Trial counsel failed to properly preserve for appeal the State presenting evidence that Mr. Ard had been to prison before an did not want to go back. Trial counsel failed to object to Scott Fleming testifying that Mr. Ard statement, "Well, I've been to jail. I don't want to go back." And Mr. Flemings response, "I said, 'Well, I don't want you to go back either.'" Tr. 256, lines 18-20. When the witnesses repeated this testimony, trial counsel also failed to preserve the mistrial motion. Tr. 268, line 4 – 272, line 3.

> 10(a) & 11(a)(11) Trial counsel failed to object to the prosecutor's closing argument asking the jurors to render a verdict that speaks the truth. Tr. 369, lines 6-9.
>
> 10(a) & 11(a)(12) Trial counsel failed to object to the trial judge entering the jury room during deliberations, tr. 438, line 2 – 439, line 13, which is structural error requiring a new trial. *E.g. State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1991).

Applicant withdrew the allegations of ineffective assistance of trial counsel contained in paragraphs 10(a) and 11(a)(4), (5), (6), and (7) of his PCR application. Applicant proceeded on the following allegations of ineffective assistance of appellate counsel contained in his PCR application:

> 10(b) & 11(b)(1) In the alternative to 11(a)(10), appellate counsel failed to appeal the trial court denying the motion for a mistrial after witness Scott Fleming testified that Mr. Ard had been to prison and did not want to go back. Tr. 268, line 4 – 272, line 3.
>
> 10(b) & 11(b)(2) Appellate counsel failed to appeal the trial court denying the motion to exclude the sentence of life without the possibility of parole based on arbitrary use of prosecutorial discretion. Tr. 448, line 24 – 452, line 4.

During the evidentiary hearing, this Court heard testimony from trial counsel Aimee Zmorczek and appellate counsel David Alexander. At the conclusion of the hearing, the Court heard arguments from counsel and requested proposed orders.

II. FINDINGS OF FACT.

A. Evidence Presented at the PCR Hearing.

Ms. Zmorczek testified she previously represented Applicant's brother, Jody Ard, in his re-trial after our Supreme Court granted him post-conviction relief.[2] After the incident in Five Points, Applicant contacted Ms. Zmorczek on the recommendation of his brother, Jody Ard. Ms.

[2] *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).

Zmorczek contacted law enforcement and arranged for Applicant to surrender to authorities. Applicant provided a written statement, which was admitted into evidence at the PCR hearing. Form the beginning of the case, Ms. Zmorczek recognized Applicant committed the acts underlying the charges, but she believed the State "overcharged" her client, in particular as it related to the injuries sustained by Mr. Patterson. She noted there was evidence Applicant had tried to diffuse the situation. She also noted there was evidence Applicant and his companions returned to Group Therapy to retrieve a lost watch.

When Ms. Zmorczek moved the circuit court to set bond for Applicant, the Solicitor's Office informed Ms. Zmorczek the prosecution would seek a direct indictment for attempted murder of Mr. Patterson and notice the State's intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45. Ms. Zmorczek believed the Solicitor's Office adopted this course of conduct in order to block Applicant from being released on bond. Ms. Zmorczek testified that, after Applicant sought bond, the Solicitor's Office stepped up its efforts to prosecute Applicant. Ms. Zmorczek believed the Solicitor's Office's conduct constituted prosecutorial vindictiveness, *i.e.* retaliation for Applicant exercising his constitutional and statutory right to seek bond.[3] These concerns led Ms. Zmorczek to file Applicant's motion to exclude the penalty of life without parole on account of arbitrary use of prosecutorial discretion in the plea-bargaining process. R. 473-75. Ms. Zmorczek believed this motion to be meritorious. She further believed appellate counsel should have filed a brief on the merits rather than filing and *Anders* brief.

Ms. Zmorczek reviewed the testimony of Mr. Babcock and Officer MacLaughlin about Mr. Patterson's purported collapsed lung. She agreed neither witness was qualified as an expert witness. She also reviewed the testimony of Dr. Reeves, including her cross-examination, where

[3] U.S. Const. Am. VII; S.C. Const. Art. I, § 15; S.C. Code Ann. § 17-15-10, *et. seq.*

he testified about Mr. Patterson's injuries but also acknowledged none of the diagnostic testing revealed evidence of a collapsed lung. Ms. Zmorczek believed her cross-examination of Dr. Reeves responded to the potentially misleading testimony of Mr. Babcock and Officer MacLaughlin.

Ms. Zmorczek reviewed the testimony of Courtney Walker about saying a prayer for Mr. Patterson. She agreed the prosecution did not need to ask Ms. Walker about the prayer in order for her to authenticate her 911 call. Ms. Zmorczek noted that Ms. Walker did not see the assault, her role as a witness in the case was limited, and this testimony was not a significant portion of the trial.

Ms. Zmorczek testified about Scott Flemming testifying that Applicant stated to him "Well, I've been to jail. I don't want to go back," and Mr. Flemming responded, "Well, I don't want you to go back either." R. 256, lines 18-20. Ms. Zmorczek reviewed *Geter v. State*, 305 S.C. 365, 409 S.E.2d 344 (1991) and agreed this testimony was objectionable. Ms. Zmorczek acknowledged she did not make and objection to that testimony and attributed it to the difficulty hearing in the courtroom where the case was tried. Mr. Flemming later testified, "After he made the statement that he had been to prison and he didn't want to go back. And I think that's why he was standing back. That's what he said to me, I'm sorry." At this point, Ms. Zmorczek moved for a mistrial. The trial judge denied the motion for a mistrial and provided a curative instruction. R. 268-72. Ms. Zmorczek did not object to the curative instruction or renew the mistrial motion. Ms. Zmorczek thought the mistrial motion preserved this issue for appellate review.

Ms. Zmorczek reviewed the Solicitor's closing argument urging the jurors to reach a verdict that "speaks the truth and seeks justice." She additionally reviewed *State v. Daniels*, 401

S.C. 251, 737 S.E.2d 473 (2012) and agreed those arguments were objectionable. She did not offer a strategic reason for not objecting.

Ms. Zmorczek reviewed the solicitor's closing arguments and the trial judge's instruction to the jurors that attempted murder is a general intent crime and does not require the specific intent to kill. Ms. Zmorczek also reviewed *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), which observed that attempted murder is a specific intent crime, and agreed the Solicitor's closing argument and the trial judge's jury instruction was objectionable. She did not offer a strategic reason for not objecting.

Ms. Zmorczek reviewed the Solicitor's closing argument that ABHAN excludes malice. Ms. Zmorczek also reviewed *State v. Pilgrim*, 326 S.C. 24, 482 S.E.2d 562 (1997), holding the absence of malice was not element ABHAN, and agreed the Solicitor's argument was objectionable. She further agreed that any of the statutory assault and battery offenses can be committed with malice. She did not offer a strategic reason for not objecting.

Ms. Zmorczek reviewed the portion of the trial transcript where the judge went into the jury room and engaged in a discussion with the jurors. She was unaware the trial judge went into the jury room until the trial judge disclosed it to the attorneys. She explained that the Richland County Courthouse has secure areas, and the judges' chambers and jury rooms are located in the secure areas. Ms. Zmorczek reviewed *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), finding structural error when the trial judge entered the jury room during deliberations, and agreed the trial judge's actions were objectionable. She did not offer a strategic reason for not objecting.

Mr. Alexander testified he filed an *Anders* brief regarding the trial judge denying Applicant's motion to exclude the penalty of life without parole on account of arbitrary use of

prosecutorial discretion in the plea-bargaining process. He explained Applicant could not prevail on this issue unless the Supreme Court of the United States overruled *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (holding due process is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused re-indicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged).

Mr. Alexander explained why he did not brief trial counsel's mistrial motion made after Scott Flemming testified that Applicant previously had been to prison. He explained that South Carolina follows strict rules of error preservation. In his opinion, this issue was not preserved for appeal for two reasons. First, trial counsel did not object the first time Mr. Flemming made the statement. Second, trial counsel neither objected to the curative instruction nor renewed her mistrial motion following the curative instruction. If trial counsel had properly preserved this issue for appeal, Mr. Alexander testified he would have briefed the issue.

Mr. Alexander explained that the trial judge entering the jury room was not preserved for appeal because trial counsel did not object. He explained structural error is the "Holy Grail" of appellate issues because the appellant is not required to establish prejudice in order for the appellate court to reverse. If trial counsel had properly preserved this issue for appeal, Mr. Alexander testified he would have briefed the issue.

III. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The

proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

The second prong of *Strickland* requires a defendant establish that this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, No. 2016-001079, 2018 WL 736339, at *6 (S.C. Feb. 7, 2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

Due process additionally requires that a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland. Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

IV. CONCLUSIONS OF LAW.

A. Attempted murder is a specific intent crime.

Applicant alleges he received ineffective assistance of trial counsel because his "trial counsel did not understand that attempted murder is a specific intend crime," "did not object to the trial judge instructing the jurors, '[a] specific intent to kill is not necessary element of attempted murder, but there must be a general intent to commit serious bodily injury,'" and "failed to object to the prosecutor arguing attempted murder is a general intent crime and that the trial judge would instruct the jurors that specific intent is not an element of attempted murder." PCR Application, ¶¶ 10(a) and 11(a)(1), (2), and (3). This Court finds that the failure to object constitutes deficient performance.

Our Supreme Court recently addressed this issue in *State v. King*, Appellate Case No. 2015-001278, 2017 WL 4800004 (S.C. Oct. 25, 2017). Although *King* was decided three years after Applicant's jury trial, *King* relied on cases decided prior to Applicant's jury trial and, therefore, available to trial counsel. Specifically, *Sutton* recognized, "Attempted murder would require the specific intent to kill and conduct towards that end." 340 S.C. at 397, 532 S.E.2d at 285. Additionally, South Carolina has long recognized that attempt crimes are specific intent crimes. *E.g. State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime.") (citing *Sutton, supra*)). Trial counsel, therefore, was deficient under the first prong of *Strickland* for not objecting to the Solicitor's closing argument

and the trial judge's instruction to the jury that attempted murder is not a specific intent crime, and, as a result, Applicant was sentenced to life in prison without the possibility of parole.

Applicant asserts that he "was prejudiced because (1) this instruction deleted the specific intent requirement of attempted murder, (2) reduced attempted murder to the statutory offenses of assault and battery of a high and aggravated nature ("ABHAN") or first-degree assault and battery, S.C. Code Ann. § 16-3-600(B), and (3) prevented the jurors from considering lesser included offenses of ABHAN and first-degree assault and battery." PCR Application, ¶¶ 11(a)(2). Pursuant to our Supreme Court's recent decision in *Smalls*, this Court "should consider the specific impact of counsel's error had on the outcome of the trial" when evaluating the prejudice prong of *Strickland*. Here, trial counsel acknowledged during her opening statement and closing argument that Applicant committed the conduct alleged in the indictments and informed the jurors that Applicant would ask them to determine that he committed lesser-included offenses rather than the charges alleged in the indictment. Specifically, trial counsel informed the jurors that Applicant was not guilty of attempted murder or ABHAN. The trial judge allowed the jurors to consider ABHAN and first-degree assault and battery as lesser-included offenses of attempted murder. The trial judge, however, instructed the jurors, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." Not only was this instruction an incorrect statement of the law, but it also failed to take into account the elements of the lesser-included offenses instructed to the jurors. Proof of "great bodily injury" is an element of ABHAN. S.C. Code Ann. § 16-3-600(B)(1)(a). "A person commits the offense of assault and battery in the first degree if the person unlawfully offers or attempts to injure another person with the present ability to do so, and the act is accomplished by means likely to produce . . . great bodily injury." S.C. Code Ann. § 16-3-600(C)(1)(b)(i). Both ABHAN and first-degree

assault and battery require the jurors to consider whether the "act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1)(b) and (C)(1)(b)(i). The "specific impact" of trial counsel's error, therefore, was to prevent the jurors from considering the lesser-included offenses in a case where Applicant acknowledged the conduct but contended he was guilty of a lesser-included offense.

Trial counsel's failure to recognize that attempted murder is a specific intent crime additionally allowed the Solicitor to argue, impermissibly, that ABHAN and first-degree assault and battery require the absences of malice. *See Pilgrim, supra.* Had trial counsel objected to trial judge's instruction, the objection would have precluded this argument that further reduced the jurors' ability to consider the lesser-included offenses of ABHAN and first-degree assault and battery.

This Court has carefully reviewed the entire trial record once again. Trial counsel's strategy of seeking convictions of the lesser-included offenses was valid and reasonable under the facts of this case. Trial counsel's strategy of seeking convictions of the lesser-included offenses made it even more imperative that trial counsel object to the closing argument and jury instruction that misstated the law. This Court finds there is a reasonable probability the jurors would have convicted Applicant of one of the lesser-included offenses of attempted murder—ABHAN or first-degree assault and battery—but for trial counsel's deficient performance regarding the Solicitor's closing argument and the jury instruction. This Court, accordingly, grants Applicant a new trial on the charge of attempted murder.

B. Courtney Walker saying a prayer for Mr. Patterson.

Applicant asserts he was denied the effective assistance of trial counsel because "trial counsel failed to object to Courtney Walker testifying about saying a prayer for Jesse Patterson, the alleged victim of attempted murder." PCR Application, ¶¶ 10(a) and 11(a)(8). Applicant further asserts he "was prejudiced because this testimony was not relevant, lacked any probative value, and highly prejudicial." This Court finds Applicant failed to carry his burden of proof on this ground for relief. This testimony was very isolated. Even assuming trial counsel should have objected to this testimony, this Court must "consider the specific impact counsel's [alleged] error had on the outcome of the trial." *Smalls,* at *6. Moreover, the court gave a curative instruction on the matter. Under this analysis, the failure to object to this testimony did not affect the outcome of the trial.

C. Severity of Mr. Patterson's injuries.

Applicant asserts, "[t]rial counsel failed to object to numerous witnesses—not qualified to provide an expert opinion—testifying about Jesse Patterson, the alleged victim of attempted murder, having a collapsed lung." PCR Application, ¶¶ 10(a) and 11(a)(9). Applicant further asserts he "was prejudiced because this testimony unfairly portrayed the injuries as more aggravated than they really were." *Id.* This Court finds Applicant failed to carry his burden of proof on this ground for relief. The court gave a curative instruction on the matter, and the trial counsel advanced a valid strategy for handling this testimony. *See Freiburger and Ingle, supra.* Significantly, trial counsel clarified the nature and extent of Mr. Patterson's injuries by eliciting testimony from Dr. Reeves that medical tests did not confirm the existence of a collapsed lung.

D. Mr. Flemming's testimony about Applicant's prior incarceration.

Applicant asserts he received ineffective assistance of trial counsel because

> Trial counsel failed to properly preserve for appeal the State presenting evidence that Mr. Ard had been to prison before and did not want to go back. Trial counsel failed to object to Scott Fleming testifying that Mr. Ard statement, "Well, I've been to jail. I don't want to go back." And Mr. Flemings response, "I said, 'Well, I don't want you to go back either.'" Tr. 256, lines 18-20. When the witnesses repeated this testimony, trial counsel also failed to preserve the mistrial motion.

PCR Application, ¶¶ 10(a) and 11(a)(10). This court disagrees.

Under the first prong of *Strickland,* trial counsel was deficient for not objecting the first time Mr. Flemming provided this testimony. *See Geter, supra.* After Mr. Flemming provided the testimony a second time, trial counsel moved for a mistrial. The trial judge provided a curative instruction. Trial counsel was deficient for not objecting to the sufficiency of the curative instruction or renewing the motion for a mistrial. *State v. George,* 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996) ("Appellant did not contemporaneously object to the sufficiency of the curative charge or move for a mistrial. Therefore, this issue is not preserved."). *See also State v. Ferguson,* 376 S.C. 615, 621, fn. 2, 658 S.E.2d 101, 104, fn. 2 (Ct. App. 2008) (same).

Determining prejudice under the second prong of *Strickland* is a more difficult task. Initially, this Court notes that *Geter* was a PCR case where our Supreme Court found deficient performance but denied relief because Geter did not establish prejudice. As noted throughout this order, our Supreme Court recently provided guidance for analyzing the prejudice prong of *Stickland* in *Smalls*. *Geter*, in fact, is one of the cases the Supreme Court cited in *Smalls* for the proper role of considering "overwhelming evidence" in the *Strickland* prejudice analysis. *Smalls* observed the "overwhelming evidence" evidence of Geter's guilt, including corroborating medical evidence in a criminal sexual conduct with a minor trial, precluded a finding for a "reasonable

probability the result of the trial would have been different had counsel's performance not been deficient in this regard." *Smalls,* at *6 (quoting *Geter,* 305 S.C. at 367, 409 S.E.2d at 346). As discussed in Section IV(A), *supra*, there was not "overwhelming evidence" or "something conclusive" establishing that Applicant is guilty of the offenses as charged in the indictments rather than the lesser-included offenses. In fact, the defense was to seek convictions of for lesser-included offenses. Curative instructions do not cure every error in a trial because in some situations "it is difficult, if not impossible, to unring a bell." *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted). Thus, it is impossible to know how Applicant's prior record influenced the jurors' decision to not find the lesser-included offenses.

This Court does not conclude that there is a reasonable probability the result of the trial would have been different but for trial counsel's deficient performance, and Applicant fails to prevail on this issue.

E. Not objecting to the Solicitor's closing argument that asked the jurors to return a verdict that speaks the truth and seeks justice.

Applicant asserts he was denied effective assistance of trial counsel because "trial counsel failed to object to the prosecutor's closing argument asking the jurors to render a verdict that speaks the truth." PCR Application, ¶¶ 10(a) and 11(a)(11). This Court disagrees. Under the first prong of *Strickland,* the Solicitor's argument was arguably objectionable. *See Daniels, supra.* Although our Supreme Court has instructed trial judges not to instruct jurors in this manner, it has not yet held these arguments impermissible argument by counsel. This Court additionally notes that our Supreme Court has not found prejudice on this issue in cases where the trial judge provided a similar, improper instruction to the jurors, when the jurors otherwise were properly instructed on reasonable doubt and circumstantial evidence. *See, e.g., Daniels, State v. Beaty,* No. 2015-000718,

2016 WL 7474479 (S.C. Dec. 29, 2016), *reh'g granted* (Mar. 24, 2017), and *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000).[4] The trial judge's incorrect instruction regarding attempted murder notwithstanding, the trial judge properly instructed the jurors about reasonable doubt and circumstantial evidence.

F. Trial judge entering the jury room.

Applicant asserts that he received ineffective assistance of trial counsel because "[t]rial counsel failed to object to the trial judge entering the jury room during deliberations, . . . which is structural error requiring a new trial." PCR Application, ¶¶ 10(a) and 11(a)(12). This Court finds that, under the circumstances of this case, the trial judge entering the jury room was not structural error, and it must therefore be shown that the error was prejudicial.

The trial record reflects that the jury commenced deliberations at 11:40 AM. (R. p. 429). The jury returned with a note pertaining to this PCR allegation sometime between 12:12 and 1:06 PM, (R. p. 437), at which time the trial court laid the following record pertaining to this PCR allegation:

> [Trial Court]: Do we have everybody here? All right. As I have told the attorneys outside the courtroom, I received a note from the jury. And the first note said: "We

[4] Given the holdings in *Daniels* and *Beaty,* our Supreme Court very likely will be called upon to determine the continued validity of this jury argument. This Court notes our Supreme Court allows certain jury arguments that are not the appropriate subject matter of a jury instruction and disallows jury arguments in other situations. Perhaps the distinction is whether the challenged argument correctly or incorrectly states the law. *Compare State v. Belcher*, 385 S.C. 597, 612, fn. 9, 685 S.E.2d 802, 810, fn. 9 (2009) ("we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging.") and *State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) "While we no longer sanction this charge by the judge, we recognize that evidence of flight remains proper.") *with Simmons v. State*, 331 S.C. 333, 339, 503 S.E.2d 164, 167 (1998) (finding prejudicial ineffective assistance of counsel when "the trial judge's instructions to the jury did not correct the solicitor's misstatements concerning the consequences of the burglary conviction.").

would like to hear your recording of the charge to the jury. Is this possible?" Signed by Ms. Setzer.

Because y'all were at lunch and lunch had been delivered almost contemporaneously with my getting a note, **I went to the jury and said, "Look, if you want to hear the charge it's going to take a little bit of time to find it and it's going to take time to hear it and lunch is here. So what I'm going to do is let y'all eat your lunch and then we'll bring [y'all] in."** Plus the lawyers had just left . Y'all -- I assume y'all had gone to get something to eat.

And they said okay and then one of them said, "Well, can we ask you a question?" **And I said, "no, you can't do that."** She said, "Well, we may not want to hear the whole thing." **And I said, "well, if you know what you want to hear if you will write it down, then I will give it to the court reporter and we'll see if we can find it."**

I then, after they had an opportunity to eat, I asked y'all to come down and as I think as the solicitors were walking up, they brought a second note to me. And it said: "Please re-read the attempted murder charge and assault and battery of a high and aggravated nature."

So they have reduced what they -- the whole charge. So, I'm going to bring them out, Ms. Young has located on her equipment where those charges are, and confirm with them again that that's what they want to hear and we'll play that charge. And if that's sufficient for them, then we'll allow them to retire to the jury room again. If they want more well play whatever they want.

So, anything from the State with respect to the notes and what I did up to this point?

[Solicitor]: No, sir.

[Trial Court]: Anything from the Defendant?

[Trial Counsel]: No, Your Honor.

[Notes marked Court's Exhibits 4 and 5] [**Jury brought into the courtroom**].

[Trial Court]: All right. Thank you, Madam Forelady. I have received both of your notes, and I have reviewed them with the attorneys and I just informed them a little bit that **when I got your first note I went into the jury room because they weren't here and told y'all we were going to wait until you had an opportunity to eat because the food had just gotten here and they had gone to lunch and it would take a little bit of time to hear the charge.**

> **And somebody indicated, well, maybe you could reduce what you wanted to hear. And I asked you to write down whatever it is you wanted to hear.** And your note, the second note came just as the attorneys got here.
>
> So, we have located it. It says: "Please re-read the attempted murder charge and assault and battery of a high and aggravated nature charge."
>
> What I'm going to do is replay what my charge was before. And Ms. Young has located that on her computer, and we will play that. **If you want to hear something after that, let me know that and we'll play whatever it is you want to hear.**
>
> [Portions of jury instructions played for jury].

(Tr. pp. 438-40 (emphasis added)).

The jury then resumed deliberations with no objection by either party. (R. p. 441).

Applicant asks this Court to grant post-conviction relief because counsel failed to object to, and to preserve for appellate review, the court's entering the jury room unaccompanied by any party or the defendant. Applicant characterizes the error as structural and premises his allegation upon State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). In that case, our state Supreme Court found reversible error when, in the guilt phase of a capital trial, the trial judge entered the jury room to answer a jury's question accompanied by counsel from both the state and defense, but not the capital defendant. The court held "this conduct to be reversible error regardless of the presence of counsel" and cautioned the bench "that this procedure is highly improper and also runs counter to the requirement that in a death case the defendant be present at all stages of trial." 279 S.C. at 421-22, 308 S.E.2d at 784-85, overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (citing State v. Taylor, 261 S.C. 437, 200 S.E.2d 387 (1973)); (also citing State v. James, 116 S.C. 243, 107 S.E. 907 (1921)). In the penalty phase of that same case, the judge entered the jury room without counsel for either side to "request for periodic reports on the status of jury deliberations." Id. at 423, 308 S.E.2d at 785. The court again found this action improper. Id. (citing State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951)).

As to the ineffective assistance of counsel allegation framed in the application, this Court finds Applicant has failed to meet either prong of the Strickland test. See Weaver v. Massachusetts, __ U.S. __, __, 137 S.Ct. 1899, 1910 (2017) (applying Strickland error-and-prejudice standard to claim of ineffective assistance of counsel for an alleged violation of the defendant's right to public trial). "A defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure." Starnes v. State, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991) (emphasis in original). "[T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record." State v. Caldwell, 300 S.C. 494, 500, 388 S.E.2d 816, 819 (1990), overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006).

This Court finds Applicant was not prejudiced by the court's interaction with the jury. This Court finds this case distinguishable from the errors found to have occurred in Elmore, supra, which was a capital case, as well as from other similar pre-Elmore jurisprudence in our jurisdiction. State v. James, 116 S.C. at 243, 107 S.E. at 908 (defendant "has a right to be present at every part of the trial proper, to hear the evidence, to hear the judge's charge, to see, know, and hear what the judge says when he communicates with the jury, in answering their questions or further instructing them, unless he absents himself"); State v. Smart, 278 S.C. 515, 523-25, 299 S.E.2d 686, 691-92 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) ("This Court recognizes that the better practice would be to have the defendant present in the courtroom [when a deliberating jury's inquiry is answered by the trial court]. We do not, however, hold that prejudice should be presumed without some showing."); see also, In Interest of Dwayne M., 287 S.C. 413, 415, 339 S.E.2d 130, 131 (1986) ("While the right to be present is a substantial one, there is no presumption of prejudice.").

Unlike Elmore, the trial court in this case did not enter the jury room to ask about the status of deliberations or to substantively respond to any jury question off of the record and out of the defendant's presence. The trial court entered the jury room because they had asked a question and it was, presumably, going to take a while to return them to the courtroom for an answer because the parties to the case had gone to lunch. The trial court refused to answer the jury's precise inquiry and re-instructed the jury as to the appropriate procedure for submitting questions to the court during deliberations. The court then made a full record of what occurred and did not respond to the jury's inquiry until all parties were present and a record could be made. (R. pp. 438-40). This interaction does not form a basis for post-conviction relief. Contra State v. James, supra (defendant prejudiced where he remained in lock-up while trial court answered jury's inquiry to issue further instructions on the law of self-defense); cf. State v. Smart, supra (finding no prejudice in the content of the court's response to jury's inquiry, from which defendant was absent, where court made a record of the full response given). Such an interaction was not critical to the proceeding's outcome and constitutes a ministerial communication from which neither structural error nor prejudice can be discerned. See id.; Starnes v. State, supra.

G. Allegations of Ineffective Assistance of Appellate Counsel.

Applicant asserts two grounds of ineffective assistance of appellate counsel. For the reasons set forth below, this Court denies relief on these grounds.

First, Applicant asserts he was denied effective assistance of appellate counsel because "in the alternative to [PCR Application, ¶¶ 10(a) and] 11(a)(10), appellate counsel failed to appeal the trial court denying the motion for a mistrial after witness Scott Fleming testified that Mr. Ard had been to prison and did not want to go back." PCR Application, ¶¶ 10(b) and 11(b)(1). Appellate

counsel did not appeal this issue because trial counsel did not preserve for appellate review. *See* Section VI(D), *supra*, for a discussion about why this issue was not preserved for appellate review.

Second, Applicant asserts he was denied effective assistance of appellate counsel because "appellate counsel failed to appeal the trial court denying the motion to exclude the sentence of life without the possibility of parole based on arbitrary use of prosecutorial discretion." As seen, appellate counsel filed and *Anders* brief on this issue. This Court agrees with appellate counsel that Applicant could not prevail on this issue unless the Supreme Court of the United States overruled *Bordenkircher, supra.*

V. CONCLUSION.

Therefore, it is ordered that Mr. Ard's application for post-conviction relief is granted. It is further ordered that Applicant's case is remanded to the Court of General Sessions for a new trial.

IT IS SO ORDERED.

Clifton Newman
Presiding Judge, Fifth Judicial Circuit

Feb 13, 2019
Kingstree, South Carolina 2019

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Stewart Randall Ard, #217645, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2016-CP-40-06225 **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(E), SCRCP**

Respondent hereby moves pursuant to Rule 59(e), SCRCP, and all other applicable rules to alter or amend the judgment issued by this Court.

This matter is before this Court by way of an application for post-conviction relief ("PCR"). Following a hearing on the matter, this Court granted relief by order dated February 13, 2019, and filed February 19, 2019. In its order, this Court found Counsel was ineffective for failing to object to the solicitor's closing argument and the trial court's jury instruction that a specific intent to kill was not required to find Applicant guilty of attempted murder.[1] This Court remanded the matter to the Court of General Sessions for a new trial. Respondent received the order via email from the Richland County Clerk of Court's office on February 19, 2019.

DISCUSSION

In making this motion, Respondent reserves and incorporates all previous arguments and authority presented to this Court. Respondent submits the judgment should be altered or amended based on the following:

[1] Applicant raised several additional issues, and this Court denied relief on all other grounds. Respondent is not challenging those findings.

This case arises from a bar fight in the Five Points area of Columbia. Applicant and three friends were patrons at the bar Group Therapy. One of the patrons, not Applicant, punched a wall, causing a bouncer to ask the group of four to leave. After a cross exchange, the bouncers escorted the four patrons out of the bar. Jesse Patterson was the bouncer working the door at Group Therapy that night. Sometime after the four patrons were escorted away, Patterson was outside the door talking to the bar's owner, Scott Flemming, when Patterson heard screaming behind him, turned, and saw co-defendant Benjamin Geno running at him and throwing punches. Applicant came from behind Geno and stabbed both Patterson and Flemming with a knife. Then Applicant ran back toward his parked car at the Post Office across the street. Gabe McDaniel and Joe Molino, two bouncers at a neighboring bar, chased Applicant. Applicant attempted to stab these gentlemen as well, but was unsuccessful, as McDaniel and Molino both turned and fled when Applicant came at them. Applicant then fled the area in his vehicle with the three other men who were originally kicked out of Group Therapy. Cameras inside and outside the bar captured the fight.

The Fifth Circuit Solicitor's Office charged Applicant with attempted murder for the stabbing of Patterson and three counts of assault related to the attacks on Flemming and the two other bouncers who received no injuries. In her opening statement, trial counsel conceded Applicant was guilty of second-degree assault and battery with respect to Patterson, but denied he was guilty of attempted murder. In closing, trial counsel argued Applicant lacked malice or intent to kill Patterson. Tr. pp. 402-03. The solicitor argued attempted murder was a general intent crime. Tr. 374-77. The trial judge instructed the jurors, "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." Tr. 416-17. The jury found Applicant guilty of the attempted murder of Patterson, second-degree assault and battery as to Flemming and McDaniel, third-degree assault and battery as to Molino, and carrying

a concealed weapon.

Applicant argued, and this Court found, trial counsel was ineffective for failing to object to the trial court's jury instruction on attempted murder.

ARGUMENT

In its Order Granting Application for Post-Conviction Relief, this Court found trial counsel did not understand that attempted murder is a specific intent crime, and this deficiency prejudiced Applicant by influencing (a) counsel's failure to object to the jury instruction that "a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury," and (b) counsel's failure to object to the prosecution's argument that attempted murder is a general intent crime. Applicant alleges, and this Court found, prejudice flows from the jury instruction and closing argument because it diluted the jury's ability to consider lesser-included offenses. Specifically as to the jury instruction, Applicant alleges prejudice because (1) this instruction deleted the specific-intent requirement of attempted murder, (2) reduced attempted murder to the statutory offenses of assault and battery of a high and aggravated nature ("ABHAN") or first-degree assault and battery, S.C. Code Ann. § 16-3-600(B), and (3) prevented the jurors from considering lesser included-offenses of ABHAN and first-degree assault and battery.

This Court's order relies in part upon dicta from State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), because Sutton includes language recognizing that, "[i]n general, '[a]ttempt is a specific intent crime.'" 340 S.C. at 397, 532 S.E.2d at 285. However, Sutton was decided before attempted murder was even recognized as a separate offense in South Carolina, and the holding in Sutton found "specific intent [was] *not* required to commit" the equivalent, then-recognized

offense of assault and battery with intent to kill. Id. at 396-99, 532 S.E.2d at 285-86 (emphasis added). In 2010, the General Assembly replaced the offense of assault and battery with intent to kill (ABWIK)[2] with the offense of attempted murder and codified ABHAN, along with three other lesser degrees of assault and battery, as a lesser-included offense. S.C. Code Ann. §§ 16-3-29, 16-3-600; see State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). Attempted murder is defined by statute as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" Id. at § 16-3-29. The statute for ABHAN defines the offense as a person unlawfully injuring another person and, either "great bodily injury to another person results" as defined by the statute, or 'the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(A)-(B)(1); see also S.C. Code Ann. § 16-3-600(C)&(D) (additional lesser-included assault and battery offenses charged in this case). In 2017, the Supreme Court decided State v. King, 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017), aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), and found "'[T]he Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder....'"

However, the Court of Appeals' decision was delivered in June 2015 and the Supreme Court's decision in October 2017, years after Applicant's case was tried. At the time of Applicant's trial in 2014, which is the relevant time frame for analysis of counsel's actions under Strickland, the law in South Carolina was not clear as to the required level of intent. Applicant has relied on the South Carolina Supreme Court's opinion in State v. King as support for his contention trial counsel should have known specific intent was required for attempted murder, but in fact, as evidenced by both the majority opinion and by Justice Kittredge's concurring opinion in

[2] Formerly S.C. Code Ann. §16-3-620. See legislative history of S.C. Code Ann. § 16-3-29.

King, existing authority supported the attempted murder instruction rendered at Applicant's trial. 422 S.C. at 74-74, 810 S.E.2d at 32 (Kittredge, J., concurring in result only); State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("malice aforethought encompasses both the specific and general intent to commit murder"); State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) (for ABWIK, the required finding of "malice aforethought, either express or implied" encompasses a requirement of general intent). Indeed, the very fact the Supreme Court went to such lengths to discuss the history of ABWIK and attempted murder in this state and to clarify the standard demonstrates the law was not clearly defined until that decision was rendered.

Importantly, the relevant lens for analysis is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689. See also Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute, as noted by the Supreme Court in its analysis in King. 422 S.C. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

Trial counsel, therefore, cannot be deficient based on King, because it was not the law at the time of Applicant's trial, so trial counsel was not on notice that she needed to object. See, e.g., Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue); see also Hill v. State, 350

S.C. 465, 567 S.E.2d 857 (2002) (holding failure of trial counsel to object to erroneous jury instruction was ineffective where appellate decision announcing change in law had already become final by the time of defendant's trial). This Court's order finding deficiency and granting relief on this issue is based on a change in the law that occurred three years after Applicant's trial, which is an incorrect application of the Strickland standard. Strickland v. Washington, 466 U.S. at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."); id at 688 ("The proper measure of attorney performance remains reasonableness under prevailing professional norms.").

Additionally, this Court's order does not contain a finding regarding Respondent's argument Applicant has not met his burden of establishing prejudice due to overwhelming evidence of malice and intent.[3] Strickland v. Washington, 466 U.S. at 687 (regarding the prejudice prong, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"); Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (explaining "the PCR court should consider the specific impact counsel's error had on the outcome of the trial" as well as "the strength of the State's case in light of all the evidence presented to the jury"); see generally, Jackson v. State, 355 S.C. 568, 573, 586 S.E.2d 562, 564 (2003) ("Our confidence in the outcome of Jackson's trial is not undermined by his failure to receive a self-defense charge [due to an error by counsel].").

[3] Even had the jury been charged that attempted murder required a finding of specific intent to kill, and even had Applicant been convicted of the lesser-included offense of ABHAN, Applicant would still have faced a mandatory LWOP sentence because he had three prior armed robbery convictions. S.C. Code Ann. § 17-25-45; (R. p. 450). When considered in conjunction with trial counsel's strategy to concede guilt at to a lesser-included offense, and the facts outlined above, including the jury's request to be re-instructed only as to attempted murder and ABHAN, no prejudice appears in the nature of the sentence received as a result of the conviction.

The facts established at trial show Applicant acted with malice and intent to kill. At PCR, trial counsel testified Applicant "drove the knife in" in regards to the victims who received medical treatment, and "it was all on video." PCR Tr. p. 20. After he and three other patrons were made to leave the bar by its bouncers, Applicant was nearly immediately thereafter overheard by a restaurant employee on the sidewalk stating to his comrades that they would go back to the bar to retaliate against being kicked out. Tr. pp. 319-24. Applicant did in fact return and came at each of the four victims with a knife, making contact with and causing injury to two of the four victims, all of which was captured on video. Tr. pp. 228-35. Patterson's treating trauma surgeon described his injuries as life threatening and testified Patterson had been stabbed in the torso, resulting in two "pretty deep" lacerations. The lacerations penetrated one lung and the chest wall and caused the victim's blood pressure to drop. Patterson's lung was noticeably injured and required a chest tube for treatment. Tr. pp. 196-205. Thus, there is no other reasonable interpretation of Applicant's actions other than a specific intent to kill, and Applicant was not prejudiced by the jury instruction on general intent due to the overwhelming evidence of malice and intent. Cf. State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652 (Ct. App. 2012) (finding no error in the trial court's jury charge where "it is not possible to interpret the evidence to support any conclusion other than that the person who shot [Victim] committed ABWIK."). Therefore, trial counsel was not ineffective.

CONCLUSION

For the foregoing reasons, Respondent requests that the order be altered or amended.

Respectfully submitted,

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Attorney General

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Senior Assistant Deputy Attorney General

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By: _____
ATTORNEYS FOR RESPONDENT

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March 1, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2016-CP-40-06225
	)	
STEWART RANDALL ARD, #217645,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, South Carolina 29646

DATED this the 1st day of March, 2019.

LINDSEY A. MCCALLISTER
Attorney for Respondent
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THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
)	Case No. 2016-CP-40-06225
Stewart Randall Ard,)	
Applicant,)	
)	**Response in Opposition to State's**
)	**Rule 59(e), SCRCP Motion**
vs.)	
)	
State of South Carolina,)	
Respondent.)	
)	

This matter is before this Court on Stewart Randall Ard's application for post-conviction relief ("PCR"). By written order dated February 13, 2019, this Court granted Mr. Ard post-conviction relief. On March 1, 2019, the State served a Rule 59(e), SCRCP motion. By email dated August 16, 20219, this Court requested a response to the State's motion. This response follows.

DISCUSSION

The State's motion, at p. 3, argues, "This Court's order relies in part on dicta from *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), because *Sutton* includes language recognizing that, '[i]n general, "[a]ttempt is a specific intent crime"' . . . However, *Sutton* was decided before attempted murder was even recognized as a separate offense in South Carolina." Our Supreme Court recently addressed this issue in *State v. King*, Appellate Case No. 2015-001278, 2017 WL 4800004 (S.C. Oct. 25, 2017). Although our Supreme Court decided *King* three years after Mr. Ard's jury trial, it is significant that *King* relied on cases decided prior to Mr. Ard's jury trial and, therefore, available to trial counsel. Specifically, *Sutton* recognized, "Attempted murder would require the specific intent to kill and conduct towards that end." 340 S.C. at 397, 532 S.E.2d at 285. Additionally, South Carolina has long recognized that attempt crimes are specific intent

crimes. *E.g. State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime.") (citing *Sutton, supra*)). Trial counsel, therefore, was deficient under the first prong of *Strickland* for not objecting to the Solicitor's closing argument and the trial judge's instruction to the jury that attempted murder is not a specific intent crime. *See* order at p. 10.

The State's motion, at p. 4, argues, "[T]he Court of Appeals' decision [in *King*] was delivered in June 2025 and the Supreme Court's decision [in *King*] in October 2017, years after Applicant's case was tried." The State then argues *Strickland*[1] precludes the Court from considering *King*. In reality, the State askes this Court to overlook *Sutton's* holding that attempted murder is a specific intent crime, *Thompson* and *Nesbitt* holding that attempted armed robbery is a specific intent crime, and *Nesbitt*, citing *Sutton*, recognizing, "Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime." 346 S.C. at 231, 550 S.E.2d at 866. These cases, therefore, placed Mr. Ard's trial counsel on notice that attempt crimes, including attempted murder, are specific intent crimes. When the State has made similar arguments in other cases, our Supreme Court has looked to our state's caselaw to determine when the bench and bar was on notice a particular legal concept. *E.g. Thompson v. State*, 423 S.C. 235, 243, 814 S.E.2d 487, 491 (2018) ("after *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989)] was decided in 1989, the law was 'clear that no witness may give an opinion as to whether the victim is telling the truth.'"); *Briggs v. State*, 421 S.C. 316, 806

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

S.E.2d 713 (2017) (same). Thus, while the State's motion, at p. 5, points out "the relevant lens for analysis is 'counsel's perspective at the time' of trial," this Court properly found trial counsel deficient based on *Sutton, Thompson* and *Nesbitt*. *King* did not represent a change in the law but rather an application of long existing precedent—these three cases in particular.

The State's motion, at p. 6, argues, "[T]his Court's order does not contain a finding regarding Respondent's argument Applicant has not met his burden of establishing prejudice due to overwhelming evidence of malice and intent." This argument is without merit. This Court's order correctly included the following statement in the standard of review:

> The second prong of *Strickland* requires a defendant establish that this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, No. 2016-001079, 2018 WL 736339, at *6 (S.C. Feb. 7, 2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

Order at p. 9.

Smalls additionally observed, "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury."). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id. at* *7. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice .

. . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." *Id. at* *8.

This Court applied *Smalls* to the facts of this case:

> Here, trial counsel acknowledged during her opening statement and closing argument that Applicant committed the conduct alleged in the indictments and informed the jurors Applicant would ask them to determine he committed lesser-included offenses rather than the charges alleged in the indictment. Specifically, trial counsel informed the jurors that Applicant was not guilty of attempted murder or ABHAN. The trial judge allowed the jurors to consider ABHAN and first-degree assault and battery as lesser-included offenses of attempted murder. The trial judge, however, instructed the jurors, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." Not only was this instruction an incorrect statement of the law, but it also failed to take into account the elements of the lesser-included offenses instructed to the jurors. Proof of "great bodily injury" is an element of ABHAN. S.C. Code Ann. § 16-3-600(B)(1)(a). "A person commits the offense of assault and battery in the first degree if the person unlawfully offers or attempts to injure another person with the present ability to do so, and the act is accomplished by means likely to produce . . . great bodily injury." S.C. Code Ann. § 16-3-600(C)(1)(b)(i). Both ABHAN and first-degree assault and battery require the jurors to consider whether the "act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1)(b) and (C)(1)(b)(i). The "specific impact" of trial counsel's error, therefore, was to prevent the jurors from considering the lesser-included offenses in a case where Applicant acknowledged the conduct but contended he was guilty of a lesser-included offense.

Order at p. 9. 11-12.

This Court's order then considered *State v. Pilgrim*, 326 S.C. 24, 482 S.E.2d 562 (1997), holding the absence of malice was not element ABHAN, and observed:

> Trial counsel's failure to recognize that attempted murder is a specific intent crime additionally allowed the Solicitor to argue, impermissibly, that ABHAN and first-degree assault and battery require the absences of malice. *See Pilgrim, supra.* Had trial counsel objected to trial judge's instruction, the objection would have precluded this argument that further reduced the jurors' ability to consider the lesser-included offenses of ABHAN and first-degree assault and battery.

Order at p. 12.

Thus, the purported strength of the State's case regarding malice and intent did not preclude the jurors from considering lesser-included offenses that also require intent and can be committed with malice. *Smalls, supra.* The State's attempt to conflate the separate elements of "malice" and "attempt to kill" must be rejected.[2]

CONCLUSION

For the reasons set forth in this Court's order granting post-conviction relief and this pleading, this Court should deny the State's Rule 59(e), SCRCP motion. This Court has not overlooked or misapprehended any issue related the ground of relief for which it granted Mr. Ard post-conviction relief.

Respectfully Submitted,

By: _____

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Attorney for the Applicant Stewart Ard

August 19, 2019
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[2] The State's motion, at p. 6, cites *Jackson v. State*, 355 S.C. 573, 586 S.E.2d 562, 564 (2003) for the proposition, "Our confidence in the outcome of Jackson's trial is not undermined by his failure to receive a self-defense charge [due to error by counsel]." Mr. Ard, however, has never claimed self-defense in this case.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2016-CP-40-06225
Stewart Randall Ard,	)	
Applicant,	)	**Response in Opposition to State's Rule 59(e), SCRCP Motion**
	)	
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

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August 19, 2019
Greenwood, South Carolina

State of South Carolina)
)
County of Richland)

In the Court of Common Pleas
Fifth Judicial Circuit
2016-CP-40-6225

Stewart Randall Ard,

Applicant,

vs.

State of South Carolina,

Respondent.

Transcript of Record

September 20, 2019
Columbia, South Carolina

B E F O R E:

The Honorable Clifton B. Newman, Judge

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

E. Charles Grose, Jr., Esquire
Attorney for the Applicant

Lindsey A. McCallister, Esquire, Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

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Certificate Page.	37

E X H I B I T S

No.	Description	Page No.

No Exhibits Introduced.

THE COURT: Yes, ma'am.

MS. McCALLISTER: May it please the court, Your Honor? My name is Lindsey McCallister, and I'm representing the state on this matter. This is *Stewart Randall Ard vs. The State of South Carolina*, 2016-CP-40-06225. Your Honor, you heard the PCR hearing in this matter, and state -- and, and granted relief on one issue, the issue of the attempted murder charge and whether counsel was ineffective for failing to object to the court's general intent, general intent charge on attempted murder. Your Honor, I can go through the full procedural history if you would like me to, or I can go straight into the state's motion if you would like.

THE COURT: I remember there was some kind of disruption at Five Points, and the defendant and others were put out and they came back, and somebody was stabbed, and he was tried and convicted of attempted murder.

MS. McCALLISTER: That's correct, Your Honor, and as I stated earlier, Your Honor found for the applicant on, on the one ground about the -- whether the jury instruction, the general intent instruction, whether it was ineffective for his counsel to have failed to object to that instruction. And, Your Honor, the state filed this motion ---

THE COURT: Who was that counsel again?

MS. McCALLISTER: It was Ms. Zmroczek, Aimee Zmroczek.

THE COURT: Yes. Okay.

MS. McCALLISTER: The state filed this motion asking Your Honor to reconsider your ruling on that issue. And, Your Honor, our, our focus today, you found deficiency and prejudice because attempted murder, as we now know thanks to the *King* decisions, is a specific intent crime.

The instruction that was given at Mr. Ard's trial was that a specific intent to kill is not a necessary element of attempted murder, but there must be a general intent to commit serious bodily injury. Your Honor, the state's issue, we disagree with both deficiency and prejudice, but our focus is on the deficiency finding.

Your Honor, the order and counsel for Mr. Ard has relied heavily on the *King* decision which came out in 2017. This case went to trial in June of 2014. So, that was even before the court of appeals decision in *King* came out. So, there was no -- it wasn't the law in 2014 is the state's position, and, and the law in 2014 is the relevant analysis for analyzing trial counsel's conduct under *Strickland*.

THE COURT: When did *King* -- that was in Charleston. When did that -- was that murder or attempted murder? That was attempted murder?

MS. McCALLISTER: Yes, Your Honor.

THE COURT: When did that occur?

MS. McCALLISTER: When did the actual incident with King occur, Your Honor?

THE COURT: Or the *King* trial, or does it matter?

MS. McCALLISTER: Your Honor, I'm not sure. It, it occurred in November of 2010 was when the incident occurred, Your Honor.

THE COURT: And his trial was?

MS. McCALLISTER: So, his trial was, it would have been some time after that, Your Honor.

THE COURT: Sure.

MS. McCALLISTER: I'm not sure of the exact date of the trial in *King*.

THE COURT: Well, I know *King* quite well. I believe Judge Benjamin ended up ---

MS. McCALLISTER: That's correct.

THE COURT: --- sitting with the Supreme Court on that ---

MS. McCALLISTER: She did, Your Honor.

THE COURT: --- case.

MS. McCALLISTER: That is correct.

THE COURT: I was presiding in Charleston quite a bit during the time that was going on as far as the trials. Go ahead.

MS. McCALLISTER: Okay. Thank you, Your Honor. Your Honor, the state's contention essentially is that a finding

of deficiency in this situation where the trial occurred in 2014 and the decision didn't come out until years later is, in effect, a finding requiring counsel to be clairvoyant on these issues, Your Honor. And Your Honor is familiar with the attempt murder statute, and I'm sure sort of the legislative history behind that. But I think it's common knowledge that the legislature in 2010 kind of codified some of the common law crimes, and prior to that time attempted murder wasn't a crime that really existed in South Carolina. It was assault and battery with intent to kill.

THE COURT: So, when the attempted murder statute -- of course we all know about the ominous crime bill or...

MS. McCALLISTER: Omnibus.

THE COURT: Omnibus Crime Bill, when was that?

MS. McCALLISTER: That was in 2010, Your Honor, I believe June of 2010.

THE COURT: 2010. So, the definition of attempted murder as being a specific -- you must specifically intend to murder, was then put in the statute in 2010?

MS. McCALLISTER: Your Honor, the statute that was put into effect in 2010 reads:

> A person who with intent to kill attempts to kill another person with malice aforethought, either expressed or implied.

That's the, that's the sort of attempted murder language in the code section.

THE COURT: Say it again. Oh, yeah, okay. Say it one more time.

MS. McCALLISTER: A person who with intent to kill attempts to kill another person with malice aforethought, either expressed or implied.

THE COURT: Okay.

MS. McCALLISTER: And, Your Honor, and that's -- that last part that, that malice aforethought, either expressed or implied, I think is where kind of *King* and all of the confusion about whether this was intended to be general intent for specific intent came from. And I think it was why *King* was a necessary decision and why the court needed to clarify what the intent standard was supposed to be. But essentially, Your Honor, the attempted murder statute combines elements of specific intent and general intent. And there was precedent for that at the time that this case was tried, that that malice aforethought language encompasses both specific and a general intent to commit, in the context of murder, to commit a murder, and that the law ---

THE COURT: Let me just ask you a few -- just things as they come to my mind. Has it been changed to say with the specific intent to kill or just as a result of *King*?

MS. McCALLISTER: Your Honor, it's just as a result of *King* as far as I'm aware. And so, Your Honor, the *King* decision itself acknowledges that there is ambiguity created by that statutory code section, and the *King* decision uses that exact language that, that the justices acknowledge the ambiguity.

And essentially if you read through the *King* decision, there was a majority opinion, and then there was Justice Kittredge's concurrence and the result he wrote separately. And both of those decisions and explanations essentially require you to sort of ignore one part of the statute because that part about malice aforethought, expressed or implied, seems to point towards general intent, while the language with intent to kill seems to point towards specific intent, and *King* goes through that whole analysis, Your Honor. And Justice Kittredge wrote about that in his concurrence:

> The majority and I agree that the statutory language creates an ambiguity. With intent to kill speaks to a specific intent crime, while malice aforethought, either expressed or implied, points to a general intent crime.

And so, Your Honor, the state's contention then is that if we're looking at this through a *Strickland* analysis in order to find deficiency, you have to find that

counsel's conduct was not reasonable under prevailing professional norms at the time in 2014. And so our, our argument is that she might have been ultimately incorrect, but her interpretation that this was a general intent crime and that she had no basis to object to that instruction is not unreasonable. Your Honor, even Justice Kittredge, he concurred in the result but he, he wrote that he would affirm the trial court's finding and related jury instruction that a specific intent to kill is not an element of attempted murder. And so we're talking ---

THE COURT: You love the concurring opinion.

MS. McCALLISTER: I do.

THE COURT: Not the majority opinion.

MS. McCALLISTER: Well, it's not that I like one or the other. It's just I think the fact that even multiple justices on the Supreme Court couldn't agree whether the legislature intended for this to be specific intent or general intent speaks to the fact that *King* did -- *King* was essentially making a new, a new law because the law was not clear, and so it is not fair to hold Ms. Zmroczek to a standard of being required to know that she had to object to specific intent. Certainly now we would hold her to that standard, but in 2014, Your Honor, I don't think that that was -- it was that clear and that that is a fair application of the *Strickland* standard in terms of

deficiency, Your Honor.

Additionally, Your Honor, I mean, looking through the record from the trial and from the PCR hearing, it appears that that charge that was given is verbatim, just from the judge's bench book, and so I don't know now ---

THE COURT: Of course, they've dispensed with having a judge's general bench book because that's not controlling. It's not law. It's not even used anymore.

MS. McCALLISTER: Yes.

THE COURT: For many reasons, probably including what you just indicated.

MS. McCALLISTER: Yes, and that may be the case, Your Honor, but at the time in 2014 -- again the relevant time period -- they were using a bench book. This charge came directly from it, and so I don't know how Ms. Zmroczek ---

THE COURT: And not based on any mandate of any kind. It was just a suggested guide for judges.

MS. McCALLISTER: I agree, but I think it goes to whether Ms. Zmroczek was reasonable in her interpretation of the law, and that's what we're looking at.

THE COURT: Well, she had no -- she didn't use the bench book, did she?

MS. McCALLISTER: She didn't use the bench book, but the judge used the bench book to, to come up with the charge, and so he charged exactly what was in his book.

And had Ms. Zmroczek objected, you know, the answer to that is, well, this is the charge in the bench book. This is what the judicial department is telling judges they should charge on this issue. And so I don't think ---

THE COURT: I understand everything you're saying. I was a prosecutor, solicitor for seventeen years and I prosecuted many, many, many cases. Of course, attempted murder was not the charge until 2010. It was assault and battery of a high and aggregated nature, assault and battery with intent to kill. And though the charge was assault and battery with intent to kill, intent to kill was not an element of it. Just the -- it only required an assault with intent to commit serious bodily injury. That could be assault and battery with intent to kill, and the question is when does the line -- when does the dividing line go into effect? And the statute changed in 2010, so is that when the dividing line -- does the dividing line go into effect when the Supreme Court decided *State vs. King*? Is that *State vs. Sutton*, is that a dividing line?

I understand all the issues, and so it's not a, it's not a -- something to be simply a simple resolution. Perhaps many judges didn't follow the 2010 legislative -- or did not consider that that required a different charge. Perhaps -- and certainly Ms. Zmroczek didn't think it, but it presents us with this issue, and that's why we're here

right now. So, so, go right ahead.

MS. McCALLISTER: Yes, Your Honor. Thank you. So, I, I think you understand the state's argument in terms of prejudice -- I mean, in terms of deficiency, and obviously if there is no deficiency, then the prejudice prong essentially isn't even reached, Your Honor. Your Honor did find prejudice, however, and so I would rest mostly on what's written in the motion, but it's the state's contention there is ---

THE COURT: Well, it's prejudice because, you know, these days when juries have to find that a person who, whether they shoot at someone or stab someone, whatever they do, the jury must find that they had a specific intent to kill that person, and that's a very high bar for any jury to determine exactly what the person specifically intended to do. Not attempted to hurt the person, maim the person, but in that person's mind was a specific intent to kill the person. That's what the jury has to decide. And these days, it's such a -- and the reason the Supreme Court deals with this, it's jurors have a very difficult time proving that or deciding that.

Of course, you know, someone drives by and makes someone mad, and they pull out a gun and shoot at their car, then that's attempted murder. Those are the charges these days, but for a jury to decide that that person had a

specific intent to kill that person, as opposed to scare them or whatever, it's a difficult proposition.

So, it gets me still back to when is the dividing line as far as what the lawyer should have done during the course of this trial? And I don't recall what Ms. Zmroczek said during her own testimony. I know many lawyers come in and fall on their swords saying, you know, I'm sorry I lost the case. It's my fault. And I don't know how much should be placed on that end. Do you recall what she said?

MS. McCALLISTER: Your Honor, I mean, I think she agreed that knowing what she knows now, she should have objected to these instructions and she didn't. I mean, that's clear from the transcript.

THE COURT: Okay.

MS. McCALLISTER: It's not really arguable that she tried to object or anything like that.

THE COURT: All right.

MS. McCALLISTER: She clearly did not. And I -- and so she testified, you know, that she felt like she should have based on, I think, based on what she knows now or what she knew at the time of the hearing.

And, Your Honor, so again to your point, we understand that specific intent is obviously a very high bar. In this case, Your Honor, however, the attempted murder victim was stabbed in the chest twice, deep enough to penetrate the

chest wall and a lung. And so, Your Honor, I mean, I think our -- the state's argument is that that conduct is egregious enough that there is no way that a jury would have found anything other than a specific intent to kill, and essentially that, that even with the instruction, it was a harmless error. And I think that's covered pretty well in the state's written motion, Your Honor. So, I will, I will let Mr. Grose respond unless you have questions.

THE COURT: All right. We'll have to see what Mr. Grose has to say about it.

MR. GROSE: Judge, I have three key, key disagreements with what they said. The first is in 2010, the legislature did not codify the common law of assault. They actually abrogated the common law and created this new scheme. When they did, those of us who were at the legislature at the time when these bills were being discussed realized that they were creating an attempted murder offense that would require specific intent, and we knew that because of the *Sutton* case, which had interpreted the old assault and battery with intent to kill charge and said that attempted murder would be a specific intent crime. But at the time of *Sutton*, we didn't have that crime in South Carolina.

We also knew that they were creating a specific intent crime because at the time they enacted that, there was the

State vs. Thomas and the *State vs. Nesbitt* cases that said that attempt crimes are a specific intent. You have to have the specific intent to complete that crime.

So, the second thing I disagree with is is that *King* was not a change in the law. *King* was -- certainly *King* interpreted the attempted murder statute, but if you go back to look at *King*, *King* relied on *Sutton*, *King* relied on *State vs. Thomas*, *King* relied on *State vs. Nesbitt* stating that, you know, the long established practice in law in South Carolina is is that attempts are specific intent crimes.

The third key thing that I disagree with them on is it wasn't so much that Ms. Zmroczek testified that, based on what she knows now, she would have done it differently because if you'll recall at the hearing, I had her look at *Sutton*. I had her look at *State vs. Thomas*. I had her look at *State vs. Nesbitt*. Those were all cases that had been decided before Mr. Ard's trial.

They all said that attempt crimes are specific intent. *Sutton* specifically said that attempted murder was a specific intent crime and she acknowledged that, based on those cases that existed at the time of Mr. Ard's trial, that she was on notice that attempted murder would be a specific intent crime.

And I think that's important because in our, our

memorandum in response to their 59(e) motion, we cite another *Thomas* case, *Thomas vs. State* and *Briggs vs. State* which were both PCR cases dealing with vouching. And we know that we have had a slew of those cases coming out since 2010 or 2012, and the issue in those cases -- state was making the exact same argument in *Thomas* vs. *State* and *Briggs vs. State* as they're making today. Well, this *Kromah* case hadn't come out, but what our Supreme Court case said was oh, no. You go back and look at the, the *Dawkins* case, I think it was, from the 1980s, and lawyers have been on notice for decades to object to a witness that is vouching for the credibility of another witness. So, the key is, is what was Ms. Zmroczek on notice of. She was on notice of *Sutton*, *Nesbitt*, and *State vs. Thomas*, and should have been objecting to a general intent crime.

And additionally, in addition to that, you know, her, her defense put her on notice as to, you know, she really needed to make sure the jurors understand the distinction between these assault crimes because this was never a case, a whodunit case, so to speak. This was always a case for the jurors to determine which level of crime that it, that it was. And so that makes it even that much more important to get it right and, and that's not what, not what happened in this case.

And as far as, you know, the prejudice aspect of it,

the *Smalls* case, you know, tells us that, you know, we have to look to the specific error in the case. And the specific error in this case was not giving the jurors the proper definition of attempted murder, which did not give them the proper distinction between all the assault crimes which essentially allowed the state to argue if you find this was done intentionally, with malice, it's attempted murder, where any of the lesser-included offenses could have been done intentionally and with malice.

And while they talk about the nature of injuries, I'm certainly not going to say that that can never be a consideration, but the nature of the injuries still doesn't preclude the state from having to prove the specific intent. And, and that's the specific error of what happened in this case.

And so I, I, I think you, you got it right. I wish you'd granted on a couple more grounds but I, I understand. I think you got it right, and if they decide to appeal this, I'm perfectly comfortable defending this order on appeal because I think the analysis mirrors the analysis that our Supreme Court has applied in other cases that sort of, I guess, procedurally present the same one.

THE COURT: Well, concerning my questions to Ms. McCallister about this dividing line, when is the dividing line, whether the dividing line was 2010, when the Supreme

-- *King* came out, and Sutton --, you probably said none of that really, that there is no dividing line or ---

MR. GROSE: Well, I, I would say ---

THE COURT: What's your take on it?

MR. GROSE: Well, I'd, I'd say to the extent that there's a dividing line, the dividing line is 2010 when the legislature enacted the attempted murder statute because ---

THE COURT: Before that, it was in the cases, *Sutton* ---

MR. GROSE: Well, before that, before that, there was in the cases, but, see, before, before 2010 we did not have an attempted murder crime in South Carolina.

THE COURT: You couldn't be guilty of attempted murder because there was no statute.

MR. GROSE: Right, there was no statute and, and, and there, there was, there was no common law crime of attempted murder. So, if, if you look at the key point being the 2010 when the legislature codified -- or not codified but abrogated the common law and created the new offenses and you look at what, what lawyers were on notice of in 2010, *Sutton* had already happened, *State vs. Thomas* had already happened, *State vs. Nesbitt* had already happened. So, when we create an attempt crime -- and it's not the first time South Carolina has had an attempt crime.

I mean, everything can be an attempt crime.

So, in 2010 you look at what we had. We had a decision from the Supreme Court that said if we had a crime of attempted murder, it would be a specific intent crime. And we had two other decisions from our Supreme Court saying that attempt crimes are specific intent crimes, and at least one of those cited to *Sutton*. Maybe they both did. I, I can't remember, but -- so if, if -- and, and, and like I said, it's, it's not like *King* changed the law. I mean, the General Assembly created a specific intent crime in 2010.

That there was some confusion among some lawyers and perhaps some judges doesn't change the fact they created a specific intent crime and, and lawyers were asking judges to charge that attempted murder was specific intent. Obviously the *King* case, they had to ask that question or it wouldn't have gotten up on appeal, and that's because they were on notice of *Sutton* and *Nesbitt* and, and *Thomas*.

And to her point, well, the judge might have said, well, this is in my charge book, I'm going to charge what's in my charge book, that might have happened, but then it would have been preserved for appeal and the case would have been reversed on appeal, so.

THE COURT: Yeah. Well, before *State vs. Belcher*, the charge book was pretty clear that malice could be implied

through the use of a deadly weapon. That was a ---

MR. GROSE: Well, and, and actually *Belcher* didn't -- well, *Belcher* ---

THE COURT: That wasn't *Belcher*, implied malice?

MR. GROSE: That was.

THE COURT: Okay.

MR. GROSE: That was, but malice can still be implied from the use of a deadly weapon. The problem with *Belcher* was ---

THE COURT: Well, self-defense is a defense, yeah.

MR. GROSE: Well, well, and actually they had a case come out within the last, I don't know, two, three months that says never charge that anymore.

THE COURT: Implied, yeah.

MR. GROSE: But, but that case also says -- I mean, lawyers, prosecutors can still argue the circumstantial evidence inferences that arise from the use of a deadly weapon and the manner in which it's used. And *Belcher* is more of a comment on the facts of the case is the way our case law has kind of evolved since then because we, we've had a number of other jury instructions that our Supreme Court has invalidated, not because they're bad law but because they ran afoul of our constitutional prohibition of the judge commenting on the facts and telling the jurors how to decide the facts. The lawyers can still make the

same arguments. They're just on a little bit more level playing field now with, with the charges being more neutral.

THE COURT: So, I sort of take if from what Ms. McCallister may be saying is that there perhaps have been a lot of bad jury instructions by judges, but you shouldn't look back to this case ---

MR. GROSE: Right.

THE COURT: --- because ---

MR. GROSE: Well, I'll, I'll ---

THE COURT: --- the judges weren't given new instructions until *State vs. King*. How do you respond to that?

MR. GROSE: Well, if you're looking at the instruction books, I was involved in that *Beatty* case. *Beatty* came after *Daniels* where they, they, they told that particular judge take this charge out of your charge book, and then the Supreme Court left that same charge in their charge book for years. And I imagine that multiple things like this is why we don't have charge books anymore.

Again, I think that, you know, we're, we're dealing with a substantive rule of law with regards to attempted murder with the requirement, the element that the state prove a specific intent. That was the crime that was created in 2010. And all *King* did was say, yes, the

legislature created a new crime in 2010, and it has an element as a specific intent, and we know that because of *Sutton*, *Nesbitt*, and *State vs. Thomas*.

THE COURT: Yeah. Well, and I'm taking from what she says that the, the court shouldn't look back and review what lawyers should have done, judges should have done before *State vs. King*. That these -- we shouldn't look retroactive to any -- to -- retroactively, and Mr. Ard should not, even though there were errors, based on the statute from 2010 -- though she didn't say there would be, but that all of that notwithstanding, we shouldn't look back and pick out those other errors. Otherwise, hundreds of inmates who were -- who are serving time based on attempted murder being charged without indicating that there -- that you don't have to have an intent to kill, that we would have floodgates of inmates trying to get out, et cetera, et cetera. What's your ---

MR. GROSE: Well, number one, they always want to make that floodgate argument. But like I say, I think that other judges, other defense lawyers, and other prosecutors were getting it right. That was a specific intent crime even before *King*.

That argument is the argument that the attorney general's office made in the *Thompson vs. State* and *Briggs vs. State* in the CSC context. And how the Supreme Court

looked at that was they say, yeah, we've had all of these cases, and we have to keep telling you over and over and over again that we really mean it. You don't call these witnesses to vouch for another witness, but even though we said that after this case was tried -- all this case law goes back to *Dawkins* from the 1980s, 1989, I think. And they specifically said in those two cases that defense counsel was on notice in 1989 to object to witnesses that vouch for other witnesses.

So, in 2010 when the legislature said we have an attempted murder, the *Thompson* case, the *Nesbitt* case, and the *Sutton* case placed counsel on notice that they had to object to a general intent instruction if it was a specific intent crime.

And so that, that is why I think that the result that you have reached is the correct result. I think it's consistent with the analysis that our Supreme Court has applied in other cases, and I don't think it's going to open a floodgate because I think by and large the other lawyers around the state were aware of *Sutton*, *Nesbitt*, and *Thompson* and were, were making the objections where the judges were charging incorrectly.

THE COURT: So, then she further says that, well, even if the judge didn't and the lawyer didn't get it right -- or not the judge because we're not here on appeal. We're

here on PCR. But even if the lawyer didn't get it right, there's no prejudice because this crime was so gruesome or so bad that there's no prejudice.

MR. GROSE: Well, then again they, they always argue that, but I think you kind of alluded to the answer to that question earlier when you talked about how hard it is for prosecutors to prove a specific intent and for jurors to find specific intent.

And in this case, Ms. Zmroczek's defense was that this was a lesser-included offense, and Judge Barber certainly viewed the record and saw that there was evidence where jurors could decide that Mr. Ard was guilty of a lesser offense and, and not attempted murder. When the, when the instruction was given incorrectly, that allowed the state to make arguments that they couldn't have made if they -- if, if the judge had instructed it properly and were able to argue that, you know, intentional plus malice equals attempted murder when intentional plus malice could also equal assault and battery of a high and aggravated nature, or assault in the first degree, or maybe even assault in the second degree depending upon how the jurors viewed the, the damages. And so that is where, you know, the error played out in front of the jury with the jurors, and that's why we've established prejudice in this case.

THE COURT: All right.

MS. McCALLISTER: Your Honor, if I could ---

THE COURT: Ms. McCallister, anything you'd like to respond to?

MS. McCALLISTER: Yes, Your Honor. Thank you. I think the main point that I want to make is that I don't think that this interpretation is as simple as Mr. Grose is trying to make it in his argument that, well, in 2010 they created attempted murder, so everyone should have been on notice.

So, yes, the legislature did create a crime that it titled attempted murder in 2010; however, they used the common law language from the old common law offense of assault and battery with intent to kill. So, what you have essentially is a code section where the title of the offense, attempted murder, sort of indicates one thing but the body of the offense, the language of it, indicates another thing. And so I think that's a very different situation. And I don't think that that was enough to put everybody on notice that we're talking about a specific intent crime when ABWIK was clearly the settled law in this state was that ABWIK was a general intent crime. And you used the exact same language in the statute now. I just don't see how that is so clear as to trigger an absolute requirement that counsel should have been on notice that she should object to that.

And again going back to the *King* decision, the *King* decision goes to great pains to go through the history and to come up with this result. And so the fact that the Supreme Court needed to do that, I think, is -- goes to the fact that this was a reasonable -- it was a reasonable interpretation of the statute to believe that this was meant to be a general intent crime.

And, and that's the thing is that *Strickland* does not require counsel -- it doesn't require, require counsel to be clairvoyant. It doesn't require her to have predicted what the Supreme Court was going to do. Their decision makes it clear that this is an ambiguous statute and so that, that right there, Your Honor, in my opinion answers the question because if the statute is ambiguous and she did not have the benefit of their guidance on how to interpret it in 2014, I don't see how she can be deficient because she was not on notice that she needed to object. And so I just don't think it's as cut and dry as Mr. Grose would like to make it that, oh, the dividing line is 2010 because that's when we had attempted murder.

THE COURT: Well, the language from the *Sutton* case, it says attempt is a specific intent crime.

MS. McCALLISTER: It does say that, Your Honor, and that's ---

THE COURT: But you seem to be saying that ---

MS. McCALLISTER: But I think that ---

THE COURT: You seem to be arguing that, that attempted murder is a general intent crime.

MS. McCALLISTER: No. ABWIK, Your Honor, was a general intent crime.

THE COURT: Yeah. I understand.

MS. McCALLISTER: Yes, and so the attempted ---

THE COURT: And you're saying that -- and also attempted murder in two thousand -- the time of his trial was a general intent crime?

MS. McCALLISTER: I'm sorry. I'm not trying to argue that.

THE COURT: Okay.

MS. McCALLISTER: I'm trying to say that I think that was -- I don't think that was an unreasonable interpretation because of the confusion in the statute itself. That it's essentially -- it's titled attempted murder. So, it's titled like an attempt crime, but the language of the statute is verbatim the old ABWIK elements and so ---

THE COURT: So, do you generally, do you believe that if -- the result can be unjust, but if the lawyer did not create the injustice, then PCR does not apply?

MS. McCALLISTER: Well, first of all, Your Honor, I don't think the result in this case was unjust but ---

THE COURT: Well.

MS. McCALLISTER: --- I don't think that's what PCR is meant to address.

THE COURT: Well, in light of *State vs. King*, it has to be considered unjust.

MS. McCALLISTER: Because, as I was arguing earlier, Your Honor, I don't -- the state believes that there's not prejudice here because of the overwhelming evidence against Mr. Ard that he, he stabbed someone twice in the chest. How is that not an intent to kill? I mean, if you stab someone twice in the chest, I think sufficient enough to cause them to have a penetrated lung and require surgery, I mean, that the -- I think that goes very heavily towards a specific intent.

THE COURT: Yeah, and I can understand that if a jury were to reach that conclusion, then it obviously would be supported by the evidence.

MS. McCALLISTER: Yes.

THE COURT: But ---

MS. McCALLISTER: And I think the state ---

THE COURT: But the nature of charging the jury, the jury has to believe that based on the proper law as presented by the lawyers and the judge.

MS. McCALLISTER: Yes, and, Your Honor, and the state did not -- I think, I believe the state says in the trial

transcript that, you know, that they didn't believe they had to prove specific intent to kill, but they believed that they had shown that, and so I think, Your Honor, that they ---

THE COURT: And which part of that argument was the jury to go with? That the state didn't have to prove it, or that the state ---

MS. McCALLISTER: But I think that goes to, again, I think that goes back to the prejudice, Your Honor, is that in, in this situation, I don't even -- you know, had the jury been improperly charged, it is irrelevant because there's no other way to view the evidence is that if -- that you've stabbed someone twice in the chest, caused them significant injury, life-threatening injuries, that's, that's intent to kill, and so ---

THE COURT: Yeah, but I've seen so many instances in which juries have not concluded that was an intent to kill.

MS. McCALLISTER: And if Your Honor disagrees with the state's argument, then you may, but I'm ---

THE COURT: No, I'm saying that. No, I said I've seen so many instances. I'm not seeking to ---

MS. McCALLISTER: You know, and ---

THE COURT: --- weigh any of that.

MS. McCALLISTER: Again, Your Honor, this incident was captured on video. I mean, it, it's -- it was clear who

the perpetrator was. It was clear that this started out as a fight. Mr. Ard left and came back, and so I think there's -- there is evidence from all of the circumstances that, that this was intentional, that it was an intent to kill, and that the jury would have found that regardless.

But again, as I said, Your Honor, we don't even get to prejudice if there's no deficiency. And so that, that just goes back to, you know, the issue of whether Ms. Zmroczek was on notice that she should have to, have to object to these instructions. And the state's position is that, you know, *King* itself is very clear that there was ambiguity in the statute at the time that, that pointed towards both specific intent and general intent. And so if we're looking at this through the lens of *Strickland* and whether Ms. Zmroczek was reasonable in not objecting to the charge, I think that goes to the reasonableness of her, of her failure to object.

THE COURT: Okay, and I'm looking at my order.

(A PAUSE.)

THE COURT: Did I interrupt someone? Because I had something I wanted to ask you.

MS. McCALLISTER: I think you were about to ask me a question.

THE COURT: Okay.

MS. McCALLISTER: I'm not sure what your question was.

THE COURT: That this page, this order is, goodness, a 21-page order and you pointed out what you consider to be a number of deficiencies with the structure of the order itself, including that the order does not contain a finding regarding the argument, applicant has not met his burden establishing prejudice due to overwhelming evidence such as in *Strickland*. And so have you hit on all of those things in your argument today? First, that his counsel would have -- in effect, I'm finding that counsel had to be clairvoyant. And then secondly even if client should have known that the instruction was improper, there's no prejudice to the overwhelming evidence. Does that cover the two main criticisms of the order?

MS. McCALLISTER: Yes, sir, Your Honor, it does.

THE COURT: Okay.

All right, Mr. Grose, what do you think about all that? I like it when I'm not -- when this is not one of ten PCRs that I have to hear. This is the only thing I have scheduled this afternoon, so I want to hear all that you have to say about this.

MR. GROSE: Well, I, I can be pretty brief.

THE COURT: Yes, sir.

MR. GROSE: I, I think her point when, when she talks about *King* and the Supreme Court in *King* went and looked at the history. Part of that history was *Sutton*, *Nesbitt*, and

Thompson, the same history that I say puts all of us in the defense bar on notice that attempted murder in 2010 was a specific intent crime. But I find it interesting that, that she's resting on, well, the statute was ambiguous because since the beginning of time, ambiguous statutes that are criminal in nature have to be construed against the state. So, she loses. I don't think it's ambiguous but if it is, she loses.

THE COURT: Yeah, I was -- that thought, that thought has rolled in my mind that those statements were made because statutes are also always strictly construed against the ---

MR. GROSE: Right.

THE COURT: --- person seeking the -- or whoever is trying to enforce it.

MR. GROSE: And so I don't, I don't think it's ambiguous, but if it is, it still has to be construed the way we say it would be construed. And her noting that it was ambiguous is, as she said, it's captioned attempted murder, and we had all this law about attempt crimes. So, unless you have any questions, I don't, I don't really have much else to add.

THE COURT: I'm enjoying the discussion, hearing what ---

MR. GROSE: I figured that you were.

THE COURT: --- you all have to say about it because it's a, it's a -- it's something that's really been with the courts. I've given jury instructions on attempted murders, and everyone is always trying to tweak it to make it more precise based on everything, based on the evolving nature of the law and all that as well, which you say is not that evolving. It's been there, the key word being attempt.

MR. GROSE: Right.

THE COURT: And the court's treatment of what that requires where there is an allegation of attempt. The act constituting attempt must be done with the intent to commit that particular crime.

Yes, ma'am.

MS. McCALLISTER: Your Honor, if I could just respond to the issue about the ambiguity?

THE COURT: Yes.

MS. McCALLISTER: I mean, I understand the point. However, I think that is more of a point if we were talking about, you know, a trial or on direct appeal. Here we're looking at whether Mr. Ard received constitutionally effective assistance of counsel. We're looking at counsel's conduct and in order to do that, we have to look at what she knew or should have known. And so when you have the Supreme Court with a long and -- you know, opinion

and a separate concurrence going back and forth where those justices don't even agree over what the correct interpretation of a statute is, that is, that's sort of the point I'm trying to make about the ambiguity is that because the statute was ambiguous, it was not enough to put someone on notice that they needed to be objecting to those instructions.

And it obviously wasn't just Ms. Zmroczek. I mean, this, you know, this instruction was given in, in a lot of cases, which is why *King* was necessary because there was confusion among the bar and the judges about whether it should be specific intent or general intent.

THE COURT: Yeah. Well, some people, some defendants appeal, some don't. Some file PCRs. Some don't.

MS. McCALLISTER: Correct.

THE COURT: Many folks who file PCRs come and withdraw them because they believe that they may get more time if they go back for another trial. So, there are a lot of different dynamics at play, and I can only be concerned with this specific case.

But Mr. Grose is saying, well, Ms. Zmroczek didn't need to be clairvoyant. The law is clearly established going -- that she should -- all she had to do was be up to date on the existing law through *Sutton* and other cases, and that she wasn't and she said she wasn't. Didn't she

say that, that she ---

MR. GROSE: Your Honor, I think she acknowledged that she should've been aware of those cases and made an objection, yes, sir.

THE COURT: You know, I guess the days of lawyers just showing up and arguing something in court without doing some research and making certain that the client is being represented based on what the instructions from the courts are or have been, that's the -- that's what puts us in these, these settings like we're in today dealing with the post-conviction relief, but any final words of wisdom from either side?

MR. GROSE: Not unless you have any questions.

THE COURT: I think I've asked a lot. I don't have any more. Let me confer with my clerk, who is a rising star.

(A PAUSE.)

THE COURT: All right, I have no further questions, and you all have not submitted anything new other than the copies of everything that ---

MS. McCALLISTER: Yes. I just wanted you to have what you need for today, Your Honor.

THE COURT: Okay. All right.

MS. McCALLISTER: But we haven't submitted anything knew other than the motion.

THE COURT: Okay. Well, I will take one final review through everything that -- things that were handed up today and things argued today, and I'll be in touch in a matter of days. Not weeks or months but a matter of days.

MR. GROSE: Thank you, Your Honor.

THE COURT: All right, thank you all.

--- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 20TH DAY OF SEPTEMBER, 2020.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/*Elizabeth B. Harris*, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JANUARY 30TH, 2020

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4006225

Stewart Randall Ard

PLAINTIFF(S)

State Of South Carolina

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court

RICHLAND COUNTY FILED 2019 NOV 5 AM 11:24 C.C.P.&G.S. & F.C.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 5 November 2019 to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr.

Lindsey Ann McCallister

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

THE STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Stewart Randall Ard, Applicant, vs. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Case No. 2016-CP-40-06225 **ORDER DENYING MOTION TO ALTER OR AMEND**

RICHLAND COUNTY
FILED
2019 NOV -5 AM 11:23
C.C.P., G.S., & F.C.

This matter is before the Court on a Motion to Alter or Amend the Order of the Court filed on February 19, 2019.

Having fully considered the 59(e) Motion of the Plaintiff, the Court finds that the Order of the Court should not be Altered or Amended.

The Motion to Alter or Amend is therefore denied.

AND IT IS SO ORDERED this 30th day of October 2019.

Clifton Newman
Presiding Judge