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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Horry County
The Honorable Larry B. Hyman, Circuit Court Judge

THE STATE, Petitioner,

vs.

ANTWUAN LEVON NELSON, Respondent.

Court of Appeals Appellate Case No: 2020-001374

APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTWUAN LEVON NELSON,

APPELLANT

APPELLATE CASE NO. 2017-001406

RECORD ON APPEAL

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COUNTY OF HORRY) CASE NO.: 2015-GS-26-00011

2015-GS-26-00013

June 12-15, 2017

BEFORE: The Honorable Larry B. Hyman, Jr.

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

ANTWUAN LEVON NELSON,



Defendant.

APPEARANCES:

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Charles Barr, Esq.
Attorneys for the Defendant.

Official Court Reporter
Natalie Dahl, RPR

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P-R-O-C-E-E-D-I-N-G-S

THE COURT: Do you have any requests for voir dire? Do you have a witness list?

MS. WALTER: I do, Your Honor. I apologize, I thought we were doing this after lunch so we'll do this quickly.

THE COURT: Judge Seals needs the panel back.

MS. WALTER: Do you prefer it broken down; for instance, with the police witnesses, do you --

THE COURT: I don't care. You can submit one list if you want, fine with me.

MS. WALTER: I'm happy to do that, but I don't know Mr. Barr's witnesses. Do you want to combine our list, Mr. Barr?

MR. BARR: Yeah.

(A discussion was had off the record and Mr. Nelson enters the courtroom.)

MR. BARR: I have some voir dire.

THE COURT: You have some voir dire.

MR. BARR: Do you want to take a look at this?

MS. WALTER: Yes, please.

THE COURT: The defendant is now in the courtroom.

Let's take up the issue of voir dire.

Question No. 1: Is there anyone on the jury

THE COURT: Brian Babbit, Tony Poye, Andre Hannah, Michelle Cantey, Kenny Harlow, Rhett Ammons, Doug Robinson, Edward Proctor, William Stair -- is that Stire?

MS. WALTER: Stair, Your Honor.

THE COURT: Stair, okay. Suzann Cromer, Jennifer Nates, Melinda Shadoan, Lynn Grayden-Labiak, L-A-B-I-A-K, Tom Day, Claudia White, Jerome Rogers, Lilian Brockington and Antwuan Nelson.

MS. WALTER: And, Your Honor, I did neglect to put Michelle McSpadden, M-C-S-P-A-D-D-E-N, with two L's.

THE COURT: Michelle McSpadden. Anyone related by blood or marriage, do you have a close personal relationship with, do you have any kind of social relationship as far as you know with any of these witnesses that I have named, any of these potential witnesses? Yes, sir, stand.

JUROR: I recognize the last name, Cantey. I'm friends with a person by the name of Cantey, but not that particular person --

THE COURT: Michelle Cantey?

JUROR: Yes, I'm friends with someone from her family.

THE COURT: Do you know her at all?

OPENING STATEMENT - MR. HIXSON

MR. HIXSON: May it please the Court. Your Honor, beg the Court's indulgence for a moment.

Yes, you will buy it. You will buy it. That is what Antwuan Nelson, the defendant in this case, told the victim in the case, Michael Rogers. When Michael Rogers refused to buy a quantity of illegal drugs that Antwuan Nelson tried to sell him. This whole thing happened in the victim's kitchen, right in front of his common-law wife, girlfriend, mother of his child. So you will hear much of this case with the eyes and the words and the perceptions of Kristen Bloomer.

You will buy it. When he didn't, Antwuan Nelson used the first weapon, his fist, going about beating Michael Rogers on his kitchen floor. Michael Rogers was getting beaten, he told his wife, Get my gun. Get my gun. Antwuan Nelson heard that. He headed for the door.

About 45 minutes later, Antwuan Nelson got his gun. He went to the trunk of his car, popped it, produced an AR-15 and fired a fatal shot in the chest of Michael Rogers. Yes, you will buy it. Fortunately, Myrtle Beach Police Department were very close to the scene. You'll hear the testimony of the police officers who were just around the corner, around 37 Avenue North, Myrtle Beach, near Oak Street.

OPENING STATEMENT - MR. HIXSON

They arrived on scene right at the time Mr. Nelson was placing his weapon back in the trunk of his vehicle to leave.

He was placed under arrest at that time. Of course it is in a neighborhood, right, residential neighborhood. You'll hear the officers talking about folks coming out going, Man, man, man, what just happened. As a result of that, they had to get the defendant out of the scene pretty quickly, so you will hear the testimony of Jim Garrett who put the defendant in custody, he was in handcuffs, in the back of his car. You'll hear Jim Garrett testify that Antwuan Nelson said, I shot him, but he was going to shoot at me, or something along those lines.

That is the case that we're here about. That's what we'll talk about whether or not, as you can imagine, sitting in your house and a door-to-door salesman knocks on your door and asks you to buy an item and you say, No, I don't want to buy it, and that salesman smacks you in your face in your house. You push him out the door and that salesman gets a gun and kills you for not purchasing that item. Is that self-defense? Could that ever be self-defense? It never could be. It is murder. That is murder.

Let's talk about that. The Judge is going to

charge you on the law at the end of the day on what to apply to this case. This defendant is facing three different charges, okay. He's facing murder, which in South Carolina is one of the most serious things, but the simplest charge to comprehend. That is the unlawful killing of another with malice aforethought, either expressed or implied. It's pretty simple. So the evidence will show without doubt that Michael Rogers was a person, and the evidence will show that he was killed by Antwuan Rogers, by the evidence and Antwuan's own statement. Pretty easy.

So expressed malice is did you say "I'm going to kill you," or did you do something to manifest extreme indifference to human life, like the use of a high capacity AR-15 military-style weapon with a round to the chest. You can infer the intent to kill by that. We'll talk about that at the end of the day.

Does self-defense apply? I'll give you a road map as we go through this case to think about it as you review evidence. One of the key components of self-defense is you cannot be at fault in bringing on the difficulty, so remember that. The basic element of this trial is illegal drug sales. You are at fault by bringing on the difficulty if you are engaging in the illegal sale of crack cocaine, and that's before

you get out of the gate. We are not selling tomatoes on the side of the road or Avon lotion to someone, we're selling illegal crack cocaine and marijuana in someone else's house.

So right out of the gate, pay attention as you listen to the facts, Antwuan Nelson is at fault for bringing on the difficulty. You'll hear from Kristen Bloomer that Antwuan Nelson is the initial aggressor, punched him in the face and on top of Michael Rogers in his own kitchen, beating a man he later shoots on his own kitchen floor. That is being at fault and bringing on the difficulty. Self-defense does not apply right out of the gate.

The other thing to pay attention to is you have a duty to retreat. So if you say, Man, the only thing left to do because I'm afraid because this man has a gun, all you have to do is this (indicates), I'm getting out of here. If you can do that, you can't kill another person if you can go, right. So if you can walk away, if there is a period of time -- in other words, not boom, boom, boom, boom, it is 35, 45 minutes, which the testimony will be that is how much time when the initial fist fight, the drug deal, until later on when shots were fired. Kristen Bloomer will testify roughly 35, and some people say an hour, but

say 35 to 45 minutes, that is called a "cooling off period" in the law. There is a time of reflection on what we should do, like walk away and no one dies. Just that simple. You have to do that before you kill someone, right, walk away. The only time you don't have to is if you are in your own home, you don't have a duty to retreat in your own home. You would have been considered to retreat as far as you can, but that applies to Michael Rogers in his house, not Antwuan Nelson.

So those are the arguments you will hear. That is what the basic trial is about. You'll hear a simple charge which is possession of a weapon during the commission of a violent crime. The testimony will be, as you can imagine, murder in South Carolina is a violent crime, probably the most violent one there is we have in the law, and you have to decide whether that AR-15 is a weapon. Pretty straight-forward stuff there. That is a weapon during the commission of a murder that Antwuan possessed it at the time that he killed Michael Rogers.

The last one is possession with the intent to distribute crack cocaine, that Antwuan Nelson in Horry County, on or about January 27, 2014, that is the day that this happened, that he possessed a quantity of

crack cocaine, cocaine base under the law, with the intent to sell it, distribute it, give it to someone else. Note that the allegation isn't that he completed the transaction, but he possessed it with an intent, not that he actually did it, because the testimony will be Michael Rogers said, No, I don't want to buy it, no. So he didn't complete the transaction, that is why it is possession with the intent to distribute.

You'll hear about a quantity of crack cocaine on the kitchen table that Kristen Bloomer observed, and you'll hear after the fact a witness who -- her apartment was right beside the apartment complex, and when at least three rounds were fired by the AR-15, one hits a brick wall beside Michael Rogers' head, one hit Michael Rogers, and the second goes through the wall of the apartment complex 75 yards down stream where a lady is sitting on her sofa, it comes through the wall and hits her end table right when she's sitting at the computer typing on the computer. She gets up, looks out the window, looks where Michael Rogers was struck and she sees a black male with black clothing, red trim, throw an object over the fence. You'll hear her testimony.

Based on that testimony, law enforcement deployed

a K-9 unit to look for any article thrown around there. The witness testified she thought maybe it was a gun because she heard shots, but she couldn't see what it was. There you will see 11 rocks of crack cocaine wrapped in cellophane wrapping. You'll hear from a SLED chemist that tested that, that will testify that is crack cocaine, and that the African-American wearing black and red trim that just got done shooting Michael Rogers threw the drugs over the fence that he was in possession of, so when cops arrived, he wouldn't have drugs on him and he could claim self-defense.

That is the trial in a nutshell about as precisely as I can give you in a short period of time. This case won't last that long. It is a pretty serious one. You have 18 witnesses or so, give or take what happens. We anticipate you getting this case tomorrow sometime for you to deliberate. When you go back in the jury room and heard all of the testimony, considered all of these issues, each one of you will be firmly convinced in your return to the jury room, and you'll find that the defendant is guilty of murder, guilty of possession of crack cocaine with intent to distribute, and guilty of possession of a weapon during the commission of a

violent crime.

THE COURT: Mr. Barr.

MR. BARR: May it please the Court.

THE COURT: Sir.

MR. BARR: Ladies and gentlemen, after such a traumatic opening statement, I'm almost tempted -- I'm scared to introduce myself. My name is Charles Barr. I'm an attorney. My office is in Kingstree, and that is where I've been practicing law for last 38 years. I represent the person that is referred to in this litigation as "the defendant," Antwuan Nelson, the young man seated over to my right. He is about 26, 27 years old, lives in Andrews.

This incident took place here in Horry County, and I believe you will hear from the evidence when it is presented that at the time it took place, Antwuan was in school over here in Horry County. That is how he got over here. Now, I'll tell you what, I sat and watched you and you intently listened to Judge Hyman as he gave you your preliminary jury instructions, and I never -- I've never heard better instructions in my life. As you listen to those instructions, and then you heard from my good friend Scott Hixson, you almost wondering is it quite that simple. Would the narrative he gave, very emotional, but it is a

narrative, and that is what it is.

His Honor instructed you initially that at this stage of the litigation, what the lawyers are doing -- one of which is myself, and the other Scott Hixson and Ms. Walter -- what we are doing now is we are outlining the theory of our cases. Of course I learned a long time ago don't promise jury things because you don't know what you are going to get. Don't promise what the evidence will show, especially when you don't -- let me give you an example what I'm talking about. His Honor instructed you this is not made for TV drama. This is real. What we're doing here, and what you are doing with respect to your role, is a search for the truth.

There is no question that a young man got killed on the 27th of January 2014 here in Horry County. There is no question that Antwuan Nelson is accused of shooting and killing him. We understand that. I'm not making light of it. But now it is a search for the truth, and it would be nice if things were as simple as what Scott has painted. It is just not that simple. In order to get you entrapped into the Prosecutor's case, in order to get you thinking the man is guilty, the first thing he did is grab up a shotgun, and that is not even in evidence yet. Not

even in evidence. That is to strike up your emotions. There is another shotgun under the table. Now, there will be two guns. There will be two guns, the assault rifle and there is another shotgun hiding under these chairs over here. I won't get it and bring it over here and let you see it. I believe you have seen a gun before. I don't need to show you a gun to get your attention.

Your Honor has done that and instructed you what your duties are, and it is to determine what the facts are in this case. There is no question that the facts are in dispute. Here is what I will talk about. I'm not going to tell you what the evidence will show. Quite frankly, I don't know what some of the people will -- I learned sometimes people change their stories. Sometimes they are sitting right up on something and can't see it. So I've learned that. But let me tell you what I'm going to talk about. I'm going to talk about something called "rules of the road." I've been fishing within all my life, and within the maybe 15, 20 years I started fishing offshore. I do a lot of fishing in Murrell's Inlet. Let me tell you something. There is rules of the road. If you don't know what you are doing when you get out there on the water -- most people don't

realize it, but there is more rules for operating a boat than driving a car on the street. It's nice. What I did a couple of years ago, I took it upon myself to go down to Charleston and enrolled in a school, a course, down there where they taught -- people teach people how to operate boats and how to navigate, and ultimately it leads to a captain's license if you complete the course.

But, anyhow, here is what it is. The rules of the road is how you go about discharging your duties as jurors and finding the facts. Now, the last thing Your Honor told you about and emphasized to you is the first thing I'm talking about. I'm not going to grab a shotgun, but I'll tell you, and His Honor told you, with respect to this whole scenario, this man, Antwuan Nelson, irrespective of what Scott claimed he did, right there he is presumed innocent. That presumption of innocence is not something I sat in my office and made up. That is a rule of the road.

In other words, one of the things lawyers try to do is -- you all saw us with our heads down, making notes, probably saw me spinning through all sorts of paper trying to find out things, trying to find out things about you. Well, why do I want to -- because what we want to do is make sure that we have 12 people

on a jury that can sit down and listen to the facts, that can determine what the facts are and that can apply the law as His Honor gives it to you at the appropriate time, the facts as you collectively find them to be. In other words, he'll tell you that your verdict in this case has to be an unanimous verdict. It has to be an unanimous verdict. You have to apply the law. That is easy to say, but I'm telling you, it is not easy to do, because sometimes some people come into situations about preconceived notions about what things ought to be, what the law ought to be, and that is not what this process is all about.

What this process is about is about people that can be impartial, people that can sit down and listen. People that are willing to take the law, whether they like it or not, and apply the law, the facts as they find them to be in this case. There is no question that Antwuan Nelson shot Michael Rogers to keep him from shooting him.

Scott was talking about going around with an assault weapon. Well, I believe you might hear that he was walking around with a shotgun looking for Antwuan Nelson. What was he looking him for with a shotgun? Well, in addition to presumption of innocence, which applies even right now, and His Honor

will instruct you, that that presumption of innocence is a very, very strong substantive right of any individual who is charged with committing a crime in the State of South Carolina. That is what presumption of innocence is.

Burden of proof. His Honor already talked about that. Antwuan Nelson, as he sits here in this courtroom, has no responsibility of proving himself innocent of this charge of murder, has no responsibility of proving him innocent of this charge of possession of a weapon during a violent crime and no responsibility to prove himself innocent of PWID, possession of -- in this case it's actually possession of cocaine -- crack cocaine with intent to distribute. He has no responsibility proving himself innocent. The burden of proof is absolutely on this table (indicates) to prove his guilt, and to prove it by a standard that His Honor will instruct you, a standard beyond a reasonable doubt.

What is beyond a reasonable doubt? It is not simple. It is not simple. I don't admire you for where you have to sit, but I have to thank you for sitting here, because your job is not an easy one. At the end of the day you'll decide, and I can see already there is dust in the air, shouting, war dance

for rain, whatever, but I will tell you, it is not as simple as throwing something up in the air and asking you to find the defendant guilty when the prosecutor hasn't proven their case beyond a reasonable doubt.

You'll hear the evidence. It should leave you firmly convinced -- firmly convinced of the person's guilt beyond a reasonable doubt. That is what this case is, and that is what your duty and responsibility in this case is about.

It is a very interesting story that the prosecutor told. It is -- quite frankly, no one wants to see anyone shot and killed, nowhere, Williamsburg County, Georgetown, Horry County, we don't, but life -- life -- life is full with complicated situations where from time to time we are called upon to be able to sit down and exercise our good commonsense, draw from a vast collection of experiences that we've accumulated over the years that will enable you to sit down and say what is right and wrong. What is the truth, or what's a lie? We're believing in you to sit down and determine whether or not, under the law, the prosecutor has met their responsibility by proving this man guilty and proving it beyond a reasonable doubt. That is not unusual. As I said, I thank you for it. Thank you for it.

Now, before I sit down, on behalf of the victim's family, Michael Rogers' family, because they are here, too. It is amazing to see his family over here. They believe justice is to find Antwuan Nelson guilty and send him up the road. His family over here, they believe justice and the truth is to find him not guilty and send him back home. You are standing in between. That is why it is so important, as I said earlier, that we find people to put on the jury who can be impartial and listen to the evidence and come back with a verdict which speaks the truth. You will hear footsteps -- you'll be concerned, well, what do they think, what do they think. Well, His Honor already has spoken from the high chair and told you what the law is, and if at the end of the day you are satisfied when your conscience speaks to you through your heart and through your mind and says, hey, did you do the right thing, make a truthful decision, make a decision, not based necessarily on what you wanted, but did you make a decision based on the law and the evidence of the case. That is what the truth is. That is what the truth is, and that is where it lies. As long as have you done that, at the end of the day, I promise you, you will sleep well. You will find peace, and you will find your experience as a juror in

this case will certainly boost -- will boost your civic knowledge on how things operate in a civilized society, and you'll be satisfied and live with yourself tomorrow. Thank you.

THE COURT: You may proceed.

MR. HIXSON: We call Officer Jarrod Mackin from the Myrtle Beach Police Department.

(JARROD MACKIN, having been duly sworn, testified as follows:)

WITNESS: Jarrod Mackin, J-A-R-R-O-D, M-A-C-K-I-N

DIRECT-EXAMINATION

BY MR. HIXSON:

Q Good morning. How are you?

A Good.

Q Can you tell the jury what you do for a living?

A Police officer with Myrtle Beach Police Department in South Carolina.

Q How long have you been doing that?

A August is my ten years.

Q Congratulations. So if you've been working ten years, were you working for the police department back on January 27 of 2014?

A Yes, I was.

Q And tell me about what you were doing approaching

around 4 o'clock that afternoon.

A I was on patrol. Dispatch calls out with a weapon law violation at the address in question. I was right down the road, pulled up on scene. Officer Owens was right behind me. While we're pulling down the street, told station to give us the radio so there was no other communication except for us. While we were driving down the street, multiple people were coming up to our vehicle saying, hey, there is a guy over here in a parking lot that just shot somebody, shooting a gun in the parking lot. They told us it was a black male behind the red car with a black jacket on. We pulled up on scene, and what is now known as the defendant was leaning up against the back of the car.

Q Slow down. You are doing great. All of us that are not police officers, what do you mean -- what is your expectation when you say you were called for a weapons violation? What does that mean, and what is your expectation when you head that way?

A Basically just means that there is some sort of gun in the area that someone might be shooting off in a parking lot in the area where we'll be.

Q At the time you approach, do you know if anyone was shot or not?

A No. We figure it could be anything from

someone's been shot, to someone is running around with a gun in their hand. We just don't know.

Q Sorry to interrupt. I'll just take time before you get there. So you pull up -- and let me ask you this, did this occur in Horry County?

A Yes, sir.

Q Have to check that box. Proceed, I apologize.

A We pulled up. There was a red like an older style, longer Crown Vic or Grand Marquis, older vehicle, like an old police car but it was red. Defendant was leaning up against the back of the vehicle and he had something up to his head. We exited the vehicle, made our announcement who we were. We unholstered our weapons, because we were told this man just shot someone and we didn't know what kind of gun he had, if it was in his coat or whatever. So for our own protection, we had our duty weapons drawn on the suspect.

When we approached, told him who we were. He took whatever was in his hand and threw it. At that point, we approached him. He listened to all of our commands, didn't resist us at all. We placed him in handcuffs. After we placed him in handcuffs, we had other people telling us saying that the victim was laying down in the alley bleeding. At that point, I

stayed with the defendant, because there was probably about 40 people around making threats, yelling, threatening the defendant. So my partner went down to render aid to the victim while I stood by with the defendant so no one didn't do anything to him and he didn't get away.

Q Let's go through that in more detail. Let me show you State's 1, see if you recognize that.

MR. HIXSON: Mr. Barr?

MR. BARR: Yes, that's good.

MR. HIXSON: Any objection?

MR. BARR: No.

Q (MR. HIXSON) Do you patrol in the area of 37th Avenue North in Myrtle Beach?

A Yes.

Q And you have knowledge of the layout of the street and general orientation of that area?

A I do.

Q Do you recognize that?

A Yes, that is the location.

Q What is that? For madam court reporter, what are you looking at?

A Apartment complex with the apartment in front of it.

Q You are looking at a photograph?

A Oh, yeah, photograph of the incident location.

Q I'll show that to the Court.

MR. HIXSON: We'll like to admit that as State's 1?

MR. BARR: No objection.

THE COURT: Without objection, State's 1.

MR. HIXSON: May I publish to the jury?

THE COURT: Yes, you may.

(State's Exhibit 1 admitted.)

(Published to the jury.)

Q (MR. HIXSON) Can you describe to the jury what we're looking at? 37th North is the bottom.

A So the L-shape building with the lighter brown roof --

Q This one?

A Yes, sir. That is the apartment complex where the victim lived at and where the incident took place at. The front parking lot is where he was located upon our pulling up.

MR. HIXSON: May I ask the witness to come around?

THE COURT: Yes, you may. Do you need an easel?

MR. HIXSON: I don't mind it, but I can hold it.

THE COURT: All right.

Q (MR. HIXSON) All right. Let's orient for the

jury what we're talking about, where is our discussion about?

A So his vehicle was parked right here, and there was another vehicle parked right here. We drove down from this section, because it is a dead-end road, you can't come to this location from this way.

Q So what road goes up and down this way?

A Is -- so if this was flat, you would have Oak Street, north and south, and then continuation of 37th down to King's Highway, the main road through Myrtle Beach.

Q So the ocean is over here?

A Correct.

Q Dead-end, and this is the way to Oak Street?

A Correct.

Q Okay. More detail, my friend.

A So as we pull in, we have people stopping us on the street, telling us what is going on. We make our approach and park at an angle facing the car to use our engine blocks as a place to get back to in case he does have a gun and starts to shoot at us. I parked -- his vehicle was approximately right here. I made my vehicle parked right here. I think Officer Owens had his vehicle parked somewhere behind me. He was leaning up against the back of the car here. Where he threw

the object, it was a little grassy area here.

Q Did you recover that object?

A We did. It turned out to be a cell phone.

Q Take a seat and I'll show you a couple of them.

(A brief pause in the proceedings.)

Q (MR. HIXSON) I'll show you three photographs, they are marked State's 2, 3 and State's 4. Take a look, and I'll ask you questions about all of them.

A (Witness examines document.) Okay.

Q Are these photographs a fair and accurate representation of the scene you saw on January 27, 2014 in Horry County, Myrtle Beach?

A Yes.

MR. HIXSON: I would like to authenticate. I showed them to counsel. Any objection?

MR. BARR: No, sir. No, sir.

THE COURT: I think we saw the exhibits yesterday, and we're on line with which exhibits?

MR. BARR: I'm on line, Judge, and I have no objection.

THE COURT: Without objection 2, 3 and 4.

(State's Exhibits 2, 3 and 4 admitted.)

Q (MR. HIXSON) Let's talk about State's 2. What are we looking at? There is a red vehicle, whose vehicle did that belong to?

A At that time I didn't know, but that was the vehicle that the defendant was standing behind at the time.

Q It appears it is backed into the spot; is that correct?

A Correct.

Q When you see the photograph, there isn't anything in the front. Was there anything blocking that vehicle to pull out to 27th Avenue to Oak Street?

A No, sir.

Q I'll show you what is marked as State's 4 -- excuse me, let's do State's 3. What is that building in the background you see?

A The front of the apartment complex where the victim resided at.

Q Is that the same vehicle, different angle, from that vehicle?

A Yes.

Q On the side of the house in this area, what is down this area here?

A It is an alley that goes to the back side of the top of the L-shaped buildings.

Q Is that where the victim was found?

A Just down the alley.

Q Can you point to that alley as it corresponds to

this larger photograph? I'll show it to the Court. This area; is that correct?

A Right.

Q Right here?

A Yes, sir.

Q So the witness pointed to this area; is that correct?

A Yes. That's the alley that goes back to the back of the apartment complex.

Q Now, I think you indicated as you approached the vehicle you indicated that the defendant had something in his hand, he threw it and you found out that it was a cell phone. I think that is where he left off. Did you see the defendant with a rifle?

A When we were handcuffing him, to the left side where we were standing at the corner of the car, there was an AR-15. The magazine had been -- I don't know if it fell or whatever, but the magazine was out of the gun. It wasn't up inside -- like it wasn't ready to fire.

Q State's 4 is in evidence. Take a look at that.

A Yes.

Q Is that a fair and accurate representation of the scene you saw when you took Antwuan Nelson into custody?

A Yes.
Q What is the bottom of the photograph?
A Assault rifle with a magazine.
Q Now, as it specifically relates to the rifle, did you do anything to make sure that that rifle didn't get taken or moved?
A I stood by with the defendant until Corporal Garrett arrived on scene and put him in a patrol car. I stood by with that weapon until another officer relieved me. I think it was Officer Harlow.
Q You mentioned that you recall seeing the defendant wearing a black jacket. Let me -- let me show you State's 42.

(State's Exhibit 42 marked.)

Q (MR. HIXSON) What is that a photograph of?
A Looks like the jacket he was wearing the night in question.

MR. HIXSON: We move that into evidence.

MR. BARR: Let me see. No objection.

THE COURT: Without objection, State's 42.

(State's Exhibit 42 admitted.)

Q (MR. HIXSON) You approached him and he was wearing a black jacket?
A That is what we got from the people flagging us down, just wearing a black coat.

JARROD MACKIN - DIRECT EXAMINATION

Q Let's me show you State's 29 and see if you recognize this -- I believe it is 29. You testified earlier that you were standing over in the parking lot by the Crown Victoria?

MR. HIXSON: I'm showing the witness what is marked as State's 29. It has been secured with a cable lock pursuant to the supreme court order.

THE COURT: Yes, sir. And I have -- ladies and gentlemen, we have several firearms that may or may not be presented to you. I had an opportunity to inspect them and assured by the State that they are safety locked. I inspected them and made sure myself they are safety locked so they cannot fire, so you should not be concerned.

Q (MR. HIXSON) You testified that you stood guard over the AR-15 rifle. Does that appear to be the rifle you were protecting until Crime Scene arrived?

A Yes, sir.

MR. HIXSON: At this time we move State's 29.

MR. BARR: No objection.

(State's Exhibit 29 admitted.)

MR. HIXSON: May I secure that back here?

THE COURT: Yes.

Q (MR. HIXSON) And I think you indicated there was a magazine laying besides State's 29. I'm showing you

State's 29A. See if you recognize that.

A Yeah. Looks like the magazine next to the gun when we approached.

Q Do you recall if the magazine was empty or loaded? It is clear it is empty now, but do you recall --

A I don't remember if the magazine was loaded or not, but I just remember there was one out of the gun, on the side of it.

MR. HIXSON: Fair enough. We move State's 29A.

MR. BARR: No objection.

(State's Exhibit 29A admitted.)

Q (MR. HIXSON) Is that the magazine here in State's 4?

A Yeah.

Q When you initially arrived on scene, it was a possession of a weapon. Why is it that you focused your attention on Mr. Nelson? I think you indicated a crowd was gathering?

A The people that were stopping us on the road as we were driving down was saying it was black male behind the car who is the one that shot someone, so we focused our attention on him. That is why we just put him in handcuffs until we figured out what was going on, plus people were saying he has a gun. Our safety

comes into play, so we have to make sure we are safe, because if something happens to us, we can't do anything for anyone else.

MR. HIXSON: No more questions, Your Honor. Answer any questions Mr. Barr may have.

THE COURT: Mr. Barr.

CROSS-EXAMINATION

Q Officer Mackin.

A Yes, sir.

Q You were the first law enforcement officer to arrive on the scene at this incident location; is that correct?

A Yes, sir. Myself and PFC Owens. We arrived at the same time.

Q And you were directed to go to that location by a dispatcher?

A Correct.

Q And who is the dispatcher?

A I don't recall at the time.

Q You don't recall who the dispatcher was?

A No, sir. We had multiple dispatchers. Anyone could be on at the time.

Q You have what?

A We have many dispatchers that can jump in for someone on a break, so as to who it actually was -- I

mean, it was a few years back, I don't remember.

Q What do dispatchers do?

A Dispatch calls, tell us what is going on.

Q Tell you what is going on?

A Yes.

Q And send you to a particular location?

A Correct, based on the information they receive from whoever calls in and whatever information they give to them.

Q In this instance, when you went to this location, you went at the request of your dispatcher?

A Correct.

Q Do you recall whether or not your dispatcher told you what was going on at the scene?

A She told us there was a weapon law violation at this location, and by the time she was able to get anymore out, we were pretty much already on scene. So basically we gathered what the dispatcher told us, what the people flagging us down told us, and basically made an educated decision of what was happening, and that is why we handled it the way we handled it.

Q You are not familiar with any of the 911 calls that were made?

A No, sir.

Q But you were dispatched to the location. You got

there, and you had no trouble figuring out who you needed to talk with -- I mean you found Antwuan Nelson without having to go looking for him?

A Correct. He was still on scene, correct.

Q And what was he doing?

A Leaning up against the back of his car with and what we later found out was on his cell phone.

Q Did he make any attempt or appear to you to make any attempt to flee the scene?

A No, sir.

Q He was just there waiting?

A Yes, sir.

Q You mentioned that it was pretty belligerent, a pretty good crowd. I think you said around 40 people?

A Give or take, yeah.

Q That is a pretty good crowd.

A Uh-huh.

Q And, of course, you would agree that they were all pretty hostile towards Antwuan Nelson?

A Correct.

Q You had to get him away from them?

A We did.

Q Someone called Officer Garrett?

A We called whoever was in the area to show up. We didn't care who showed up. He was one of the officers

that responded.

Q And he took him out of there?

A Yes, sir.

Q Now, State's Exhibit -- the assault rifle, State's 29, the rifle you obtained, where did you get the rifle from?

A Laying on the ground where he was standing.

Q It was laying on the ground where Mr. Nelson was standing?

A Yes, sir.

Q And did you ask him anything about the rifle?

A No, sir.

Q You just picked up the rifle?

A Didn't touch it at all. I left it on the ground and stood by until someone relieved me.

Q So you did not handle the rifle on the scene?

A No, sir.

Q But you were able to identify it?

A Yes, sir. I was looking right at it. It was below where I was standing next to the defendant.

Q Have you ever seen a rifle?

A Yes, sir. I carry one in my car every day I work.

Q You can get that rifle down at Walmart?

A Okay.

Q Can't you?
A I would assume.
Q Yes, sir. You go straight -- how many Walmarts do you have in Myrtle Beach, do you know? You don't know, do you? Any one of them you can go and purchase that rifle. Let's not talk about a gun store.
All right. Now, the crime scene, there was no crime scene established when you got to the location?
A No. We were first responders, that is why he was not placed under arrest, just detained.
Q As a first responder, is it part of your duty to secure the crime scene?
A As best you can with two people, one victim bleeding out, one person with a gun laying next to him and about 40 irate people, we did the best we could.
Q Probably difficult to secure that crime scene, right? So you all didn't -- you didn't make any effort to secure --
A We secured what we could based on what we had. No one came over and picked up the gun. No one in the crowd just walked over and decided to pick up the gun while we were standing there, because we were still standing with it. Once more officers showed up, everyone dissimulated to a spot to secure what we had. It wasn't like a crime scene all down the street or up

a road or through a whole apartment complex. It is no different from here to where the defendant is, not hard to secure a crime scene that size.

Q You know it was not simply the crime scene in and of itself, it extended beyond the area where you were?

A The crime scene itself I don't believe did because where he was laying and bleeding out was right where we were, so that is what we secured that we knew about when we were there.

Q All right. Now, where Mr. Rogers was laying, was that near a fence?

A It was down the fence a little bit down the alley.

Q In the alley?

A Uh-huh.

Q And of course there are two ways into that alley?

A Uh-huh, front way and a back way.

Q Front way and a back way?

A Correct.

Q You are not an investigator?

A No, sir.

Q And of course you didn't inquire and don't know -- perhaps even today -- which end of the alley Michael Rogers came in from, do you?

A No, sir.

JARROD MACKIN - CROSS-EXAMINATION

Q If he came in from the back, he would have been at the back of the apartment complex; would he not?
A Possibly, yes.
Q And of course you didn't even go back there, did you?
A No, sir. I stayed with the defendant.
Q But there were people all around there, weren't there?
A Correct.
Q You would not agree as an officer with respect to the crime scene, if Mr. Rogers entered the alley from the back, that would have been part of the crime scene?
A Possibly. I'm not sure.
MR. HIXSON: Object, posing a hypothetical. He can't answer a hypothetical.
THE COURT: I'll let him answer that question, okay.
MR. BARR: Thank you, Judge.
A Say it one more time.
Q (MR. BARR) I said, You would agree that depending which end of the alley Michael Rogers entered from, and he had to enter by one, if he entered from the back, that portion of the apartment complex would have been part of the crime scene?
A That is where the incident took place and he was

shot at, yes.

Q You did find him in the alley?

A Correct.

Q Now, there were people standing all around the crime scene; is that right?

A Correct.

Q You don't know how long he was in the position he was in, do you?

A No, sir.

Q And you don't know whether or not anything had been tampered with prior to the time you got there?

A No, sir.

Q You indicated that the crowd was friendly to Mr. Rogers; am I correct?

A No, sir.

Q Hostile?

A Towards him, but they -- I never said they were friendly towards him. We didn't know if they were just upset because of what happened and he is the one that did it -- at that point, we had no idea who was who. For all we knew, we still had suspects running around the location. We had no idea with just the two of us.

Q I'll ask you again. I think I wrote it down when you said it the first time. The crowd was hostile towards Antwuan Nelson?

A The majority, yes, sir.
Q All right. So now if they were hostile towards Antwuan Nelson, that stands to reason that they were at least sympathetic as a result of what happened to Mr. Rogers?
A Possibly.
Q All right. All right. All of these people, bystanders, sympathetic people, hostile people, they were all around the crime scene -- you didn't interview any witnesses? Did you interview any witnesses?
A No, sir.
Q So you didn't take any statement from anyone?
A No.
Q You didn't do any further investigation to determine whether or not the weapon that you saw was registered or -- you didn't do any of that, did you?
A No, sir.
Q When you left -- did you leave before or after Officer Barrett (sic)?
A Officer who?
Q The gentleman that came to pick up Antwuan Nelson.
A Garrett?
Q Garrett, I'm sorry.
A Yes, sir. I was still on scene when he left with

him.

Q You were still on the scene?

A Yes, sir.

Q How long did you stay on the scene after he left with Antwuan Nelson?

A Maybe a half an hour, 45 minutes at the most for crowd control.

Q Crowd control. Did you participate -- put up any yellow tape?

A No, sir.

Q You didn't put up any?

A No, sir.

Q At the time you left, was there any yellow tape up anywhere?

A Yes, sir.

Q But you don't know who put it up?

A It was one of our supervisors, Corporal Toole (phonetic) at the time.

Q You didn't participate or assist in putting it up?

A No, sir.

Q Do you have a recollection where the crime scene tape extended at the time it left, what it encompassed?

A Not to my recollection, the whole area, no, sir.

MR. BARR: Nothing further.

JARROD MACKIN - REDIRECT EXAMINATION

THE COURT: Anything further?

REDIRECT-EXAMINATION

BY MR. HIXSON:

Q When you arrived, and I think you did -- well, it was a fairly intense situation?

A Yes.

Q Did you see anyone running in and out of the alley or taking anything out of the alley as you were focusing your attention on Mr. Nelson?

A No, sir.

Q You also indicated the reason your attention was directed towards Mr. Nelson was because the crowd said he just shot?

A Yes, sir.

Q Is your testimony that they were agitated because they saw this guy kill another man?

A It is possible, yes, that that is why they were upset.

MR. HIXSON: Nothing further.

THE COURT: Let's give the jury a quick break -- we've been here about an hour and 15 minutes -- before we start the next witness. Let's give the jury a quick break.

(The jury exits at 10:45 a.m., and a recess was taken.)

THE COURT: Thank you. If you would, give us the jury. Have they brought your witness around yet?

MR. HIXSON: I haven't called him yet.

THE COURT: Go ahead.

MR. HIXSON: Shane Owens.

(The jury enters at 11:01 a.m., and the following is heard in the presence of the jury.)

THE COURT: Have all of our jurors -- if you are not ready, just tell him you haven't had enough time, okay. Yes, ma'am, swear the witness.

(NICHOLAS SHANE OWENS, having been duly sworn, testified as follows:)

WITNESS: Nicholas Shane Owens, O-W-E-N-S.

MR. HIXSON: Thank you, Your Honor.

DIRECT-EXAMINATION

BY MR. HIXSON:

Q Could you tell the Court what you do for a living?

A UPS currently.

Q On January 27 of 2014, did you work for the Myrtle Beach Police Department?

A I did.

Q What were your responsibilities back in January 2014?

A 2014, I was assigned to the Myrtle Beach Traffic

Division, traffic enforcement. Along with various duties, I was also responsible for patrol calls and things like that with Officer Mackin as well.

Q So at some point in time around 4 o'clock or so, did you receive a call to go to 37th Avenue North in Myrtle Beach?

THE COURT: Is someone on the jury having trouble hearing? Would you move the mic?

A Is that better? I received a call --

THE COURT: Thank you.

A If I remember, my recollection is it was a shots fired call. I think it was in the area of 33rd and King's Highway, close to the incident location. I remember turning in. Officer Mackin was right in front of me, so we posted together at the same time. Came down the road, the address of [redacted] 37th Avenue North I was familiar with. I had prior narcotic calls, so I was familiar with the address, so I knew it was on the right-hand side. I came down. Mackin was to the left, I was to the right. I could visually see people down the road running around and back -- I think Mackin called for radio silence. Came up to the roadway and there was --

Q (MR. HIXSON) Let me stop you for a second. Let's build on this. This is State's 1. The jury has

seen this. I'll request you point out what we are looking at to help the jury understand.

A This is 37th Avenue North, this is going west towards Conway. This is east towards King's Highway, north, south. We're coming in from this way here. Officer Mackin is to the left, I'm to the right of him, parallel to him. [redacted] 37th is the incident location, where it happened right here. This is the alleyway where the incident took place as well.

Q At what point in time do you see -- at some point do you see a red Crown Victoria parked?

A I do. As I come up here you have a tree way. You could see a burgundy/red Crown Victoria kind of right up in here, and I could see it right there.

Q Was it pulled in or backed in; do you remember?

A To my recollection, it was backed in.

Q Let's me show you what is in evidence, marked as State's Exhibit 2. Do you recognize that?

A I do.

Q That photograph already in evidence, is that what you recall? Do you remember seeing that when you approached 37th Avenue?

A That is it, yes, sir.

Q I think that the photograph shows the vehicle is backed in and can pull straight out into 37th?

A It is.
Q If this aids your testimony, tell the jury what you did next?
A Continued to approach the location. We stopped and got out. There was people -- patrol vehicles here, I guess to the south. There is people over here. I remember seeing a lady. I think she said there's shooting, and that's him. When I looked to the right, I saw I guess the defendant beside a vehicle. I drew my weapon out, along with Officer Mackin, Get your hands up, let me see your hands. At that time the defendant kind of dropped down, made me kind of nervous. We charged the location to cut the distance between himself and our location, because we didn't know what he had. He rose back up with a small item in his hand, identified it as a cell phone and then we moved around to where he was at. Officer Mackin pulled his handcuffs out. When we obtained him, it was not an investigation. We didn't know what we had, so.
Q Let me show you State's 4 and see if you recognize that?
A Yeah. That is the back of the car. When we got around back, put him on the ground, that is when I noticed there was an AR-15 laying behind him, and that is when I got nervous. I didn't know if he was going

for it or not. Officer Mackin went ahead and secured the defendant.

Q When you say he was "going for it" --

A He went down in a rapid motion, and we're telling him to get his hand up, and he went down. So I couldn't see behind the car. I didn't know what was behind there. I didn't know there was a weapon there.

Q When you first saw him, did he have a weapon in his hand?

A No, sir. He had a small object, later identified as a cell phone.

Q So he wasn't setting the weapon down, he was bending toward the weapon?

A Yes, sir. That is the recollection I have.

Q But ultimately did Mr. Nelson raise that towards you?

A He did not raise the weapon at me, no, sir.

Q Did he submit to your commands rather quickly; is that fair?

A After we charged a distance on him, we were right on top of him at that point, and that is when we got around to the back side of the car and placed him on his knees, and Officer Mackin secured him.

Q And both had duty weapons on him?

A Absolutely.

NICHOLAS "SHANE" OWENS - DIRECT EXAMINATION

Q Let me show you what is marked as State's 3 in evidence.

A That is the front of the apartment complex, basically the vehicle that we observed, and this is the alleyway beside where the victim was shot.

Q The jury has already seen this, and I have testimony off of this. So, after, Mr. Nelson was placed in custody -- or in detention?

A We were still investigating at this time, so we didn't know what we had, so we just placed him in detention. It was very rapid, because at that point the scene was chaotic. There was people running around, yelling and screaming. It was like five seconds after Mackin put the handcuffs on him we -- I looked to my left and I could see the alleyway in question, and there was people like running around. I seen a victim laying on the ground, black male.

Q Is that the first time that you came to understand that someone actually had been hit?

A It was, yes. At that point, it is a gun call. I knew there was a weapon involved after that. You know, I'm thinking everything is okay, but then I saw the victim, so I said, Oh. I left Officer Mackin with the suspect. I tried to clear the alleyway out. There was a lot of people in the alleyway. Maybe a dozen people

were there. I saw a white female with the victim. She was crying, upset. I got my weapon up and pointing -- not pointing, but, Get out of the way, because I need to get in there to get to the victim to help him. I got him out -- I came up around where she was at, and she was like, I guess, on her knees, to the best of my recollection, crying. She was saying something about needing -- get it out of his neck. I could see a large bulge in his neck where it was blown out. I knew from combat it was a fatal blow, when I was in Iraq. I did what I could. I tried to get her away and push her. I looked around the best I could, and I started -- I think she had a towel, if I remember correctly. I think I did CPR. I felt a little pulse, I think, but I knew he was kind of -- I had to go through the steps to help the man. I had blood on me. I called dispatch, I need EMS now, it's bad. She said, They are coming. I said, You need to get them here now because he's not going to make it. There is nothing I could do for him. I tried what I could until EMS got there.

Q Let's let that settle in for a second. Let's go back to lighten it up a touch. When you approached Mr. Nelson, when he was at the back of the car -- by the way, do you see Mr. Nelson in the courtroom today?

A Yeah, right there (indicates).

MR. HIXSON: Let the record reflect that he is pointing at Mr. Nelson in a tan suit sitting at counsel table.

Q (MR. HIXSON) As you approached him, do you recall any style of what type of clothing he was wearing when you approached him?

A Black and red trim. Once I got around back, I could see his shoes, like red or black or something.

Q I'll show you a couple of photographs. One is already in evidence, State's 42. We've published that already. I'll show you a couple of others and see if you recognize these. I'm specifically referring to State's 44, State's 45 and State's 46. Take a look at all of those.

MR. HIXSON: Mr. Barr has seen all of those.

A That is like the shirt he had on. The jeans and definitely the shoes, is what I can recall.

THE COURT: Are those in?

MR. HIXSON: I'm moving them in now.

MR. BARR: No objection.

THE COURT: That is 44, 45 and 46.

(State's Exhibits 44, 45 and 46 admitted.)

Q (MR. HIXSON) So you approached, and that is what the defendant was wearing?

A That's correct.

Q With a black jacket top?

A With a black jacket.

Q Let's take what you talked about piece by piece. I'll show you three items, State's 5, State's 6 and State's 7. Take a look at those at once, and if you will talk about them individually.

A There is the alleyway where the victim was shot, black male.

Q What number are you referring to?

A Exhibit 5.

Q State's 5. Is that a fair and accurate representation of the scene you saw -- obviously everything has been removed, but --

A Right. Yes, sir. It is the view. This is a view coming into the alleyway, a little bit better view where additional shots were fired into. This is where it kind of -- victim was laying about middle ways into the alleyway. That is State's Exhibit 6.

Q Okay.

A This is a crime scene photo. It is more like in the nighttime. It was kind of nighttime when I was there, just prior to dark. So this shows kind of where there is a weapon and where the victim was laying, State's Exhibit 7.

MR. HIXSON: Yes. Move 5, 6 and 7 into evidence.

THE COURT: Mr. Barr?

MR. BARR: No objection.

(State's Exhibits 5, 6 and 7 admitted.)

Q (MR. HIXSON) Let's talk about State's 5, the point of view with the camera, if we look at the chart, where you were in the photograph -- where would you stand in this photograph so the jury can understand?

A You would be up in here looking this way, so coming from the north looking south.

Q So the photographer is taking the picture that way?

A Correct.

Q And does that appear to be the red Crown Victoria?

A It does.

Q Let's talk about State's 6. Can you describe that for the jury?

A Entrance to -- I guess it would be the south entrance to the apartment complex to the west side of the building looking back northbound.

Q So when you initially arrived on the scene, you were headed down the alley, is that the way you approached where Mr. Rogers was?

A Correct.

Q And then State's 7?

A Again, appears to be a north view shot, and it's the image coming from the south side of the west side of the apartment complex.

Q As you approached, did you see a weapon lying on the ground up there?

A Initially, no, because I was trying to move everyone out. I was worried about someone having a gun in the alleyway. I'm trying to keep myself safe, but trying to get to the victim to help him. But to the best of my recollection, soon thereafter I seen the shotgun laying there.

Q Is that the location when you saw the shotgun laying there?

A To the best of my recollection it was laying close to him.

Q Additionally, when you were there, did you see any fire or unfired shotgun shells around that location?

A Yes, I didn't see any I seen unfired shotgun shells. I didn't see any spent shells at that time. I think they were green, I can't remember, but I seen no shotguns shells that weren't fired.

Q How many did you say?

A I think I saw two that were not spent.

Q. Two unfired?
A Yes, sir.
Q Can you point to where you recall seeing the shotgun for the first time?
A Right up in here (indicates). Right there (indicates).
Q Were you able to get a look at the shotgun?
A I wasn't able to look at the dimensions, but I made a mental note of what it looked like.
Q Do you think you would recognize it if I presented it to you today?
A I would.
Q This is State's 30. This weapon is secured with a cable lock. Do you recognize that?
A I do, that is the weapon from the day of the incident.
Q Did you handle that weapon when you arrived at the crime scene?
A To my recollection, I did not. I never touched that weapon.
Q When you were there, after you are trying to resuscitate Mr. Rogers, did you secure that scene or make sure -- protect the integrity of the scene?
A I tried to do my best with what I had. I guess -- I found out that it was his common-law spouse

was there. She was highly upset. I guess she kept trying to get to the victim, for obvious reasons. I tried to get her back. Behind me was the alleyway. You can see, I'm worried about someone taking shots from behind me as well. So it is a hard angle. I'm trying to help him, giving CPR the best I can and tried to secure the scene. I know it is a crime scene, so I'm trying to secure it, the integrity. Like I testified earlier, you have a chaotic scene. Dozens of people highly charged. Someone is shot. It is him on the ground by himself with the defendant, and I'm calling for backup for more officers. You try the best you can to work with.

Q Did -- approximately how long do you think that you were trying to assist Mr. Rogers until EMS arrived until he was taken to the hospital?

A I don't know the exact time. It seems like a few minutes. I called like twice to get help there. It's close proximity to the 38th station, so I knew they would be coming quick, but it seemed like a couple of minutes. They got there pretty quick, but nothing they could do, I don't think.

Q And we'll probably talk about this, but the nature of the agitation, what is your understanding when you are seeing the nature of the agitation, why

everyone was so upset?

A Well, someone was shot. I assumed maybe the gentleman that lived there was shot, maybe neighbors and friends and family. I didn't ascertain that at the time, but that is what it was.

Q That's fair enough.

MR. HIXSON: Beg the Court's indulgence.

Q Did you have the opportunity to learn the functionality of a pump shotgun through your training and experience?

A I did it when I was in the service as well as in the Army as a scout, so I know shotguns and assault rifles very well.

Q And specifically as it relates to the functionality of this, maybe you can help explain to a layperson on the jury what the significance is between a loaded shotgun shell and an unloaded shotgun shell is, and how a pump action -- how do you go about putting this into fire, whether it is loaded or not loaded?

A I mean, the shotgun shell, if it was ready to fire, obviously the shell would have been inserted into the weapon system, so you can't observe this on the ground. If it would have been in a fired position, I don't know if I could testify exactly to it being ready

to fire at that point.

Q. Just from general experience as to how it relates to what it means --

A Yes.

Q And I don't want you to handle it -- there is biological evidence on there, but as it relates to the function of the weapon, would you load it in here, live round?

A. Yes, sir. You can load it different ways, through the bottom or top. I mean, it depends on the person, what they are comfortable with. I can do it either way, but I couldn't testify as to the Defendant's abilities.

Q Just for your understanding, when you look at a shotgun shell, a live versus an unfired -- fired versus unfired shotgun shell, is it easy to see if it is fired or unfired?

A Yes. The casing would be opened on it and there would be no -- there would be a difference of shot and unfired.

Q I'll show you what is marked as State's Exhibit 55 (sic) and 35. See if you recognize that. I'm handing the witness State's 35.

A That is the weapon -- shotgun shell I observed on the day of the incident, next to the victim, laying in

front of him.

Q And State's 35?

A That is the second shell I observed laying next to the victim, next to the weapon system.

Q Has that shotgun shell been fired?

A No, it has not.

Q And that's for both of them, 55 (sic) and 35, are they live rounds --

A Those are live rounds and neither one has been fired.

MR. HIXSON: Move them into evidence.

THE COURT: Mr. Barr?

MR. BARR: Without objection.

(State's Exhibits 34 and 35 admitted.)

Q If it's fired, what would it look like?

A It would be open and spent on the bottom as well. The top part would have -- where the cylinder hits the pin, you could tell that it was fired.

Q As it relates to the specific type of weapon, the round this is, does it say anything on there about the size of shot? Is that 12 gauge No. 8?

A 12 gauge No. 8, yes.

Q And that is bird shot?

A I guess some bird shot, yes.

Q At some point in time, did Crime Scene arrive and

recover the items we talked about?

A They did. Once I got EMS there, get the victim -- I kind of got the victim away from the common-law spouse, I assume. She had blood all over her. We tried to clean her up a little bit. I had blood on me. Crime Scene, there was a lot of officers showing up. I don't know the actual sequence of officer arrivals, who came next. I think Officer Garrett was next, Corporal Garrett. I remember seeing Corporal Toole put tape up for the Crime Scene Unit, and then I assume the crime scene guy showed up and started doing their processing, but I don't know the exact sequence on how that went down. There was a lot going on.

Q Is it safe to say -- did you maintain the integrity of the scene as best you could until Crime Scene arrived?

A I did. Once you get all of the officers there, it is easy to maintain. I mean, we did a good job, I think, but it was hard to maintain until you got more people there.

Q I'll bring to your attention, towards the back of that building, do you see Crime Scene tape in that photograph?

A I do.

NICHOLAS "SHANE" OWENS - CROSS-EXAMINATION

Q So that is what we're talking about physically taking it off to secure the area?

A Yes, sir.

THE COURT: You are referring to what exhibit?

MR. HIXSON: State's 6. Thank you. I apologize, Your Honor. We move in the shotgun, State's 30.

THE COURT: Mr. Barr?

MR. BARR: No objection.

THE COURT: Without objection, it is submitted.

(State's Exhibit 30 admitted.)

MR. HIXSON: I no further questions.

THE COURT: Mr. Barr.

CROSS-EXAMINATION

BY MR. BARR:

Q I didn't hear you when you indicated what your job is with the Myrtle Beach Police Department; what do you do?

A At the time, I was assigned to the Traffic Unit, traffic officer. I do traffic enforcement within the police department. That was my official title, traffic officer.

Q So you were assigned to the traffic department?

A Yes, sir, at the time.

Q Write speeding tickets?

A I rode motorcycles, everything.

Q You don't investigate crime scenes?

A Certainly, I do, yeah. Before you go to traffic, a patrol officer, same thing Officer Mackin was at the time. I do crime reports as well. My specialty is traffic enforcement, that is what I do.

Q So you have a supervisor?

A I do.

Q What is your supervisor's title?

A Actual title was corporal.

Q And you said you also investigate crime scenes?

A Certainly, yeah. That is what I was trained to do. As a patrol officer, I've been to dozens and dozens of crime scenes. I know how to integrate, how to keep a scene secured, I do all of that.

Q So when you went to the location on -- is it 37th?

A [redacted] 37th North.

Q It is a dead-end, isn't it?

A To my recollection it is a dead-end, yes, sir.

Q It is a dead-end. All right, sir. So when you went there, was there crime scene tape when you got there?

A No. It was an active situation, there wouldn't be anything there.

Q There was no crime scene tape up?

A No, sir.
Q All right. Now, I'm going to show you what is marked and entered into evidence as State's Exhibit 7. I believe that exhibit may have been entered into evidence through you. Are you familiar with it?
A I didn't take the crime scene photos.
Q You didn't take that?
A No. I didn't take any photos, no, sir. I'm familiar with the area. I see what you are saying, the tape. I see the tape back there, the yellow tape, yes, sir.
Q Do you know who placed that tape back there?
A I wouldn't know that, sir.
Q Are you at all familiar with the layout of this apartment complex?
A The internal workings of it, I'm not familiar with it.
Q You don't know what is beyond that tape?
A I couldn't testify what is beyond that tape, no, sir. I can imagine there would be an apartment complex, being as the picture would show and based on the statements of rounds hitting the back of the apartment complex. There was one adjacent to it.
Q Did you know there was an alleyway from where -- back where that tape is, to go back around to the

apartment that Mr. Rogers was living in.

A You are referring to a north side entrance?

Q Yes, sir.

A Possibly. I've never used it, but I would imagine being that if the west side had an entranceway, there would be one on the north side.

Q There is an actual alley that goes back on the back of the building, comes straight down from his apartment up top -- or did you go back there?

A No, sir, I did not go back there. No, sir.

Q I see. Now, you didn't take this photograph?

A No, sir. I would speculate it was done by the crime scene people.

Q And there are number markers 13, 12, maybe 9; do you see those?

A I do. 8, 9, 10, 12 and a 13.

Q Did you put those markers down?

A Not to my knowledge, no, sir.

Q And you don't know why the markers were placed there?

A Markers identify items that correlate to the crime.

Q Identify items that correlate to the crime, but you didn't put them there, so with respect to the items that were found by somebody that would perhaps be

considered of some evidentiary value, you had no input in making the selection or picking those particular items?

A At the scene what I secured, that is the items I can testify, that placement of the shotgun, the rounds are what I can relate on the day of question.

Q Take a look at and tell me which items correlate to where the shotgun was?

A Shotgun is here. No. 8. It looks like No. 8 in the corner. No. 8 in the corner, shotgun. I remember the shell -- my recollection -- being back in here, 9 and 10. That is what I can remember.

Q So you saw the shells back at 9 and 10, two shells?

A Best I can remember, 9 and 10.

Q And the shotgun at?

A 10 -- or I think 8. Can I see it again? Looks like it's marked as 8 to the shotgun, yes. I'm not sure what 13 or 12 is. I don't know what those are. You have to have crime scene people to that.

Q You are sure that this is the shell or shotgun?

A Yes, sir. It was against the wall just like I remember. It was close to the wall.

Q And No. 9, tell me what No. 9 is.

A Best that I can remember, that is where the shell

was close -- that is where I remember the shells being close to the victim and that's where he was laying at, if I remember correct.

Q Victim was laying at 9?

A I'm not sure if that is how they had it marked, but he was in the middle, and the shells were close to him, and the shotgun was across -- that is how I remember it. How they mark that scene -- that is what I can remember. The shells were close to him, and the shotgun was away from him next to the wall.

Q Did you see blood on the ground?

A Yes. I had blood on me.

Q Is that where No. 9 is?

A Possibly. Could be No. 9.

Q Looks like No. 9.

A Could be. Very well could be.

Q You don't know how -- now, the blood, obviously that is where Mr. Rogers' body was, right?

A I imagine it would be, yes, sir.

Q The shotgun, you don't know how the shotgun got way up towards the front of the alley?

A I didn't touch the shotgun. If he's laying here, it was like over here in the tight space. Like in the pictures it is very close to like a wall.

Q So you have the shotgun in one place, blood in

another place, and the two shells, unspent shells, unshot shells, all in different places?

A That is what I can recall. They were close to the victim. The shells were closer to the victim than -- I think the shells were a little ways over here. That is the way I can recall it.

Q But the markers you got, you say the markers indicate where the shells were found, where the shotgun was found and where the victim was?

A Those markers are more accurate to where I remember the shells being at.

Q They are all scattered around?

A I agree. That is the best I can recall.

Q Now, tell me, if you would, inasmuch as you also have some experience investigating, and that is part of your job, you don't -- you have not written down anything in your notes or anywhere to indicate how those pieces of evidence got scattered around?

A No, sir. Like I said, I did my best I could to secure it, and that is just what I can recall. The shotgun shells being separated from the shotgun, and then the victim, that is what I recall.

Q As you sit here today with all of your experience, knowing how evidence is at a crime scene, knowing the way the victim was and the shells was, the

shotgun was, what do you think of how they got scattered around; have you thought about it?

A That is what I observed when I walked up to the victim, because I'm looking as I'm coming down. I remember that is the first thing that caught my eye, was the shotgun shells because they were green in color, and I remember them being close to the victim.

Q But you will agree, they are all scattered around?

A Certainly based off that photo, if that is the way they are marked. I couldn't testify as to why it was marked like that.

Q If you think about it now as an experienced investigator, how do you think they got scattered around like that?

MR. HIXSON: Once again --

MR. BARR: I'll rephrase the question.

MR. HIXSON: Unless you want him as an expert.

THE COURT: Asked what he observed.

Q No question you observed where they were?

A Yes, sir.

Q And no question you didn't move them?

A I didn't touch anything to my knowledge, no, sir.

Q And no question, as far as you know, that photograph with the markers is accurate?

A I mean close to what I remember. I remember the shotgun being in the location where it was at, and I thought the shells were close to the victim. I don't know if they marked the marker the 9 or 8 -- I don't know how they marked that scene, I don't know that.

Q But I'm talking about what your recollection is of what you saw when you say you were there?

A I come up and saw the shotgun shells close to the victim, the victim laying there. He was bleeding out with a hole through his neck, and the shotgun was laying across from him next to the wall, and the shotgun shells not spent was laying directly -- pretty close to him. That is what I can remember.

Q Is that a 12 gauge?

A I would have to look at it again. I think it is a 12 gauge. I would have to look at it again.

Q Mr. Hixson said it was a 12 gauge, but I wouldn't take his word (laughing). 12 gauge (indicates)?

A Looks to be a 12 gauge, yes sir.

Q Automatic shotgun?

A Looks to be a 12 gauge, yes, sir.

Q Carries five shells?

A I imagine so. I don't know what brand.

Q Remington. Carries five shells?

A Correct.

Q And when you put five shells in it, every time you shoot, it kicks one out, doesn't it?

A It does. I imagine -- actually, I'm -- I can't testify the workings of the weapon system. I imagine it does spit the shell out.

Q You haven't shot one of these?

A Exact model, I don't know. Maybe I have. I can't be sure.

Q Any 12 gauge automatic?

A It will spit a shell out.

Q It will kick a shell out as soon as you shoot it?

A Yes, sir.

Q Ain't no telling where it's going to kick it to, is there?

A No, sir. No, no. No, sir.

Q Do you know whether or not there was shells in the magazine when this shotgun was found?

A I do not know, sir, no, sir.

Q Don't know. Now, if you were carrying -- well, that is a hypothetical. I won't ask you that.

Based upon what you know about shotguns, these don't shoot unless you have shells in them, does it?

A Yes, sir.

Q You have to have shells in it?

A Yes, sir.

NICHOLAS "SHANE" OWENS - CROSS-EXAMINATION

Q You can't have them scattered around, you have to put them in the magazine of the weapon?

A Yes, sir, you have to load it.

Q You didn't notice anywhere any spent shotgun shells?

A I did not. I seen the victim and tried to help him the best I could. The lady had pressure on his neck. I remember seeing the unspent shells. I didn't see any spent shell casings, sir.

Q Did you go around the alley that goes back to Mr. Rogers' house?

A I don't remember going around looking for shell casings, no, sir. Not to my knowledge, no, sir. Nothing like that.

Q Do you know where Mr. Rogers' house was?

A No, sir, I did not. At the time, no, sir. I didn't know where he lived at the time, no, sir.

Q If you are up in that alley, you can get a pretty good view of the side of that red Crown Vic back in that alley, can't you?

A Where it was positioned at, you can get a piece of view of it, yes, sir.

Q Yeah, you could get a pretty good view of it?

A Yes, sir.

Q I have a few more questions. You didn't have any

conversation with Mr. Antwuan Nelson?

A No. I didn't meet the gentleman. I had dealings when we placed handcuffs on him. The immediate attention was to the victim and trying to help him as best I could.

Q Do you know who put the markers down?

A I wouldn't know that, sir.

Q Don't know who put up the crime scene tape?

A I seen Corporal Toole with some crime scene tape.

Q Corporal who?

A Corporal Toole. I seen him put some crime scene tape right in front of that apartment complex, but in the photos, it's on the back side of it as well. I don't know if he did the whole complex. I couldn't testify to that.

Q He put crime scene tape in front of the apartment complex?

A I seen that going up. I did observe that going up, and that was fresh right there when it happened after everyone got on scene, crime scene tape began to go up.

Q As far as you know -- well, you wouldn't know that.

Did you have any conversations with the 911 dispatcher?

A Not really conversations. All it was about was just we need EMS quickly with the condition of the victim. I think I told him twice at least to get there quick, and I think I called for backup for Officer Mackin. A lot of people running around, hostile scene, and I was worried about the safety of our people as well, so that is why I was calling for backup.

Q So there wasn't anyone from your dispatch that called you relaying information to you that was being relayed to them from Crime Scene?

A Such as?

Q Such as a caller calling into the dispatcher telling the dispatcher what was going on at the crime scene.

A I probably -- imagine that that went on. There was shots being fired through people's houses and stuff, so it's possible other people were calling 911 at the time relaying it, but it was so hectic and my duty was to the victim. I'm trying to help him. There could have been a lot going on, I just don't recall that.

Q I just want to know what you know. You were not privy to any of those conversations that were being taken place between the dispatcher and the people that were calling the dispatcher?

A I would not be privied to that, no, sir.
Q You don't know about any of those calls, do you?
A Not to my knowledge, no, sir.
MR. BARR: Thank you, sir.
THE COURT: Mr. Hixson.
MR. HIXSON: Couple clarifications.

REDIRECT-EXAMINATION

BY MR. HIXSON:
Q What is the function of a first responder officer?
A Protect and serve, help people, preserve and save lives.
Q To kind of streamline the redirect, you secured the scene until reinforcements arrived?
A Yes, sir.
Q And reinforcements include Crime Scene?
A Lots of people came. We called for a number of units because of the amount of people we had at scene, lots of people. Yeah, Crime Scene came, yes, sir.
Q And Myrtle Beach employs dozens of crime scene specialists to apply and put up tape --
A I'm not aware of the accurate number that they had, but we had a number of staff at the time.
Q I'll show you a series of three photographs that are excerpts or highlights of that to solve this

problem. There is 16, 19 and 18.

A That it is a spent shell casing that I seen.

Q Spent or --

A Unspent, I'm sorry. Unspent shell casing that I observed, the green one by Marker 10.

Q Now, let's be clear. When you were there, were there evidence markers at that location?

A There was not evidence markers. It was a fresh scene. It just happened. I did not mark the scene or anything. It is really the first time I think I saw those photos.

Q Since you saw it in real life?

A Yeah. Yeah. It was almost three years ago, so. This is Marker No. 11, unspent shell casing as well.

Q And this is State's 19?

A This looks like a crime scene photo with more markers on the ground, 9 through 12.

Q In that photograph, is 10 and 11 depicted also?

MR. BARR: Can I see?

MR. HIXSON: Let me lay a foundation and I'll let you see it.

A It's 9 through 12. And 10 and 11 would be the spent shell casings --

MR. BARR: Judge, objection. He said he is laying a foundation. Of course the exhibits that I

cross-examined him on were already in evidence, and if he is laying a foundation for something else to get in this witness, then he's beyond the scope of cross-examination.

THE COURT: Let me see where he is going.

MR. HIXSON: Your Honor, I'm simply redirecting him on the location of the shell casings, because Mr. Barr on cross-examination elicited some confusion as to the locations on these photographs.

THE COURT: I'll allow it.

MR. BARR: He's gone beyond the scope of cross-examination if he now has new exhibits.

THE COURT: I'm going to let him testify. I think it is clear that this witnesses testified that he didn't put them there, so I'm going to let him clarify.

Q. (MR. HIXSON) Finally, State's 16. I think you mentioned that is a further out shot?

A It is, yes, sir, with the markers identifying items.

Q Are these photographs a fair and accurate representation of your recollection, absent the markers, of what was in that alleyway that night?

A Yes, sir. That may have been where the victim was laying as well, as best as I can remember.

NICHOLAS "SHANE" OWENS - REDIRECT EXAMINATION

Q That appears to be blood letting right there (indicates)?

A It does.

Q Would you like to look at these in more detail now, sir?

MR. HIXSON: I'll let the record reflect we did pretrial on these photographs ahead of time.

THE COURT: Okay.

MR. HIXSON: State moves 19, 18 and 16 into evidence.

THE COURT: Mr. Barr, subject to your objection?

MR. BARR: Your Honor, I object at this point, and of course I would assume that the prosecution has some witness through which they can get the photograph properly authenticated. He didn't take the photographs. He now has been redirected on these photographs.

THE COURT: Those are the same numbers you asked him about. These are just photographs of what action is there, so I'll allow it.

MR. HIXSON: May I publish these to the jury, 16, 18 and 19?

(State's Exhibits 16, 18 and 19 admitted and published to the jury.)

Q State's 7, Mr. Barr was referring to the marker

numbers? Do you see the close-up of the marker numbers on that photograph.

A Yeah, 9 and 10, but the 11 is off -- I can't see the 11 in this picture, but the 10, that's how it would look, yes.

Q. Fair enough.

MR. HIXSON: I'm publishing 17 and 19, Markers 10 and 11 that show the shotgun shells.

Q (MR. HIXSON) And I think you testified earlier 9 is blood letting where you think the victim was located?

A Yes, sir.

Q And the shotgun shells right next to him?

A Yes, sir.

Q One last question to clarify. This is a pump-action shotgun? Can you read that stamp on the side of that?

A 870 Magnum.

Q Yes, sir. That's a pump-action shotgun? What does that mean?

A You release the -- basically you have to slide it back to charge it, and spent shell casing comes out automatically when it is fired.

Q So isn't it safe to say that this is not a semi-automatic, and this is not an automatic, you have

to function the weapon every time for it to work?

A Correct, sir.

Q So shells just don't shoot out of there like exhaust from a car? You have to actually function it --

A Yes, sir, that's correct.

MR. HIXSON: Nothing further.

THE COURT: Mr. Barr?

MR. BARR: Thank you, Judge.

RECROSS-EXAMINATION

BY MR. BARR:

Q With respect to the shotgun, are you at all familiar -- do you hunt?

A I hunt occasionally, yes, sir.

Q Deer?

A Hunt for deer, yes, sir.

Q A 12 gauge shotgun is buckshot?

A I don't use a shotgun. I use rifles.

Q You still hunt?

A I still hunt. I try to stay away from shotguns.

Q With respect to that shotgun, are you familiar with it?

A I can't testify to that exact rifle, that shotgun. I don't personally own one, and I don't know if I have ever shot that kind of shotgun. I don't

know.

Q But now your testimony hasn't changed as far as having five, six shells in the chamber?

A Well, sure it will take five shells into it, yes, sir. That hasn't changed, no, sir. I'll keep that.

Q If you pump it to throw another shell out of the magazine into the chamber, it is going to kick a shell out, isn't it?

A Correct.

Q Whether it is automatic or semi-automatic?

A Correct.

Q Or even bolt action, it is going to kick a shell out?

A Correct.

Q Now, take a look at Exhibit No. 6; that is what we're talking about?

A Yes, sir.

Q I think you can see that alleyway a lot clearer; in fact, there is a marker there that says "11"?

A Yes, sir.

Q What was at that marker?

A To my knowledge, it is the shell casing or the unspent shell.

Q To your knowledge the unspent shell?

A Yes, sir.

NICHOLAS "SHANE" OWENS - RECROSS-EXAMINATION

Q A shotgun shell that hasn't been fired, the one that Ms. Walter had a few minutes ago?
A That would be the one, yes, sir.
Q It's either one or two, she only had two.
A Well, the other one is 10. It is close to it right there.
Q So that's 10?
A Right.
Q You don't know what distance that is apart though, do you, and you really can't tell from the photographs, can you?
A I couldn't testify to the exact measurements of that, no, sir.
Q Did you note that this alleyway here, where "11" was found, goes up to Mr. Rogers' house?
A I did not know that, no, sir. I did not know that.
Q You don't deny that based on your knowledge Tab No. 9 would be blood?
A Pretty sure that is where it was --
Q Presumed to be to blood?
A Presumed to be blood, yes, sir, where the victim laid, yes, sir.
Q And what is No. 12?
A I don't know what No. 12 would be, sir.

Q You don't know what No. 12 would be?

A I can't tell from the photos, and I don't have a recollection. I don't know. I don't recall that.

Q Of course the shotgun is not depicted in Exhibit 16, is it?

A It is not depicted at all, no, sir.

Q It is not depicted at all? You've got the blood where Mr. Nelson supposedly was. You have shotgun shells some distance away. You have another shotgun shell, No. 11, up in the alley. Doesn't this seem a bit unusual to you?

A As far as location, or what are you referring to?

Q If a person had a shotgun and got shot, how does everything get scattered around like this?

A I imagine if the gentleman took a round to the neck he was highly likely -- he was disoriented and everything could have went off. I don't know what was in his hands, I can't testify to that. But he took a round to looks like the neck area, so it could have got disbursed in that manner. It is plausible -- that's the most plausible how it happened like that, he took a round to the neck and everything came down.

Q He took a round to the neck and -- you don't know what the weight of the shells are, do you?

A Exact weight of the shells?

NICHOLAS "SHANE" OWENS - RECROSS-EXAMINATION

Q Yeah. What the weight of those shells -- they have pellets in them. No. 8 shells you said, right?

A Yeah.

Q I mean, usually they just fall down?

MR. HIXSON: I object. Beyond the scope of redirect. We have had a lot of time talking.

THE COURT: Sustained. I mean we're going way beyond your recross.

MR. BARR: I'll go back. I thought we were at crossing his redirect?

THE COURT: Yes, you are.

Q (MR. BARR) You don't know if that shotgun was sent to SLED to be examined, do you?

A I can't testify to that, no.

Q Sir?

A I could not testify to that, sir, I do not know that. Don't know that.

Q But no question that that is the shotgun that you saw in the alley next to Mr. Rogers?

A That is the shotgun I recall, yes, sir.

Q All right.

MR. BARR: Thank you.

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

MR. HIXSON: Jim Garrett.

JAMES GARRETT - DIRECT EXAMINATION

(JIM GARRETT, having been duly sworn, testified as follows:)

THE CLERK: State your full name and spell your first and last for the Court.

THE WITNESS: James Garrett, J-A-M-E-S, G-A-R-R-E-T-T.

DIRECT-EXAMINATION

BY MR. HIXSON:

Q Good morning. How are you?

A Fine.

Q You tell could us what you do for a living?

A Until the 20th of June, I'm a policeman for the Myrtle Beach Police Department, and then I retired.

Q So you are on medical leave towards the end of your career --

A Medical leave and then retired 20th of June.

Q Congratulations. Thank you. Were you working for the police department back in January 27th of 2014?

A Yes, I was.

Q Did you have an opportunity to go to a scene around 37th Avenue North in the City of Myrtle Beach?

A Yes, I did.

Q. Tell us about that, please.

A I heard it being dispatched out, and then I heard from the other officers on scene that they needed

backup. So when I arrived, I observed a pretty large crowd irritated. I got out of my car, observed they had one individual, Mr. Nelson, in handcuffs.

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

A Officer Mackin had him in handcuffs. I said, Put him in my car, let me take him to the station. I didn't know if the aggressor was after him, going towards him or if the crowd was just upset. I just knew I needed to remove him from the scene for his safety and to calm things down.

Q At that moment in time, did you know exactly what was transpiring, what had just happened?

A I know it was some kind of shooting incident. I didn't know whether he shot someone, or someone shot him or what. I didn't know. I know he was being detained. I wanted to remove him from the scene for his safety and to calm down the incident location.

Q So is it safe to say that your role transformed to backup officer to kind of a transportation officer?

A Yeah. I was a supervisor, but my car is there. I said, Put him in the car, let me get him to the station.

Q Okay. In fact, did you do that?

A Yes, sir, I did.

Q And during the course of transporting Mr. Nelson

to the detention center, did he have any -- did you question him? Did you ask him any questions during that period of time?

A No, I didn't ask him any questions.

Q. Did Mr. Nelson say anything to you during that period of time?

A Yeah. He said that he shot him because he was going to shoot me.

Q So let's make sure we understand that. Where did that statement take place?

A In the rear of my vehicle. He was in the backseat, and I was transporting him approximately 20 blocks to the police station.

Q At that time you said he was in handcuffs?

A Yes, sir.

Q Was he under arrest at that time?

A I assumed he was under arrest or detained. I didn't arrest him. All I knew is he needed to get out of there and be taken to the police station.

Q But at the time that you made that decision, you were kind of trying to diffuse the scene as hectic?

A Correct. Yes, sir. Yes, sir.

Q So did you ask him what happened, ask him any questions?

A No, sir, I didn't ask him any questions. Only

thing I stated is that the detective will talk to you when you get to the police station.

Q. So let's be clear specifically. He said -- Mr. Nelson tells you in the police car on the way to the police station --

A Yes, sir.

Q What did he say?

A He said I shot him because he was going to shoot me.

MR. HIXSON: No further questions, Your Honor.

MR. BARR: Nothing.

THE COURT: All right, sir. You may step down. It is noon. Let the jury have lunch. Let's have them back at 1:30. Mr. Ropp, take them to the jury room and let them collect their things.

(The jury exits at 12:00 p.m., and the following is heard out of the presence of the jury.)

THE COURT: All right. Let's be back in -- just to give you a heads up, I want both of you to be familiar with State versus Frasier, State versus Hernandez for your cases.

MR. BARR: State versus Frasier?

THE COURT: State versus Frasier, that is 401 South Carolina 224. Hernandez is 386, South Carolina 655. I know where we are going with the case -- or I

think I know where we are going, and I want you both to be familiar with that case as we proceed.

MR. HIXSON: Thank you, Your Honor.

MR. BARR: With those two cases, State versus Hernandez and --

THE COURT: State versus Frasier.

(A lunch recess was taken.)

THE COURT: Thank you, please be seated. I apologize, I had things I had to take care of. Please get us a jury.

MR. BARR: Judge, may we approach the bench?

THE COURT: Yes.

(Whereupon, a bench conference was had.)

THE COURT: Go ahead and call the witness up.

MR. HIXSON: Michelle Cantey.

(The jury enters at 2:01 p.m., and the following is heard in the presence of the jury.)

THE COURT: We have all of our jurors. I apologize, there is always something going on and we had to take things going on before I bring you back in here. Madam Clerk, swear the witness.

(MICHELLE CANTEY, having been duly sworn, testified as follows:)

THE CLERK: State your full name and spell your first and last for the Court.

MICHELLE CANTEY - DIRECT EXAMINATION

THE WITNESS: Michelle Canty, M-I-C-H-E-L-L-E, C-A-N-T-E-Y.

DIRECT-EXAMINATION

BY MR. HIXSON:

Q Good afternoon, ma'am, how are you?

A Well.

Q Can you tell this Court and jury what you do for a living?

A I'm in marketing for a local state agency.

Q Have you lived in Myrtle Beach for a period of time?

A Over 20 years.

Q So 20 years or so you lived in Myrtle Beach back in January 27 of 2014; is that correct?

A Correct.

Q Where were you living?

A I had recently moved to Broadway Station.

Q So is that somewhere near 37th Avenue North here in the City of Myrtle Beach?

A It faces 38th, yes, sir. So it is right across 37th.

Q Let me show you something already admitted into the evidence. In case the jury doesn't know where Broadway Station is, this is State's 1; do you recognize generally that overview? Here is

37th Avenue and the building. It is already admitted into the evidence. And then this unit back here, that is 38th Avenue. Do you recognize that, generally speaking?

A Yes, sir.

Q Let me show you a couple of photographs and we'll make sure the jury understands where you were so they understand your testimony. I'll show you a series of photographs, five of them, State's 24, 25, 26, 27 and 28. Take a look at those all at once. I'll ask you individual questions about them after you take a look at them. Do you recognize all of those?

A Yes, sir. That is the unit I was living in at the time, and the other photographs are -- that is the balcony of the first floor condo.

Q What is that?

A That is actually what I pointed out to the investigators as a bullet hole.

Q And State's 26?

A That is just an overview of the general area of the first floor. That is actually the window I was looking out of that day.

Q And that one, State's 27?

A That shows the bullet hole entering my condo.

Q And, finally, State's 28?

MICHELLE CANTEY - DIRECT EXAMINATION

A Where the bullet is embedded in the drawer of my end table.

Q All of those photographs, are they fair and accurate representations of those individual scenes outside of your apartment, inside your den, sofa and the bullet hole?

A Yes, sir.

MR. HIXSON: We move these into evidence, 24, 25, 26, 27 and 28.

THE COURT: They are in evidence without objection.

(State's Exhibits 24-28 admitted.)

MR. HIXSON: Do you want to see them, Judge?

THE COURT: Yes, thank you.

MR. HIXSON: Thank you. May I publish?

THE COURT: Yes.

Q (MR. HIXSON) Let's look at this. What is the jury looking at?

A They are looking at from the sidewalk area of the condo, it's a first floor condo, so that is the balcony, and through those sliding glass doors was the den area.

Q To help understand the importance of this, can you help show looking at this one what view, if you are -- if you are in your apartment looking out your

apartment, what would you see?

A This is the stairwell. My condo is on the first floor here, so you look down the alley.

MR. HIXSON: For the Court, she testified this is her unit and this is the view she sees from her place.

THE COURT: Okay. Do you want the witness to mark the unit so the record is clear?

MR. HIXSON: That is fine with me. I'll get a Sharpie.

Q (MR. HIXSON) See if you can make a dot.

A Understand, this was the first floor, although I'll mark here.

THE COURT: Put her initials or something that for the record would indicate that she's showing it being her unit.

Q (MR. HIXSON) You indicated it is a first floor unit, obviously?

A Uh-huh. You can see far left where the breezeway is in the smaller photo, and that is the stairwell.

Q So if we were to explain the importance of setting up this photo, I just want to show you this photo, and that is State's 25. Can you point for the jury the defect you are referring to through that fence?

A Yes. You see the flowers along the balcony and

right here is -- so through the flowers you see there is a bullet hole about the size of a pencil going through it, it is small to see in the picture, but.

Q Right here?

A That's it, yes, sir.

Q Let's talk about State's 26, tell us what that is.

A That is my living room or den area. You see that I have my books packed and my computer is still on the couch. At the time the bullet came in under the lip of the end table and embedded itself into the end table itself, making the drawer go ajar. At the time of the incident, I was sitting at the very end on the sofa, feet propped up on the coffee table with my computer checking my E-mail.

Q So if you were standing right in front of the door slide glass door and you are looking that way, what would you see?

A Actually, from that glass door you look through the balcony and look straight down the alley between the buildings, and then there is a wooden fence that separated them.

Q Let me show you something already put in evidence, two of them. I'll show you State's Exhibit 6. What is the unit you see at the end of the

photograph?

A That would be the bottom unit, would be my unit.

Q And the reverse of that, State's 5, that view?

A That is actually -- oh, that is down the alley now.

Q At the very end?

A Yeah, the end of this alley, so basically the opposite view looking towards 37th Avenue.

Q This is State's 6. That is your unit?

A Yes, sir.

MR. HIXSON: Judge.

THE COURT: All right.

Q (MR. HIXSON) Right here?

A Yes, sir.

(Published to the jury.)

Q (MR. HIXSON) And then the reverse of what we talked about. The jury saw this already. If you are standing here, that is the very end of the view all the way down?

A That is inside the chain linked fence at the time.

Q All the way to the red Crown Vic at the end.

(Published to the jury.)

Q (MR. HIXSON) So with all of the pictures with the foundation questions, what in the world were you

doing January 27, 2014, four-and-a-half in the afternoon, tell us about why these pictures mean something to you?

A I got home a little early that day from some meetings, so it was close to 3:00 when I got home, took out my trash and had music on and listening to that and checking E-mails on my sofa instead of in the office area I had. So we heard several shots. All the sudden there was a reverberation of the building, and I couldn't figure out what that was. It just felt like a mini earthquake. So I heard neighbors outside talking, and I couldn't tell -- they were muffled. So I go to look out the window, and then that is when I see someone trying to scale the fence, that brown fence you just showed us.

Q Tell us what you saw. A person?

A It was a gentleman, yes, sir, a black male.

Q Do you recall what he was wearing?

A He was in dark clothing, black clothing, looked like a hoody because he had like just something pulled around the neck. It was cold. It was the end of January and we were expecting to have ice and rain that night.

Q Was it dreadlocks, hoody?

A I don't recall exactly that aspect of it. I just

remember that it was bulky, so I naturally assumed it was a hoody. It was dark clothing, red trim I saw at the bottom of the jacket, and that is in my report as well, because I gave a report the night of the incident. So he was like scaling up either trying to jump over, or trying to reach the top of the fence. I saw what appeared at the time to be a handgun dropped. I just assumed it was kids playing with guns and they got caught so they were just trying to get rid of evidence. I'm not trying to say anything, but you just heard noises all the time, so you never knew what to expect.

Q Yeah.

A Like it was kids that that they literally were dropping something.

Q Did that individual climb the fence, or did they -- what --

A No. They were jumping up to climb it or just to get to the top, and that is when I saw the drop on the other side of the fence.

Q Did you see a gun drop?

A I saw something from his hand drop, because I just heard guns shots. I naturally assumed it was a handgun and that the kids were out playing and got caught and trying to ditch the evidence or whatever.

Q So just to try to understand, do you believe that you saw something thrown over the fence?

A I do, yes. I do recall that it was either dropped or thrown; however, it was across the top, and I mentioned that that evening to the investigating officers.

Q Let's close the loop and we'll come for more detail. Did you bring what you saw to the attention of law enforcement?

A I did.

Q How did you do that?

A Because there was a lot of neighbors from our development as well trying to see what was going on, I realized that I had a hole in my wall, and that was the reverberation, the bullet coming through and how blessed I was, for one thing, to still be there. So I called an officer over to the chain link fence, and mentioned we had a stray bullet, to look through my plants and they would see a bullet hole. Also during that investigation I mentioned to the officer that I thought I saw him drop a gun. At that point, when I saw it, I didn't know what had happened, and through the course of the neighbors and finding out that there had been a shooting.

Q So when you say -- I know you referenced the

report you gave to law enforcement, you referenced what you said appears to be a gun, I want to clarify that. Did you see what was a gun, or are you assuming it is a gun and you don't know what was thrown?

A That's it. I'm assuming it is a gun. I don't know what is thrown. I know something left his hand and went over the fence area to the other property.

Q Let me show you a couple of pictures in evidence. I think these previously have been admitted as State's 42, 44, State's 45 and 46. I think they were previously identified as the Defendant's clothing. Do you recognize any of those by chance?

A All I can tell you is it was black, dark clothing. It could have been that jacket, or could have been another jacket with that hoody aspect. I just remember he had something around his neck. So it was definitely dark black, I mean.

Q In your report you recognize it was black clothing with red trim?

A Yes. My report stipulates black clothing, red trim.

MR. HIXSON: Beg the Court's indulgence.

(A brief pause in the proceedings.)

MR. HIXSON: Nothing further. Thank you. See if Charles Barr has any questions.

MICHELLE CANTEY - CROSS-EXAMINATION

THE COURT: Mr. Barr.

CROSS-EXAMINATION

BY MR. BARR:

Q The person you say you saw attempting to scale the fence or get up to the top to throw something over, did you ever see the person's face?

A It was a side view. I just happened to look out with the reverberation and hearing people. At the time, the person happened to be scaling the fence, or doing whatever. So I just saw the side. He turned as soon as he came to the ground and went towards 37th away from me. So I never saw full face. It was purely from the side.

Q You were interviewed by officers with the Myrtle Beach Police Department concerning what you saw. Were you ever shown any photographs of any persons?

A No, sir.

Q Now, I noticed when you were testifying under direct examination you mentioned that you only saw the person's clothing and the clothing was black, and then Mr. Hixson mentioned to you that you had given a statement with red trim?

A Yes, sir. My report reflected it was black and red trim. You know, it is three years later so you recall the darkness of the day, ice and a storm was

coming up, and it was just dark clothing, that is what I recall three years ago versus what I gave the day of the incident.

Q So you were not able to ascertain the height or maybe the physique of the person that you saw?

A No. It was just a black male. I couldn't tell you 5'6" or 5'4".

Q So you can't identify the person, and was not able to identify the person?

A No, sir.

Q All right. When you saw this person trying to scale the fence, how long after -- approximately -- after you heard the last shot?

A I can't tell you exactly because it was so quickly. You heard the sounding of the bullet and then the reverberation of the building, and then hearing neighbors outside that caused me to look down the alley or out my window that was opened, which was the sliding glass door, as far as the blinds, to see what was going on. In looking to see what was going on, that is when I noticed a gentleman trying to scale the fence or climb to the top of it.

Q So you could hear the neighbors -- you could hear noise coming from?

A Outside of my condo. I heard people talking. I

couldn't tell what they were saying. It was muffled noises with people.

Q Now, were you able to look from your condo -- if you are looking straight down the alley almost to the dead-end, were you able to see any persons congregating in that area?

A Not in the alley area. This was purely -- I mean, honestly, immediately after it happened, the reverberation of the wall, then I happened to look down the alley. Basically, I was looking out of my window to see what was going on and happened to catch sight down the alley of the male trying to scale the fence, which was totally -- almost as if I'm looking down the alley here or the row, that is how it was with someone trying to scale the fence.

Q And after --

A Then --

Q After the reverberation of your wall, no more gunshot sounds?

A No, sir. It could have been, but the reverberation was in that end, so I can't tell you. I just know we heard a couple different gunshots -- or I did, and then the reverberation of the wall.

MR. BARR: Thank you. Nothing further.

THE COURT: Anything further, Mr. Hixson?

MICHELLE CANTEY - REDIRECT EXAMINATION

MR. HIXSON: Briefly.

REDIRECT-EXAMINATION

BY MR. HIXSON:

Q After you saw the individual with the dark color with red trim scale or throw something over the fence, did you see which direction the individual went?

A I think I may have stated earlier he came down to the grcund and ran away from me down 37th.

Q Back towards the red car in that photograph?

A Yes.

MR. BARR: Judge, I would move to strike the last statement that Counsel made concerning the red car.

THE COURT: I'll deny the motion.

MR. HIXSON: Nothing further. May we excuse her from her subpoena?

THE COURT: You may. Do you have any further need for this witness?

MR. HIXSON: No, sir.

THE COURT: Do you need her, Mr. Barr?

MR. BARR: She can be excused.

THE COURT: You are released from your subpoena.

THE WITNESS: Thank you.

MS. WALTER: State calls Corporal Harlow.

(KENNETH HARLOW, having been duly sworn, testified as follows:)

KENNETH HARLOW - DIRECT EXAMINATION

WITNESS: My name is Kenneth Wayne Harlow, Junior. H-A-R-L-O-W.

DIRECT-EXAMINATION

BY MS. WALTER:

Q How are you employed?

A Employed by the City of Myrtle Beach Police Department.

Q What is your rank?

A Current rank is patrol first class.

Q Were you working for the Myrtle Beach Police Department on January 27, 2014?

A Yes, ma'am, I was.

Q And did -- directing your attention to sometime at 4:30 in the afternoon, did you get called to the area of [redacted] 37th Avenue North in Myrtle Beach?

A I did hear a call coming out in regards to, obviously, a serious situation, which I responded since I was in the general area, yes.

Q When you responded to the scene -- first of all, were you working alone or with a partner?

A Special kind of partner, I have a K-9.

Q This K-9 partner what is his name?

A Roscoe.

Q Did you and Roscoe respond to the scene?

A Yes.

Q What did you see when you first responded to the scene?

A When I arrived on scene, there were a couple other officers that got there prior to me. The scene was still not completely under control, make sure everything was preserved. So I made sure everything was safe and started securing the scene where I secured the AR-15 on the ground.

Q So when you pulled up, are you able to tell us any of the officers you saw there?

A I know that Shane Owens and Mackin was.

Q Do you recall where Officer Mackin was when you pulled up?

A Not directly, no. I can't give you the exact position.

Q I'll show you what is previously admitted as State's Exhibit 1. Is this the scene you pulled up to?

A Yes.

Q [redacted] 37th Avenue North, can you tell us to the best your recollection where you pulled up?

A It would generally be in here.

Q Almost to the property to the east --

A Correct, the car was parked somewhere here.

Q And you got out of the car, so you were parked over here?

A Correct. Yes, ma'am.
Q Did you go towards [redacted]?
A Yes. Yes.
Q You said that you -- the scene was not full --
MR. BARR: May we approach?
(Whereupon, a bench conference was had.)
Q (MS. WALTER) You said when you first arrived at the scene, you took initiative control of the environment?
A Yes. I wanted to make sure everyone was safe and get EMS as quick as possible.
Q You mentioned you stood over an AR, can you tell us where you saw it when you got on scene?
A You have a parking lot there, and there were couple of cars parked closer to 37th, and it was laying -- I made sure I got over to it and made sure everyone was away from it and secured it, basically not touching it, just preserving the area around it until we can get crime scene there.
Q I'm showing you what is admitted as State's 2.
A Yes.
Q Is this a fair and accurate representation of the scene when you arrived?
A Yes. I mean, obviously there was people around, but, yes, the car -- I definitely remember the car.

Q And where was the AR in relationship to what is depicted on Exhibit 2?

A I can't give you exactly where it was. It was generally in the area of the car.

Q So showing you what was previously admitted as State's Exhibit 4; do you recognize that?

A Yes.

Q Is this the AR you stood guard over?

A Yes.

Q Is that just at the back of the red Crown Victoria?

A Yeah, that is the red Crown.

Q State's 2?

A Yes.

Q So from the time that you got there and noticed the AR, how long -- well, what finally made you move from standing guard over the AR?

A I did not move until another officer arrived on scene because I'm not -- the magnitude of the case, something like laying on the ground, I'm not going to leave it.

Q And the condition that it is depicted in State's 4 with the magazine out, that is how it was when you found it, saw it?

A Yes. Yes.

Q While you were standing there, did you make note of any other type of evidence that you would want to draw someone's attention to?

A Yes, I noticed spent shell casings, yes, ma'am.

Q I'm going to show you what is marked as State's Exhibit 10 without showing them to the jury, 11, 12 and 13; do you recognize what is depicted in those photos?

A Yes, ma'am.

Q And I'm going to go back again to State's Exhibit 2. Can you tell us where in State's 2 these photos relate to?

A Yeah. We have the trashcans laying here, and the shell casings here.

Q Can't show them to the jury.

A Oh, I'm sorry.

Q That's okay. So these pictures are reflective in the areas of the photograph?

A Yes, ma'am.

Q And other than perhaps the time of day and evidence markers, are those photos a fair and accurate representation of what you saw when you were standing guard over the AR?

A Yes, ma'am.

MS. WALTER: I ask that these be admitted, State's 10 through 13.

MR. BARR: No objection.

(State's Exhibits 10-13 admitted.)

Q (MS. WALTER) So showing you State's 10, and I'll show it to the jury, but can you describe what they will be seeing?

A Yeah, I mean that is the area with -- let me make sure I have everything. You have the shell casing which -- spent shell casing, which means used shell casing, laying up against the trashcans.

Q In the corner, is that the same red Crown Victoria?

A Yes, ma'am.

Q To be clear, these little yellow tents are evidence markers?

A Correct.

Q That is not something you take care of?

A No.

Q Are those normally put there by Crime Scene?

A Usually, yes, ma'am.

Q And then this is in the corner, the red Crown Victoria?

(Published to the jury.)

Q (MS. WALTER) So then State's Exhibit 11, 12 and 13, are these just showing the actual spent cartridge casings you saw?

A Yes, ma'am.

Q Again, you did not put the evidence markers there?

A Correct, I did not.

Q And for State's Exhibit 11, the fired cartridge casing right there, Exhibit 12 kind of next to it and then --

A I just remember them next to the trashcan, yes, ma'am.

Q Did you notify Crime Scene or someone else what you saw?

A Yes.

Q Now, after someone came and relieved you from guarding the AR, did you -- were you assigned another task at this crime scene?

A Yes, I was.

Q What was that?

A A commanding officer on scene -- we learned that something was possibly thrown over a fence. My K-9 is certified for using what is called "article search." Article search is basically to locate something that does not belong in an area. If you have -- in the simple -- to try to explain it to you a little bit further, so if you have an area that is grass and something is thrown in there and does not belong there,

grass or dirt, keys, guns, wallet, does not matter, he'll stop, stare and squat next to it and not touch it, just lock in.

Q Is that what you call "an alert"?

A Yes, ma'am.

Q So Roscoe would lock in on whatever he finds and sits?

A Correct.

Q And that is how you recognize he's found something?

A Correct. Yes, ma'am.

Q So, again, let's go back to State's 1. Can you tell the jury where you and Roscoe were conducting this search?

A There is a fence that runs between these two, and it was this side of the fence, is what I was advised to use the dog to clear the area. So we start here and work all the way down the fence.

Q When you say "this side of the fence," for the record, that is the west side?

A Yes, ma'am, the side of 616 37th Avenue North, yes, ma'am.

Q Did you and Roscoe search all along the wooden fence?

A Yes. Basically, we conducted an article search

all the way down the fence, yes.

Q Did Roscoe find anything?

A Yes, he did.

Q If you could, show us on Exhibit 1.

A It was in this general area back here.

Q Back in the 37th Avenue?

A Yes.

THE COURT: Could you have him mark that?

A With my initials?

Q (MS. WALTER) Yeah, just put an "X" with your initials.

A (Witness complied.)

Q You indicated that it was the corner of 616 37th Avenue.

(Published to the jury.)

Q (MS. WALTER) Can you tell us what it was that Roscoe alerted to?

A I didn't understand -- didn't handle it, but it kind of looked like a ball of saran wrap, green leafy substance and a white powder that looked like cocaine.

Q Didn't touch it?

A I didn't touch it or do anything. I had another officer secure that while I took Roscoe and made sure everything else was checked and put back up.

Q Who was the other officer?

A Officer Ammons.

Q So approaching you.

(A brief pause in the proceedings.)

Q (MS. WALTER) Showing you 21 and 22, and without showing them to the jury, can you tell us what is in the photo?

A That is what it looked like.

Q By Roscoe?

A Yes, ma'am.

Q Other than maybe the time of day and the evidence marker, is that a fair and accurate representation of how it looked when Roscoe found it?

A Yes, ma'am.

MS. WALTER: I ask that these be admitted.

MR. BARR: We object on the grounds that it is irrelevant to this prosecution.

THE COURT: All right.

MR. BARR: This is in addition to the earlier objection.

THE COURT: We'll put it on the record fully on the next break. They are admitted, 21 and 22.

(State's Exhibits 21 and 22 admitted.)

MS. WALTER: Can I publish?

MR. BARR: Additionally, it would be our position --

THE COURT: Take the jury out.

(The jury exits at 2:40 p.m., and the following is heard out of the presence of the jury.)

THE COURT: All right, Mr. Barr.

MR. BARR: Judge, assuming that it is cocaine, it wouldn't become relevant until we had someone to say it is cocaine. The mere fact that they found a piece of paper outside of a fence -- and that is all he can say it is -- the fact that it is a piece of paper does not mean -- it has no relevance to this case.

THE COURT: Mr. Barr, how would you suggest then that we ever make a drug case if you can't testify as to what you found, where it was found and how it relates to the Defendant, which we've already heard that, before there is an analysis? In fact, that foundation must be laid before there can be an analysis.

MR. BARR: Judge, he can testify what he found, but he can't put it in evidence, because no one knows what it is. Now, once --

THE COURT: He hadn't put it in evidence, Mr. Barr. What he put in evidence or offered in evidence is the photograph of its location where it was when he saw it. You are saying it is not relevant. Well, relevant evidence is evidence that tends to have -- or

has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence. That is a rule. That is the 401 definition of relevance. All relevant evidence is admissible in this state unless it is excluded by 403. 403 would exclude -- among other things -- if its probative value is substantially outweighed by its prejudice to the Defendant. Of course if it is prejudicial to the Defendant it wouldn't be offered otherwise. The key is whether probative value is substantially outweighed by that prejudice. Well, in this case it has very high probative value because it goes to what was found, where it was found and the charge, that being possession with intent to distribute. Now, that is highly probative. Tell me how it is excludable?

MR. BARR: I'm not even arguing with 403, because this evidence doesn't even get next to 403. The simple fact of the matter is a piece of paper found outside of a fence does not in and of itself make it relevant.

THE COURT: If you can't tie it in, it has to go to probative value and you can move to exclude under 403, but we are not at that point. That is what he is

attempting to do. He said he found this ball wrapped in saran wrap, that is what it was, so we'll have to hear whether or not that is an illegal drug. I don't know whether it is or not at this juncture, but we have hear it. He says this is what I found. Let's see what it is.

I'll admit it, the photographs. The photographs show nothing more than something on the ground. Let's see what the evidence will show. Bring the jury in. I think you were seeking to publish those?

MS. WALTER: Yes.

THE COURT: Very well, you may.

MS. WALTER: Thank you, Your Honor.

(The jury enters at 2:45 p.m., and the following is heard in the presence of the jury.)

THE COURT: You may publish.

MS. WALTER: Thank you, Your Honor.

Q (MS. WALTER) To orient the jury, 21 is just a further out view of what Roscoe found, and 22 is a closeup?

A Yes, ma'am.

Q And that corner of the building, is that the building you pointed out on Exhibit 1?

A Yes, ma'am.

(Exhibits 21 and 22 published to the jury.)

Q Neither you nor Roscoe touched these items?

A Correct, did not touch them.

Q You simply turned over scheduling of the items to Officer Ammons?

A Yes, ma'am.

Q Did that essentially conclude your activity on this case?

A Yes.

MS. WALTER: Court's indulgence.

Q (MS. WALTER) You told the jury briefly about Roscoe's training to be an article dog?

A Searcher, yes.

Q So can you tell us about that? Is there any perimeter on how recently something has to have been thrown?

A Odor is usually ways that he'll locate. Like I said, it is -- you have to think of something that if you have a grassy open field and someone runs or throws anything, drops anything, keys, wallet, it does not matter, Roscoe will go across a ground grid pattern to cover as much area, and my job is to make sure he checks all locations. When he gets to that and smells something that doesn't belong in that location, he will sit and stare and lock on it. He won't come off of it.

Q Going back to Exhibit 1 again, you said you did a

grid search. Can you show us where you started?

A We started up on this end and worked back this direction. All I knew was something -- what was told to me was possibly a firearm was thrown over the fence, so either way I don't want anything in my city that doesn't belong there and I need to make sure we find all evidence to the case. We started here, and basically you take him and have him on a long leash, about 15 feet, and it's back and forth, back and forth covering as much of an area down there as we can.

Q When you say "started here," so you started sort of down where the cars were parked?

A Correct, in this general area because this is obviously where evidence was located, so I want to check as much area as possible.

Q And then the long lead grid search went all the way back to where you found the drugs?

A Yes, ma'am.

Q Did you notice anything else?

A No.

Q And did Roscoes notice anything else?

A No.

MS. WALTER: Nothing further for this witness.

THE COURT: Mr. Barr.

CROSS-EXAMINATION

KENNETH HARLOW - CROSS-EXAMINATION

BY MR. BARR:

Q As I understand it, you initially did -- I thought you said you did a report?

A Did a what? I'm sorry, sir?

Q You did an incident report?

A I did a supplemental to the report, yes, sir.

Q Yes, uh-huh. And I thought you said in that supplemental that initially you did the grid search and Roscoe didn't indicate to you that there was anything out of place?

A I'm not following you, sir. We worked down that fence, and when we got to the back of that area, he alerted.

Q He alerted?

A Yes.

Q And you found -- and you found.....

A I think it is the one on top.

Q Over here?

A Yes, sir.

Q All right. You found -- this is tagged as -- entered into evidence as State's 22. That is what you found over there?

A Yes. That is what Roscoe alerted to, yes, sir.

Q So now you were not on the apartment side of the fence, you were on the opposite side?

A Correct. If you pull up the map I'll show you where I was at exactly, but there is a fence that runs down, and I was on the opposite side.

Q You were on the opposite side of the fence?

A Yes, sir.

Q And you had been briefed by some other providers and police officers before you started your search?

A Yes. I mean, if I'm going to learn of a situation where there is possibly further evidence, that is what the K-9 is trained to do. If there is something thrown for an article search, yes, I'm absolutely going to use him to check that area.

Q And you were told -- you were looking for something that appeared to be a gun, were you told that?

A Yes, I was.

Q Now, even though you did not have any details of the description of what it was that you were actually looking for, other than it appeared to be a gun?

A Yes. Understand, I wasn't the investigating officer. I stood by with a gun, because I'm the only K-9 on scene, another officer came to me and said something was thrown over a fence, and my dog is trained to detect and locate those items so, therefore, I used him to go down through there. I didn't speak to

whoever saw. I was just advised something was thrown over the fence.

Q When you found No. 2, you didn't stop searching, did you? Or did you stop searching?

A Yes, because that is almost at the back. I basically ran to the end all the way to the back of the fence, all the way down that fence that separates the two buildings. I made sure that whole area was cleared with my K-9.

Q Didn't appear to be a gun, but you felt that you found whatever was over there that shouldn't have been over there?

A Yes, sir.

Q And how long had this been -- how long had No. 2 been over there; do you know?

A I don't know.

Q A day, two days or even longer?

A Sir, I can't give you an exact specific time.

MR. BARR: Thank you.

REDIRECT-EXAMINATION

BY MS. WALTER:

Q If you recall, if there is something that would refresh your recollection, what time did you deploy Roscoe?

A I can't give you an exact time. Like I said, as

all of the events were going on, I wasn't looking down at a watch or anything like that. Like I said, once I was relieved of securing the evidence, the AR, that is when, like I said, the commanding officer asked me -- because I was the only K-9 on scene -- we learned something was possibly thrown over the fence.

Q I believe Mr. Barr asked you if you filled out any reports in this case?

A Yes. There was a K-9 report.

Q You filled out one of those every time you deployed Roscoe?

A Yes.

Q Would that report refresh your recollection as to what time you deployed him?

A Yes, it should have all the times -- the general times from the incident, yes, ma'am.

MR. BARR: I'll object to this line of questioning. I asked him about an incident report, I made no mention of time. It is our position that this is beyond the scope of cross-examination.

MS. WALTER: Your Honor, he just asked how long it had been out there, so if we use the circumstantial evidence of Ms. Cantey's testimony that someone threw something over the fence and what time he deployed Roscoe --

THE COURT: I'll allow it then.

MS. WALTER: May I approach, Your Honor?

THE COURT: Yes.

(State's Exhibit 48 marked.)

Q (MR. BARR) I'll show you State's 48 for identification only; do you recognize that?

A I'm just verifying. I just want to make sure that I give you the correct information.

Q Do you recognize it first?

A Yes. I mean, it is a K-9 report from the system we use, yes, ma'am.

Q Would that refresh your recollection as to what time Roscoe was deployed on that day?

A Yeah.

Q And if it would, then I need you to -- you can read it over and then turn it over and let me know when you are done.

A It shows my deploy time around 17:46.

Q So 5:46 p.m.?

A Roughly, yes, ma'am.

MS. WALTER: Nothing further, Your Honor.

MR. BARR: Nothing further.

THE COURT: You may step down.

MS. WALTER: State calls Rhett Ammons.

(RHETT AMMONS, having been duly sworn,

RHETT AMMONS - DIRECT EXAMINATION

testified as follows:)

THE CLERK: Please state your full name and spell your first and last for the Court.

THE WITNESS: My name is Matthew Rhett Ammons, M-A-T-T-H-E-W, A-M-M-O-N-S.

DIRECT-EXAMINATION

BY MS. WALTER:

Q Shall I call you Mr. Ammons?

A You can call me Rhett.

Q Where were you working in January 2014?

A Myrtle Beach Police Department.

Q How long have you been with Myrtle Beach at this point?

A Since 2011.

Q When did you leave the Myrtle Beach Police Department?

A End of this last month.

Q So you were on duty January 27, 2014 around 4:30 in the afternoon?

A Yes, ma'am.

Q Did you respond to a call at [redacted] 37th Avenue North in the Myrtle Beach vicinity of Horry County?

A Yes, ma'am.

Q If you recall, what brought you to that location? What was the call?

A As Officer Harlow -- I heard it come over the radio with the severity of the call. I was in the area, so I responded. Due to shots being fired, I responded.

Q When you got to the location, were there other officers already on scene?

A Yes, ma'am.

Q If you recall, do you know who was on scene?

A When I first pulled up, I could see Officer Mackin was there, and on my computer screen I could see Officer Shane Owens should have been on scene as well.

Q So when you first pulled up --let me use State's Exhibit 1. Is this an accurate reflection of the scene?

A Yes, ma'am.

Q Where did you pull up when you got to the scene?

A Wherever I pulled up, I pulled right along here, which would have been southeast of the location.

Q Once you pulled up onto the scene, what did you do?

A I immediately got out of my vehicle, approached Officer Mackin and asked him what he needed as far as assistance. There was still numerous people on scene who were very irate and aggravated. I began to calm them down and back them away to attempt to preserve the

crime scene.

Q What was Officer Mackin doing when you saw him?

A He was standing there with a black male with dreads with cuffs on at the back of the four-door burgundy sedan.

Q I'm showing you State's Exhibit 2. Does this depict where you saw Officer Mackin?

A Yes, ma'am. He would have been at the trunk of the vehicle.

Q The red Crown Victoria?

A Yes.

Q And you said you saw a black male with dreadlocks in custody?

A Yes, ma'am.

Q And I recognize it is three years, did you have much interaction with the male at that time?

A I did not, no, ma'am.

Q Are you able to recognize him in the courtroom?

A I couldn't say if that is him or not because of the time plus the drastic change in hair.

Q So once you ascertained -- did Officer Mackin need your help at that point?

A He was asking to back people away, as I started to do as well, and that is the only assistance he needed right then.

Q When you were doing that, did you have a view down the alley?

A Yes, ma'am.

Q That runs behind the building?

A Yes, ma'am.

Q Were you able to see anyone down that alley?

A Yes. Past a couple air conditioning units there was a black male laying on the ground with a white female over him, along with Officer Owens as well.

Q From what you were able to see, were there other people in that alley?

A I don't recall. That was the main thing. I just wanted to keep an eye on Officer Owens and make sure he was safe.

Q As you were doing that -- and we understand the scene was somewhat chaotic -- are you doing the best you can at that point to keep the scene secure?

A Yes, ma'am.

Q While looking down the alley, did you see anyone picking up any items?

A No, ma'am, no one -- nothing was picked up. Everything was -- all the attention was to the victim.

Q Did you later come to find out there was a shotgun in the alley?

A Yes, ma'am.
Q Did anyone that you saw ever approach that shotgun?
A No, ma'am.
Q And no one picked up anything from the ground of that alley?
A No, ma'am.
Q At some point, a little later in the day, were you tasked with helping Officer Harlow search the other side of the fence?
A Yes, ma'am, I was.
Q And you heard him testify at -- tell us from your perspective what you saw during the search, or what you did during the search.
A I spoke with the neighbor who earlier testified that the bullet had gone through her door -- her wall. She told me at that time that she thought that something --

MR. BARR: Objection to hearsay.

MS. WALTER: It goes to course of action.

THE COURT: It isn't offered for the truth of the matter asserted but to establish his state of mind and why he reacted, what he did, so I'll allow it.

Q (MS. WALTER) Ms. Cantey told you?
A She told me that she believed that something had

been thrown over the fence to the west of the location that the victim was found. At that time I informed the commanding officer on scene, who in turn informed Officer Harlow. Once he proceeded to get his partner, Roscoe, out of his vehicle, I was able to -- because of the fact he has to pay so much attention to Roscoe, another officer is to stay with them for their safety. I stayed with him the entire time as he did the grid search towards the back of the building, which is towards the north of it. At that time, an item was located.

Q So, again, you heard him testify that the whole area on the west side of the fence was searched?

A Yes, ma'am.

Q After Roscoe found something, what did you do with respect to that item?

A Once Roscoe alerted to it, I stayed at that location so Roscoe was able to be put back into the vehicle.

Q I'm showing you what is admitted as 21 and 22.

A Yes, ma'am, that is the item that was located.

Q And other than the evidence marker, same condition as --

A Yes, ma'am. It was not touched by Officer Harlow, the dog or myself.

Q You never touched these items?
A No, ma'am.
Q At what point did you stop standing guard over the items?
A Once CSI got there, placed those markers and photographs depicted.
Q CSI, Crime Scene Unit?
A Crime Scene, yes, ma'am.
Q After the marker was placed and photographs taken, did you have anything to do with that particular item?
A I assisted with obtaining that item and carrying it back to the crime scene van just to assist.
Q Crime Scene Unit person who will be testifying shortly, would you say she was fairly busy that day?
A Yes, ma'am.
Q Were you simply helping her to transport evidence?
A Yes. That is the only evidence, just so that it wouldn't have been to left there for her to come back to it.
Q Did you see her place the marker and photograph it?
A Yes, ma'am.
Q And then from there you took it to the Crime

Scene van or vehicle and secured it in there, or she did?

A Yes, ma'am.

Q Did that essentially conclude your involvement in this case?

A Yes, ma'am.

MS. WALTER: Nothing further. Answer any questions Mr. Barr has.

A Yes, ma'am.

CROSS-EXAMINATION

BY MR. BARR:

Q What is your job title?

A At that time I was a patrol officer.

Q Patrol officer. And being a patrol officer, did that also include investigative responsibilities at crime scenes?

A Yes, sir.

Q Did you discharge that function in regards to this crime scene? Were you doing any investigation?

A Of course. That is part of being an officer.

Q So you did some investigation?

A Yes, sir. Speaking with the witness, Ms. Cantey, who spoke earlier and putting that together with the officers that needed to be -- as far as Officer Harlow, the K-9 officer, so the best assets can be utilized.

Q Did you assist anyone in locating what would otherwise be -- or could turn out to be physical or forensic evidence?

A As I just testified, I assisted Officer Harlow in finding the substance that was located at the back of the house.

Q Did you put any of the little tabs in place where the evidence is?

A No, sir. No, sir. That is not my job.

Q Not your job?

A No, sir.

Q Did you cover the entire crime scene?

A What do you mean "cover," sir?

Q Did you inspect the crime scene looking for evidence?

A No, I did not inspect the entire crime scene. No, sir. Again, that is not my job.

Q So you just specifically dealt with the K-9 officer and what he felt he had located?

A Yes, sir.

Q You never had occasion to -- you never had an I indication to go -- the alleyway which extends to the front of the building where the incident took place, you know -- you are familiar with that?

A Yes, sir.

Q And of course at the very end of the alleyway which would be going west, was where the red Crown Victoria was; would you agree?

A At the end of the alley.

Q Parked in the parking lot?

A Yes, sir. Yes, sir.

Q And then there was a truck parked close beside it, but just a little bit further pointing north?

A A little closer to the building, yes, sir.

Q If you go down the alleyway to approximately where the tape was, there is another alleyway that goes southeast?

A Yes, sir.

Q And that alleyway that goes southeast goes directly up to the apartment where Michael Rogers lived?

A Correct.

Q Did you ever have an occasion to go in that area?

A No, I did not go up the stairs or in that alleyway, no, sir, in the alleyway.

Q So from where Mr. Rogers' apartment was, which is supposedly where the -- were you aware about the scuffle in the apartment?

A Not in the apartment, no, sir.

Q You weren't aware of that?

A No, sir.

Q All right. Well....

MR. BARR: Thank you. Nothing further.

MS. WALTER: Nothing further, Your Honor.

THE COURT: You may step down.

MS. WALTER: I ask that he be excused from the subpoena.

THE COURT: Any objection?

MR. BARR: No, sir.

THE COURT: You are released from the subpoena.

MS. WALTER: State calls Kelly Matteson.

(KELLY MATTESON, having been duly sworn, testified as follows:)

THE CLERK: State your full name and spell your first and last name for the Court.

THE WITNESS: Kelly Lynn Matteson, K-E-L-L-Y, M-A-T-T-E-S-O-N.

DIRECT-EXAMINATION

BY MS. WALTER:

Q Good afternoon, Ms. Matteson.

A Good afternoon.

Q Where do you work now?

A Self-employed. I work in Cleveland, Ohio.

Q Where did you work prior to that?

A Myrtle Beach Police Department.

Q How long were you with the police department?
A Approximately 12 years.
Q When did you leave?
A The end of December 2015.
Q So you were working on January 27th, 2014 with the police department?
A Yes.
Q What was your position there?
A I was street crimes officer.
Q What does that mean?
A I would respond to crime scenes to document, preserve evidence, process.
Q On this particular day, directing your attention to around 4:30, were you on duty yet?
A No, ma'am.
Q Was there another crime scene officer on duty?
A Yes.
Q Who was that?
A Michelle McSpadden.
Q At some point, did you assist Officer McSpadden with the crime scene duties?
A Yes, ma'am.
Q Can you tell us what you did?
A I arrived on scene. I met with Officer McSpadden. She briefed me of the situation. I

assisted her with some measurements, a search of an apartment. That is what I did at the scene.

Q What are some of the duties -- I'll get into that with her. You've heard Officers Harlow and Ammons testify about items that were found on the west side of the fence?

A Yes, sir.

Q At some point, did you have anything to do with those items?

A After I left the scene back in the laboratory, yes.

Q What did you do with those items?

A When we arrived back at the laboratory, I weighed and inventoried the narcotics.

Q So when you say you weighed and inventoried, could you just describe -- let me show you State's Exhibit 22. Do you recognize -- maybe not in the situation it is now, but do you recognize the item in State's 22?

A Yes.

Q What do you recognize it to be?

A A baggy containing green leafy substance and a rock substance, white in color.

Q Is that the baggy that you opened and inventoried back at the police department?

A Yes, ma'am.

Q So when you -- can you describe the process of what you do? So you have this balled up piece of plastic, what do you do and how do you package it?

A I open it up. There is two separate baggies. I put the baggies out onto a table. I put on gloves. I took a sample of the marijuana. I put into a field test kit, which tested positive for THC, and then I also went and took a sample of the substance in the other bag and put it into a field test kit, which tested positive for cocaine.

Q I recognize that you didn't -- you are not part of the chain of custody to get the items to SLED, but did you -- after you did that, analyzed parts and got a weight, did you repackage them in any way?

A No, I did not.

Q Did someone else repackage them?

A Yes.

Q Who would have repackaged them?

A Michelle McSpadden.

Q Once you inventoried them, what did you do with them?

A We were working together at the lab at the time. We were multi-tasking on several different things. So when we completed our tasks, all of the evidence was

collected, secured and placed into a crime scene evidence room.

Q To eventually be processed by evidence staff?

A At a later date she put it into a SLED package, which was sent off to SLED.

Q SLED being South Carolina Law Enforcement Division?

A Yes, ma'am.

Q You didn't have any part in that?

A No, ma'am.

Q So your essential part of this case is opening the item depicted in State's 22, sampling the two different substances and inventorying them?

A Correct.

Q If you recall, and understanding it's been some time, do you recall the inventory you took? You told us a green leafy substance and off-white rock substance; do you recall how the off-white rock substance was packaged or how much of it there was?

A Yes, ma'am. There was approximately 11 separate small baggies. The baggies were tied into a knot and the substance was approximately the same weight in each of the bags, which is very common when you distribute narcotics.

Q So each of the 11 rocks was separately tied in a

little bag?

A That would be correct.

MS. WALTER: Nothing further.

CROSS-EXAMINATION

BY MR. BARR:

Q Did you do a collective weight on the items?

A Yes, sir.

Q 2.4 grams?

A I believe that is correct, yes.

Q Now, when it was repackaged by Ms. McSpadden, you were present?

A I want to make myself clear. When I weighed and tested the substance, it was altogether. Not everything needed to be exactly repackaged. It was placed into crime scene evidence room, and then at a later date she took it out and put it in a SLED BEST packet.

Q You analyzed it?

A Yes, sir.

Q And you left it out to be repackaged by McSpadden?

A No, sir.

Q Tell me how it was.

A Okay. So I took the substance out. We're in the laboratory together. I tested it, and then I left it

in the packaging that it was in, because we would take all of the evidence at the same time, walk it into the laboratory and -- sorry, excuse me, into the crime scene evidence room and secure it. We both were present. We were both in the room at the same time. We never left the evidence unattended.

MR. BARR: Thank you, ma'am.

A Thank you.

THE COURT: All right. Anything further?

MS. WALTER: No, Your Honor, I would ask that she be excused from her subpoena.

MR. BARR: I don't have an objection.

THE COURT: You are excused and released from your subpoena. Thank you.

MS. WALTER: I didn't know if you wanted to take a break or?

THE COURT: Do you have something relatively short? Let's take a break then now.

(The jury exits at 3:17 p.m., and the following is heard out of the presence of the jury.)

THE COURT: All right. We have everyone here. We're ready.

(The jury enters at 3:31 p.m., and the following is heard in the presence of the jury.)

THE COURT: We have everyone back in the

courtroom. Call your witness.

MS. WALTER: State calls Michelle McSpadden.

(MICHELLE McSPADDEN, having been duly sworn, testified as follows:)

THE CLERK: State your full name and spell your first and last name.

THE WITNESS: M-I-C-H-E-L-L-E, M-C-S-P-A-D-D-E-N.

DIRECT-EXAMINATION

BY MS. WALTER:

Q You have a computer open now. What are you looking at?

A I have my report from this incident just for refreshing my memory.

Q So if you kind of close the lid on your computer, when you need your recollection refreshed, let me know and we'll deal with it then.

A Okay.

Q Where are you currently employed?

A Horry County Coroner's Office.

Q How long have you been with them?

A Since September of 2014.

Q Where did you work before that?

A Myrtle Beach Police Department.

Q I'm going to ask you to slow down so the jury can hear you. How long were you with the Myrtle Beach

Police Department?

A For 14 years.

Q So safe to say you were working on January 27, 2014?

A I was.

Q What was your position at that time?

A Crime scene investigator.

Q What does a crime scene investigator do, in general?

A Our job is to respond to a scene where there is physical evidence, any kind of evidence, process the evidence, collect it, some analysis, depending what it is.

Q Do you have any type of special education or training that helps you with your job?

A Sure. I have lots of specialized training from evidence just collection to fingerprinting, fingerprinting exams, blood spatter analysis.

Q Did you respond to a scene at [redacted] 37th Avenue North in the Myrtle Beach section of Horry County in January 27, 2014?

A I did.

Q And that was in your capacity as a crime scene officer?

A Yes.

Q Can you tell us what you did when you first got there?

A Okay. One of the first jobs would have been to start marking evidence. The scene would have been secured at that point by the other officers already there. So start marking evidence and photographing the scene as we found it.

Q How do you know where there is evidence?

A In some cases it is pointed out by officers. For instance, Officer Harlow testified about standing over a rifle, so that would have been pointed out to me. In other cases they would have pointed me down the alleyway and say the scene happened down there, and I would have searched it myself and locate anything that didn't seem to belong there.

Q Once you -- and I just want to try to get through your procedure. So do you walk around the whole scene first and then come up with a plan of attack, or just start putting markers down?

A You kind of make a plan as you go. It is not -- there are a lot of things to be done at a scene so you are pulled in a lot of different directions, but you kind of move on the fly.

Q When you say you put markers down, that's those little tents that we've been seeing all over the place?

A Yes, the little yellow tents with numbers on them.

Q You are the one that puts them down?

A I'm the one that puts them down.

Q Excellent. And another thing that you do would be to take pictures of the crime scene?

A Yes.

Q And in this particular instance, could you tell me in general descriptions what areas you consider the crime scene that you processed or took photos or anything?

A Sure. The area in front of [redacted] 37th North, it was a parking lot, there was a couple of vehicles. The alleyway that leads down the west side of that building. There was an apartment that was considered part of the crime scene, the victim's apartment. There was also another crime scene investigator who helped me with Ms. Cantey's apartment, and then pointed out to me by Officers Harlow and Ammons the area on the other side of the fence where there was some evidence located.

Q Do you, as part of your job, create a crime scene diagram?

A I did.

Q I'm going to show you -- I really need to start

wearing my glasses -- I think that's 23.

MS. WALTER: Your Honor, these have all been shown to Mr. Barr and provided to him prior to trial.

Q I'm showing you what is marked as State's Exhibit 23; do you recognize this?

A I do. It is a diagram that I completed that shows the location of the evidence where we put the little tents.

Q Okay. And you created this?

A I did.

Q So it is a fair and accurate representation of the scene, as far as you know?

A It is missing one item that just looks like it didn't get printed off on the top, Item 2.

Q That is the drugs?

A That would be the drugs, yes.

MS. WALTER: Your Honor, I would ask that this be admitted.

THE COURT: Mr. Barr?

MR. BARR: Judge, I'm going to object to it going into evidence. I don't have a problem using it to illustrate, but it is not drawn to scale, and certainly not accurate.

THE COURT: Let's see how she testifies. I'm concerned as to what else may be on there. Let me

hear you describe it, okay. Let's hear her testimony, okay. She can certainly reference it.

MS. WALTER: Okay. Okay. So is it acceptable to publish to the jury for now?

THE COURT: Yes.

Q (MS. WALTER) Just to orient us, this is [redacted] 37th Avenue North?

A Yes.

Q So then 37th Avenue runs along the west to east on the bottom portion of the crime scene?

A Yes.

Q And then the legend up at the top, those numbers correspond to the numbers on the diagram?

A Yes.

Q Are those numbers also -- that corresponds to the little yellow tents?

A They, yes.

Q Perfect.

THE COURT: All right. I'm going to overrule the objection, and I'll allow you to put it into evidence.

MS. WALTER: Thank you, Your Honor.

(State's Exhibit 23 admitted.)

THE COURT: It is basically nothing more than a chart showing where the evidence markers are?

MS. WALTER: Correct.

THE COURT: Okay. I'll admit it.

MS. WALTER: It's just rather than all the different pictures.

THE COURT: Okay.

Q (MS. WALTER) So you mentioned the AR -- this is previously admitted Exhibit 4; is this the AR that Officer Harlow pointed out?

A It is.

Q And you collected that?

A I did.

Q I'm showing you what is admitted as State's 29; do you recognize that?

A Yes.

Q And is that --

A That is the rifle that we found -- or was pointed out to me at the back of the Crown Victoria in the parking lot.

Q And Exhibit 29A?

A Yes.

Q What is Exhibit 29A?

A The magazine for that weapon.

Q When you recovered Exhibit 29 and 29A, can you describe their condition as to whether or not they were loaded with ammunition?

A Okay. The weapon was on the ground with the

magazine laying next to it. The weapon was unloaded. I believe there were rounds in the magazine.

Q Is it standard practice when you recover a weapon to unload the ammunition, or is that required for Property and Evidence --

A Right. Yes. We would have unloaded it first to inventory it. Once we got back to the lab, we would have unloaded the magazine to inventory the number of rounds that were in it. It's not necessarily standard to unload it at the scene.

Q I'm sorry, I didn't mean at the scene, but at some point you unloaded it?

A Yes.

Q I'm showing you what is marked as State's Exhibit 40.

A These appear to be the ammunition that were removed from the magazine once we got back to the lab.

MS. WALTER: Your Honor, I ask that Exhibit 40 be admitted and published.

MR. BARR: No objection.

THE COURT: Without objection.

(State's Exhibit 40 admitted.)

Q (MS. WALTER) If you need to refer to your notes that's fine, but do you know approximately how many rounds are in Exhibit 40?

A I believe there was 16. If you don't mind, I'll check.

(A brief pause in the proceedings.)

A Sorry, just scrolling through. Yes, 16 unfired rounds.

Q Then State's 23, so if we go to the legend, No. 6, the rifle; No. 7, the magazine. You are showing them on the left corner. Ford Crown Victoria, is that accurate (indicates)?

A Yes.

Q So that is where they were recovered from?

A Yes.

Q And we heard Officer Harlow testify, and you've testified, that he pointed out some evidence. So showing you previously admitted Exhibits 10, 11, 12 and 13; did you take these photographs?

A I did.

Q And so are these a fair and accurate representation of what you saw?

A They are.

Q And did you touch the evidence in any way prior to photographing them?

A No. It would have been photographed, marked and collected.

MS. WALTER: Court's indulgence. Your Honor, I'm

going to do this in front of the jury because this box is sealed. We're going to open this.

MR. BARR: Uh-huh.

MS. WALTER: This is marked as State's Exhibit No. 47, but we need to open it because there is individual items inside.

Q (MS. WALTER) Now, the tags on the outside; do you recognize those tags?

A They are marked as ammunition.

Q Where would they come from?

A They were generated by Myrtle Beach Police Department to -- as a way to inventory evidence that is stored in Property and Evidence.

Q And then I'm going to show you -- we'll mark this as we go.

(State's 47A, 47B and 47C marked.)

Q 47B; do you recognize that?

A It is marked as Evidence Marker No. 5, fired shell casing from a rifle.

Q Similar to the ones that you found at the scene?

A Yes.

Q And the same with 47C and 47B.

A These are the shell casings recovered by the side of trashcans.

Q Is there anything on those packages that would

tell you where they correspond to with the crime scene?

A Yes. In the description area I have put that this one was covered, for example, for Marker 3, Tent No. 3. 3, 4 and 5 is marked on the box, which one came from where.

Q So 47B is Marker 3; 47C, Marker 4, and 47B (sic) is Marker 5?

A Yes.

Q After collecting the evidence that was at that very first part of the crime scene, where did you go next? Would you have worked your way down the alley?

A Yes.

Q And I kind of used both of these. So we see on your crime scene sketch this kind of almost like a little breezeway between the buildings?

A Yes.

Q Where does that correspond to on here?

A It is covered, but it's right along here.

Q So you're indicating on the photo a little break in the two buildings just above where it says [redacted] 37th Avenue North?

A Yes.

Q And would you have taken -- put down little yellow tents taken overall photographs?

A Yes.

Q And as you are doing that, are you relying just on what other officers are telling you, or are you doing your own scan?

A I would have done my own scan as I moved through that scene, and I spent quite a bit of time on that scene.

Q Do you know how long you spent at that scene?

A I can tell you, if you give me a moment.

(A brief pause in the proceedings.)

A Took the first photographs at about 5:40, 5:50 p.m., and we worked that alleyway until about 8:15 p.m., so a little over two hours.

Q (MS. WALTER) Had you received any type of briefing prior to beginning kind of your survey of the scene?

A Yes. I spoke to the -- I think she was a lieutenant at the time -- Lieutenant Brock, who was the on-scene ranking officer, who briefed me just about the general layout.

Q Does that help you form how you will go about looking for evidence?

A Sure. I certainly don't want to destroy anything as I move, so if there is a particular place that I need to pay special attention to, I move slower through those areas.

Q Had you been told that there had been a shooting?
A Yes.
Q So does that inform what type of evidence you are looking for?
A Sure. We're look for weapons, we're looking for ammunition, yes.
Q Do you look for different types of ammunition dependent on what type of weapon either was involved or you find?
A Sure.
Q So in this case you had already recovered -- or at some point you recovered the AR, so what type of evidence does that cause you to look for?
A We would be looking for shell casings and any fired rounds. The AR rounds are small in diameter, so we look for anything that is -- a small diameter round.
Q Do you look for possible places where a fired round could have struck?
A Sure.
Q Did you find anything in this case?
A A couple of them. Ms. Cantey already testified about the hole in the wall in her apartment, so there was that. And there was also in that breezeway a chip in the brick that could have been from an ammunition strike, we can't say that for sure, but appeared to be

fresh damage.

Q And I'm going to show you what is admitted as State's Exhibit 28.

A Yes.

Q Is that consistent with the AR round?

A Yes.

Q And that is the bullet, as far as you know, that is recovered -- the projectile that was recovered from Ms. Cantey's apartment?

A Ms. Cantey's apartment, correct.

Q So as you work your way down the alley, just kind of tell us what else you see. You mentioned a strike mark. What else do you see of note in the alley?

A We located an unfired rifle round. It was marked, I believe, No. 13. There was a shotgun that was found near the first of the two buildings, the front building at [redacted] 37th North. Beyond the shotgun there was a fairly substantial area that was red in the dirt that appeared consistent with a pool of blood. Near there we found two unfired shotgun rounds and a hat that had some blood stains on it, and then the previously mentioned unfired rifle round and the defect in the wall.

Q Did you find any unfired shotgun shells?

A Two of them, yes.

Q And I'm showing you what is admitted as State's Exhibit 30; do you recognize that?

A The shotgun that was found in the alleyway.

Q And as you do -- at some point during your investigation, did you try to determine whether the shotgun was loaded or unloaded at the time it was recovered?

A Unloaded.

Q No unfired bullets in there?

A Correct.

Q Or shotgun shells. Were there any spent shotgun shells?

A None.

Q Shotgun was completely empty?

A It was.

Q And, again, as you went down the alley, you took pictures prior to collecting them, you think?

A I did.

MS. WALTER: I believe those are admitted, Exhibit 7 and 16?

THE COURT: Is that correct, Ms. Dahl?

COURT REPORTER: That is correct.

MS. WALTER: Thank you.

Q (MS. WALTER) So I'm showing you Exhibit 7. Can you just describe for the jury -- did you take this

picture?

A I did take a picture.

Q And what is it meant to show?

A It is the alleyway leading -- we're standing facing Ms. Cantey's apartment away from those two vehicles -- they would have been to our back -- looking down the alleyway.

Q What items of evidence are marked in this photograph?

A Item 13, this was an unfired rifle round. Item 9, this was the pool of blood. 10 is an unfired shotgun round, and I could see 12 is a hat that has blood stains, and this would be the shotgun.

Q So when you arrived on scene, that is where the shotgun was in relation to the pool of blood?

A Correct. The other items in that photograph are remnants of the medical people who were treating the victim. So you will see like a collar, C-collar, but that was not evidence.

Q Okay.

MS. WALTER: Your Honor, if I may approach.

Q I'm showing State's Exhibit 20 and 36,

A Yes. This was the unfired rifle round from Marker 13, and it's still packaged the way we would have packaged it at the crime scene.

Q So did you do that packaging?
A Yes.
Q And what does Exhibit 20 depict?
A The unfired rifle round at Marker No. 13.
Q So, essentially, what is there, is in here (indicates).
A Yes.
MS. WALTER: Your Honor, I would move to admit items -- Exhibits 20 and 36 and publish them?
MR. BARR: Without objection.
THE COURT: Without objection.
(State's Exhibits 20 and 36 admitted and published to the jury.)
Q (MS. WALTER) So going back to your -- going back to your crime scene diagram, 13 would be the unfired cartridge we just saw?
A Yes.
Q You talked about a possible bullet strike in the wall.
MS. WALTER: I'm approaching with Exhibit 17, Your Honor.
Q If you can, look at this before we show it to the jury and just tell me if you recognize that picture?
A I do. I took the photograph.
Q And what is that meant to depict?

A It is meant to depict the defect in a wall that appeared to be fresh.

MS. WALTER: Your Honor, I ask that Exhibit 17 be admitted and published?

MR. BARR: Yes, sir, no objection.

THE COURT: Without objection.

(State's Exhibit 17 admitted.)

Q (MS. WALTER) As we're looking at Exhibit 14 -- I mean Marker No. 14 -- I'll show the jury first.

A Sure.

Q Just to orient us, what is in this direction?

A Ms. Cantey's apartment would be in this direction, so this would be 38th Avenue North area. This is that breezeway we talked about between the buildings, and then behind us would have been the parking lot.

Q There appears to be some sort of substance or stain on the concrete there?

A It appears to be blood, but I can't say.

Q It wasn't tested or marked?

A No.

Q And this scene also shows Marker No. 11?

A Marker 11 was an unfired shotgun shell, kind of in the breezeway.

Q I'm showing you previously admitted 34 and 35.

A These were the shotgun shells recovered from Markers 10 and 11.

Q So the shotgun shells that you just spoke of?

A Yes.

Q And you testified also that you collected the items that Item No. 2 -- or Marker No. 2 that Officer Ammons and Harlow testified to?

A Correct.

Q And we've seen those. You mentioned there was an apartment that was considered part of the crime scene. Did you take photos there as well?

A I did.

Q I just have two there.

MR. BARR: I've seen them.

MS. WALTER: Your honor, I'm referring to Exhibits 8 and 9.

A These are photographs that I took in the apartment.

Q So I'm showing you Exhibit 8; what does that depict?

A Living room area of the amendment.

Q And Exhibit 9?

A And the kitchen area.

MS. WALTER: I move to admit these and publish to the jury.

MR. BARR: No objection.

THE COURT: Without objection, 8 and 9.

(State's Exhibits 8 and 9 admitted.)

Q (MS. WALTER) I believe you said there was a different crime scene officer that went into Ms. Cantey's apartment?

A Yes.

Q Did that -- we have heard testimony in addition from Officer Ammons and Officer Harlow and also Ms. Matteson about the drugs that were recovered at Marker No. 2?

A Yes.

Q Can you describe for me what happens when you recover something that is believed to be a controlled substance?

A Okay. We would have weighed and inventoried all of the items once we got them back to the lab. So let's back up. You do not leave a controlled substance the same way you leave a firearm, like Officer Harlow testified to. So there would have been someone there present with it until we could have locked it in one of the vehicles. That was done, it was locked in my vehicle until we got back to the crime scene lab.

At that point, all of the evidence was brought in. Officer Matteson talked about having weighed and

inventoried that evidence, which she did while I was there. We were working side-by-side in the lab. After that is complete, it is locked into a secured evidence storage area, the same with all other evidence, though there is a safe in that storage area that is just for drugs. So the drugs go into a safe.

At some point later, they are tested. Officer Matteson would have done a field test, a presumptive test in the lab, but at some point later there is a confirmation test. Marijuana testing is done at Myrtle Beach Police Department, other drugs are not tested at Myrtle Beach Police Department. We just don't have the training or technology to be able to do that; that is done by the State Law Division by their chemists.

Q What we heard Ms. Matteson testify to, the off-white rock substance, 11 rocks, is that something sent to SLED?

A It is.

Q How would the packaging change from when it was found on the ground to when it got submitted to SLED?

A Once it -- once it was found on the ground, there were little small baggies. The rocks were packaged into little small baggies that were tied with a knot, like a corner of a Ziploc bag is kind of what they

looked like. And then once we -- when I packaged them to send off to SLED, there is an envelope they go in. They would have been heat sealed into plastic and then placed into an envelope with some paperwork that lets SLED know what they need to do with them.

Q We heard talk about a SLED BEST kit; can you describe what that is?

A That is the BEST kit. So it's an envelope with some paperwork that says the details of the case and what kind of testing needs to be done, and those 11 baggies with the rock-like substance would have been heat sealed and placed into that envelope. That's the BEST packet.

Q The BEST packet, is that assigned an unique number, almost like a control number?

A It is, yes. Each packet has its own number.

Q So that number will never be duplicated?

A As far as I know, that's correct, yeah.

Q And that is how you can track it from Myrtle Beach police custody through SLED and back?

A Correct. Yes.

Q I'm approaching with Exhibits 31, 32 and 33. If you could look at 31, 32 and 33; do you recognize that?

A Yes.

Q Starting first with State's Exhibit 31, what do

you recognize that to be?

A The baggies recovered from the fence, so Item No. 2.

Q So those are the baggies that the drugs originally --

A That they originally came in, yes.

Q The packaging it is in now, manila envelope, where does that come from?

A Once we got back to the lab, and Officer Matteson un-packaged, unwrapped things, she would have placed them into this envelope.

Q And what about Exhibit 32?

A That SLED BEST packet has this tear-off tab with that control number we talked about, that is what is inside this.

Q So you just pulled out another manila envelope that has marking on it; do you recognize that?

A Officer Matteson's markings, and this is where she originally sealed the white rock-like substance before it was placed into the SLED packet.

Q And the second item you took out was the plastic tab?

A Yes.

Q So now turning your attention to Exhibit 33, what do you recognize Exhibit 33 to be?

A This is the SLED BEST packet, the SLED packet.

MS. WALTER: Your Honor, I would ask that these exhibits be admitted and published.

MR. BARR: Subject to our previous objection.

THE COURT: All right. Very well. It is admitted.

MS. WALTER: So that was 31, 32 and 33.

(State's Exhibits 31, 32 and 33 admitted.)

Q (MS. WALTER) As part of your duties as crime scene officer, did you ever have any contact with the defendant?

A I did. Before I responded to the scene, the defendant was taken into custody by Officer Mackin and transported from the scene to the police department. I had contact with him once he was at the police department.

Q Do you see him in court today?

A I think so. I haven't seen the defendant in three years, but I would say that the man seated at the front table would be the defendant.

Q Is there anything markedly different about his appearance when you saw him the day of the incident?

A I don't recall.

Q So when you saw him when he was in custody, did you collect any evidence from him?

A I did, a couple of things. A gunshot residue kit, I would have done that on his hands, and then I would have collected his clothing after he changed into clothing provided by the detention center.

Q When you collected his clothing, did you also take photographs of the clothing?

A Not at the time. That was done when we got back to the lab.

Q But, eventually, you took the photographs?

A Yes.

Q So I'm showing you previously admitted 42, 44, 45 and 46; is that the clothing that you recovered from the defendant?

A It is, yes.

Q You said you did a gunshot residue test for the defendant; can you describe what you do for that?

A The gunshot residue test has little sticky pads and they are -- I would stick them all over the back side of the right hand. There would be another sticky pad that would be stuck on the front side of the right hand. We would do one for the back of the left, and one for the front of the left hand as well. They are processed by SLED. They are looking for barium antimony and lead, all three of those things are present in gunshot residue.

Q So a different pad for each side of both hands, so four different pads?

A Correct.

Q Exhibit 41. I'm approaching with what has been marked as State's 41, which we need to open. Do you recognize one of the labels?

A Yes.

(State's Exhibits 41A and 41B marked.)

Q So A and B. And you have selected what I have now marked as Exhibit 41A; do you recognize that?

A I do, it is the gunshot residue test kit for the defendant.

Q How do you recognize it as that? Do you mark anything on it?

A His name is marked at the top, my name as the collecting officer, the agency, my badge number and the case number for this incident.

MS. WALTER: Your Honor, I move to admit Exhibit 41A.

MR. BARR: Judge, does that include findings?

MS. WALTER: No.

MR. BARR: Just the kit?

MS. WALTER: This is the kit.

MR. BARR. No objection.

THE COURT: All right.

(State's Exhibit 41A admitted.)

Q (MS. WALTER) Once a gunshot residue kit is collected, what do you do with it?

A Simply packaged by us and sent to SLED.

Q Does it go through Property and Evidence?

A All evidence goes through Property and Evidence.

Q So pretty much everything that we've spoken of so far, and everything we yet have to speak of, every evidence that you collect goes through Property and Evidence?

A It does.

Q Is it their responsibility then if things are to be sent to SLED for testing to transport it to SLED?

A They do that, yes.

Q Did you assist Ms. Matteson with searching the defendant's car pursuant to a search warrant?

A Yes.

Q Where was that done?

A It was down in the Crime Scene lab. We have a garage door we can roll up, and our lab is big enough for a car.

Q Did you photograph that process as well?

A Yes.

Q Approaching with Exhibits 14 and 15; do you recognize those items?

A I do.
Q Starting first with Exhibit 14, what does it depict?
A This is the trunk of the red Crown Victoria, and it is opened.
Q Do you recall how you opened the trunk?
A I don't.
Q And was there anything in the trunk of interest to you?
A There was a case for a rifle.
Q And now I'm showing you State's 15. Is this the case you found in the trunk?
A It is the case.
Q Was there anything else in the case?
A We can see a gun lock, and we can see two more magazines, and then some boxes of ammunition and paperwork for the rifle.

MS. WALTER: Your Honor, I would ask that 14 and 15 be admitted and published, and I don't think Mr. Barr had an objection.

MR. BARR: No, sir.

THE COURT: All right. They are admitted.

(State's Exhibits 14 and 15 admitted.)

Q (MS. WALTER) I'll approach with Exhibits 37, 38 and 39, and I believe Ms. McSpadden will probably have

to look at her notes.
A I will.
Q Do you recognize those exhibits?
A I do.
Q Start first with 37; what do you recognize that to be?
A It is marked as rifle ammunition from the Crown Victoria trunk.
Q So that would have been recovered pursuit to the search we discussed?
A Correct.
Q Is that what would have been shown in the boxes?
A Yes.
Q Do you know how many rounds of ammunition were in those boxes?
A There were three boxes. In the first box there was 20; second box, 11 and then the third box, 20.
Q You also recovered the two magazines in the rifle case?
A Yes.
Q So looking at Exhibit 38; do you recognize that?
A It is marked as the magazine with 25 rounds.
Q And exhibit 39?
A Another magazine with 16 rounds.
Q So over 50 rounds, if you do the math?

A Yes.

MS. WALTER: I ask 37, 38 and 39 be admitted.

MR. BARR: No objection.

THE COURT: Without objection.

(State's Exhibits 37, 38 and 39 admitted.)

Q (MS. WALTER) Do you know whether there was any ballistic evidence or other items of evidence recovered during the autopsy, not by you, but by someone else?

A Yes, there was.

Q Would you have had anything to do with packaging that?

A I would have completed the SLED request to have that analyzed, but the packaging would have been done by Officer Stair.

Q Excellent. We have heard testimony that the shotgun was -- the unfired shotgun shells that were recovered were filled with bird shot. With that information in mind, does that cause you to look for anything in particular in the area where that shotgun was found?

A Sure. Bird shot is small pellets, little metal pellets, so when that round is fired, you don't have a bullet, per se, that comes out the end of that shotgun, but you have multiple little pellets. We didn't find

any of the pellets, nor did we find, for example, holes in the fence where it looked like there would be a strike from that kind of ammunition.

Q When a shotgun is fired, the shotgun shells that we would have seen, and I'm using Exhibit 35, if this is fired, in addition to the pellets you might look for, is there any other part of this round?

A Yes. There is something called "wadding" that would also come out of that. We did not find anything that looks like that either. A lot of time it looks like a cross shape, we did not find that.

Q So you found no evidence of birdshot anywhere in the scene that you looked?

A Did not, nor did we find any fired shotgun rounds.

Q And you didn't see any wadding anywhere?

A Correct.

Q Did you ever look at a van that was across the street from the scene?

A I don't recall looking at a van across the street from the scene.

Q We covered a lot. Does that essentially cover your involvement, or is there anything I forgot to ask you?

A We did search both of the vehicles. That is the

only other thing I have in my notes that we haven't talked about, is the second vehicle.

Q Second vehicle being the victim's truck?

A Yes, inside that vehicle.

Q What did you find inside that vehicle?

A Inside that vehicle there were some more of that white rock-like substance on a dinner plate on the floorboard, a razor, some scales and a cell phone.

Q All in that same area?

A Yes.

Q Was the victim's truck, that was also searched pursuant to a warrant, or consent?

A One of those two, I don't recall which.

Q Does that about cover it?

A That's it.

Q That's a lot that you've done, but that covers it?

A That covers it, I believe.

MS. WALTER: No further questions.

CROSS-EXAMINATION

BY MR. BARR:

Q You said you searched the victim's truck?

A Yes.

Q And you found what?

A Some more of that white rock-like substance that

tested positive for cocaine, about a half a gram.

Q In the victim's truck?

A Yes.

Q And you found scales?

A Yes.

Q As far as your job as crime scene investigator, were you assisted by any other person in conducting the investigation of the crime scene we're talking about here?

A Officer Matteson assisted me with the forensic side.

Q But as far as the person in charge, you were the person in charge?

A Of forensics.

Q So when you say "forensics," tell the ladies and gentlemen of the jury, what do you mean by "forensics"?

A "Forensics" means anything that has to do with the evidence. I would not have done interviews with the witnesses. I wouldn't have, you know -- that would have been separate officers that did that.

Q So when you collect evidence at the crime scene, you also collect evidence, I believe, that sometimes has to be sent to the South Carolina Law Enforcement lab to be examined?

A Yes, sir.

Q And as far as the SLED map, they have various departments that you send evidence to?

A Yes, sir.

Q Depending upon what the evidence is?

A Correct.

Q You send firearms to the Firearms Department, material stuff to Trace, blood to Serology?

A That is handled by SLED itself. We package everything together, and it is divided up once it gets there.

Q And they divide it up. But they divide it up to send it to the right place to have it properly analyzed?

A Sure.

Q All right. Now, would you not agree -- how long have you been doing this?

A I was there for almost 14 years.

Q 14 years. Would you not agree that with respect to the quality of the results that you get from the forensic investigation, it depends on how well the crime scene is preserved?

A I would say that is fair.

Q That is a fair statement, isn't it?

A Sure.

Q In other words, if the crime scene is

contaminated, you get contaminated evidence?

A Sure.

Q And if for some reason the crime scene has been tampered with, and there are things that have been moved, you can't very well find them or tag them or send them to SLED, can you?

A That depends on what it is.

Q Pardon me?

A That depends on what it is.

Q Well -- well, let me give you an example of what we're talking about. You didn't find any shotgun -- spent shotgun shells?

A I did not.

Q Now, you have not looked at any of the witnesses' statements or not interviewed any of the witnesses in this case, have you?

A No, sir.

Q Let me do this first. I'm not trying to say -- here is my problem with your diagram. I'll stand around here. Now -- and this is State's Exhibit No. 23. The highway -- 37th Avenue is here?

A Yes, sir.

Q Out here?

A Yes, sir.

Q This is the Crown Victoria, Antwuan Nelson's

vehicle?
A Yes, sir.
Q This Ford truck is the vehicle of Mr. Rogers?
A Yes, sir.
Q Now, this is a split level duplex here, isn't it?
A I didn't go in the front building, but I believe it is two levels.
Q It is two levels. It's upstairs and downstairs. There is an entranceway here?
A Yes, sir.
Q This is the alleyway we've been hearing about where you have various pieces of evidence, and this is the breezeway in here, No. 11. No. 11 is where -- you found the shotgun shell at No. 11?
A Yes, sir.
Q If you follow the breezeway through here and turn right here, this is the entrance to the split level where Michael Rogers lived; is that right?
A Yes, sir, Michael Rogers lived in that building.
Q He lived in that building?
A Yes, sir.
Q Not on the ground floor, but on the second floor?
A Second floor I believe is correct.
Q Were you responsible for tagging the various items?

A Yes, sir.
Q You tagged Item 11, this is a shotgun shell?
A Yes, sir.
Q What was No. 13?
A Unfired rifle round.
Q Unfired rifle round. What was No. 8?
A Shotgun.
Q The shotgun. And how about 10?
A 10 was unfired shotgun shell.
Q Unfired shotgun shell. And No. 9?
A 9 is the blood.
Q The blood?
A Yes, sir.
Q The blood?
A Yes, sir.
Q How do you know that?
A It was consistent with blood. It is a red liquid on the ground.
Q Red liquid on the ground consistent with blood?
A Yes.
Q Whose blood?
A I don't know that.
Q You don't know?
A Mr. Rogers was transported from the scene prior to my arrival there. I was told that it is where he

was found.

Q Here is my point. Do you know of anyone with the Myrtle Beach Police Department have any idea whose blood that is, do you?

A I don't remember if we had it tested for DNA.

Q No, ma'am, you didn't send it.

A Okay. Then that is where I was told Michael Rogers was found. That is where medical equipment used to treat him was found, so it is believed to be his blood.

Q Is it his blood?

A I would say most likely it is his blood.

Q You don't know. The truth is you don't know if that's the man's blood or not, do you?

A I can't say a hundred percent sure, but all the evidence points to that as his blood.

Q Don't SLED have a serology lab?

A Sure.

Q You send blood -- when blood goes to SLED, it goes to them, they separate it, and unless it involves DNA, they send it to Serology to determine -- all kinds of things they could determine, if you send it, but you all didn't send a sample of what -- you just assumed it was the man's blood, and you started calling it his blood, right?

A But SLED protocol says they do not test victim blood when there is evidence at the scene saying that that is the victim's blood. They didn't do DNA for that purpose.

Q Now, of course, you don't remember the purposes for which DNA or a serology test was done. You determined it -- you send it to prove as evidence to court -- to come to court and prove things, don't you?

A I'm not sure I followed you.

Q I mean, is that the whole purpose, you send all this other stuff -- by the way, I have a box of -- bag of shells here from Mr. Antwuan Nelson's rifle, a whole group of them that you selected, right?

A Yes, sir.

Q And you selected them for a reason, didn't you?

A Sure.

Q Now, as far as you know, is it illegal to possess any of these things?

A No.

Q It is not illegal, is it?

A No.

Q Someone said earlier, well, I can go to K-Mart, and that is probably where all that came from. Of course we're investigating a homicide?

A Yes, sir.

Q Now, as I was saying earlier, if you come up this breezeway and there is a shotgun shell here -- now, of course, I can't remember who it was, but they testified earlier in the day that he had a theory about how the shells got scattered. What is No. 12?

A A hat.

Q Whose hat?

A I don't know.

Q If there is a hat back there, in all likelihood someone was wearing it, right?

A Yes, sir.

Q From a forensic standpoint, it must have some promise of having some evidentiary value, otherwise, you would have it marked on here, right?

A It was in the alleyway in the area of the crime scene.

Q So you sent it to SLED, and in other words you wanted to see who was back there in the alleyway -- he could have been someone who threw some dope over the fence, but you wanted to see who was in the alleyway, so you collected the hat and sent it to the SLED lab and they sent it to their Trace Department, right?

A I have to check to see if we sent it.

Q I can tell you now you all didn't do it. I don't know why you didn't collect it, it is over here. You

are the crime scene investigator. As far as you know, do you have anything from the trace lab with hair samples, DNA or anything like that to identify who may have been wearing the hat?

A No, sir.

Q Does it seem odd to you -- and I know you've investigated a whole lot of these crime scenes -- well, as far as you know -- you knew there was a shotgun found?

A Yes.

Q And you don't know -- or did you know that Mr. Nelson had claimed --

MR. HIXSON: Objection, it's a self-serving statement if he says anything about what Mr. Nelson said. He can't say what Mr. Nelson would say?

THE COURT: Sustain it.

Q (MR. BARR) Do you know that your officer -- was it Barrett that talked with Mr. Nelson in his vehicle?

A I'm not aware of any statements made during interviews. That is not part of my job.

Q Part of your job. So you don't know anything about the facts, it is just forensics?

A My job is the forensics.

Q And, of course, you don't have any knowledge or explanation as to why -- with respect to gun shell No.

9, Shotgun No. 8, right -- isn't it shotgun No. 8?

A Yes, sir.

Q And the gun shell and another gun shell, No. 11, coming back up the alley going towards Mr. Rogers' house?

A 10 and 11 were shotgun shells.

Q Let me ask you one more question. Was this breezeway a part of the crime scene that was corded off?

A I don't recall where the tape was. It wasn't placed by me.

Q Isn't it true that there was tape back here somewhere?

A There was. I would have to refer to my photographs.

Q Well, it is visible -- you can see it on one of these exhibits, I'll show it to you.

A There was -- yes, in the part of the alleyway.

Q In the back part of the alleyway?

A Yes, sir.

Q You could just walk through the alleyway and walk all around and stomp all around in the crime scene. Some officers testified that there was as many as 40 people out here. Anything could have happened to a shotgun shell, spent shotgun shell?

MS. WALTER: Objection, calls for speculation.

THE COURT: I'll allow it.

MS. WALTER: I ask that she be allowed to answer.

THE COURT: Are you going to let her answer it?

Q (MR. BARR) Go ahead.

A So the question was?

Q Anything could have happened to it, we don't know what could have happened to it?

A There was no other forensic evidence saying that a shotgun was fired back there. There were pellets found. I cannot say that there was not a shell that was removed from the scene, but there is no evidence that there was ever -- fired there.

Q You didn't find any evidence?

A Correct.

Q That doesn't mean that none didn't exist; you would agree with that? You said earlier that the results of the examination, the quality of the examination depends on the quality of the forensic scene; you told me that earlier?

A That's true. We spent quite a bit of time at that scene there, and I feel confident we would have seen evidence of a shotgun blast had it been there.

Q Is it the same confidence -- now tell the truth, this blood, someone should have analyzed the blood.

Someone should have taken a sample and analyzed it, shouldn't they?

A Not according to SLED protocols, no.

Q Not according to what?

A SLED protocols.

Q SLED protocol. You mean in this case, where someone claimed to have been shot and killed, you can't even say in the whole case that this is the decedent's blood, and you are saying it is not significant?

A SLED does not do DNA analysis on decedent's -- on victim's blood when there is evidence to say that it does belong to the victim. And in this case we have statements from the officers saying that is where the victim was located. We have the medical personnel, their equipment at the scene. So there is no reason to believe that it is anyone's blood other than the victim.

Q Now, question. We've heard some other testimony concerning theories about whether or not it was actually blood, and I'm satisfied with the answer you have given me. The shotgun that was found -- and of course you don't know anything about the statements of anyone who claims that they may have had a shotgun?

MR. HIXSON: Objection. Once again, you can't disclose contents --

MR. BARR: Judge, I'll rephrase my question.

THE COURT: All right.

Q (MR. BARR) You're familiar with a shotgun?

A Yes, sir.

Q You tagged it and had it sent to SLED?

A I don't recall if it went to SLED. I'll check.

Q Well, it didn't go.

A Okay.

Q It did not go. Do you know why it wasn't sent?

A There was nothing to compare it to from the scene. There was no fired ammunition to compare it to.

Q Do you know whether or not this gun is operable?

A Don't know.

Q Do you know whether or not it has been shot within the last two years?

A Have no way of knowing that.

Q Do you know whether or not it was shot within a day of the day you found it?

A I have no way of knowing that.

Q And you don't know whether the firearm department at SLED could tell you if this gun was shot within 24 hours? You don't know whether they could do that?

A I've never asked them to do that.

Q Do they have a firearms department?

A They do.

Q And said all the other stuff -- someone sent it to the firearm department?
A Yes, sir. The rifle and the fired casings were sent.
Q Was it part of your investigation to determine the owner of the gun?
A No, sir.
Q You just picked it up and turned it over to someone else?
A It would have gone to Property and Evidence for storage.
Q Now, the clothing -- I can't remember the exhibit number -- that belonged to Mr. Nelson, was it sent to SLED?
A It was not.
Q The victim -- generally there is someone from the sheriff's department or police department in attendance when an autopsy is done.
A That's correct. And there was. It was not me.
Q It was not you?
A No, sir.
Q It would have been somebody else?
A Yes, sir.
Q I can't remember who it was. The residue that you used to take the samples from Mr. Nelson --

A Yes, sir.
Q -- did you also -- or were you responsible for conducting the same test with Mr. Rogers?
A That was done at autopsy by the crime scene investigator that attended the autopsy, not done by me.
Q You wouldn't have done that?
A I would not have done that.
Q Of course once you do the test, you don't follow up for the test results?
A Those go our -- the detective, the lead detective. I don't know the results.
Q That is Mr. Clothier? He would be the lead detective?
A I believe so, yes.
Q I have a few more. Back to this crime scene. You don't recall ever seeing -- if I'm not mistaken, there was crime scene tape, yellow tape, encompassing this parking lots in front of the building?
A There was tape in the parking lot when I got there, yes.
Q In the parking lot?
A Yes, sir.
Q And of course not too much happened in the parking lot, did it?
A I can't say that.

Q Do you recall seeing any crime scene tape back here near Mr. Rogers' apartment?

A I don't have photographs, and I don't recall.

Q You said you would have been the one that put it up?

A I did not put up the tape. I only put up the evidence markers. The tape was done by another officer prior to my arrival.

Q So as far as you know, from the time that this incident occurred until whatever, the whole -- everyone -- public had access to all of this area --

MR. HIXSON: That has been asked and answered a couple, two or three times.

THE COURT: I think so.

MR. BARR: Judge, well, you know.

THE COURT: Let's move along. Go ahead. You may continue.

MR. BARR: Is she allowed to answer the last question?

THE COURT: Yes. Yes.

Q (MR. BARR) As far as you know, the public had access to all of this area in here, in this breezeway, in front of the apartment, up the stairs until you got there?

A Until I got there, there were other officers

securing that scene. That should have been secured. There was evidence in the breezeway that was visible, so it should have been secured by other officers. I would not think there would be access to the public.

Q Give me the name of one.

A Shane Owens.

Q How did you know he was there?

A There was testimony earlier that he was with the victim. Officer Mackin testified that he was with the victim, and that is same area of the shotgun shells.

Q Was with the victim? The victim was over here in the alley.

A At the corner of that breezeway and alleyway there, where the pool of blood was.

Q This is where the victim was in the alley. I'm talking about on this end.

A On that end, I don't know.

Q The vehicle, Crown Victoria, you searched the rear of it?

A Yes, sir.

Q Did you ever have the occasion to inspect the ignition center inside of there?

A We would have -- we searched the entire vehicle. We would have noted anything that would have been out of place with the ignition, and I don't have anything

in my notes that says anything was.

Q Of course at the time that you searched the vehicle -- well, you didn't read any of the statements or anything, did you?

A I did not.

Q So you did not check the ignition system?

THE COURT: I think she said she did, Mr. Barr.

MR. BARR: I apologize. I'm so sorry. I just....

A We didn't start the car, but we didn't notice anything out of place.

Q (MR. BARR) We have a man charged with murder --

MS. WALTER: Objection, Your Honor. Move to strike.

THE COURT: You will disregard the last statement.

REDIRECT-EXAMINATION

BY MS. WALTER:

Q There was evidence that the shotgun was fired. You talked about the strike mark on the wall that appeared -- could have been made by the rifle bullet?

A Correct.

Q You said that you looked for strike marks from the pellets that would have come out of the shotgun shell?

A Yes.

Q Is that something that someone could have taken away if the crime scene was chaotic?

A In bird shot, we are talking about dozens and dozens of pellets, so it would have been hard to pick up every single one so they were missing. That strike mark was not consistent with a shotgun, it was consistent with a single solid round. We didn't see multiple patterns on the wall that would be consistent with multiple pellets.

Q And going the other way, I won't try to find a picture because it is getting late, but the strike mark was kind of as you were looking north up the alley, which would have been up the direction of fire from where the victim was shot?

A Correct.

Q If the victim is facing south down the alley, you checked east side of the alley and west side for strike marks from pellets?

A Yes, correct.

Q Did you see any?

A No, we did not see anything.

Q Would someone be able to erase a strike mark on a building or fence?

A No.

Q There also has been some question as to what this pool of red liquid at Marker No. 9 was. If there is testimony that the victim took a shot from a rifle to the neck, fell to the ground and was bleeding profusely from that wound --

MR. BARR: Objection.

THE COURT: Wait a minute, Mr. Barr. You asked her these questions now. It is redirect. You raised it, I'm going to let her answer the question. Wait until she asked it, and then maybe I'll rule with you, but I want to hear what she's asking first. Go ahead.

Q (MS. WALTER) I have a victim who takes a rifle shot to the neck, falls to the ground and is bleeding out as officers and his common-law wife are trying to render aid to him, additionally EMS workers try to render aid; do you think it is a good use of resources to scoop up some of this red liquid and ask SLED to violate their protocol --

MR. BARR: Now, Judge, I just ask that she be sworn if she's going to testify.

THE COURT: Well, she's just asking a question. Let her answer it.

Q (MS. WALTER) Would that be a good use of your resources?

A It would not be a good use of resources; in

addition, it is against SLED protocols to do that. We wouldn't have selected it without knowing that we were not going to have it tested.

MS. WALTER: Thank you. One second.

Q Oh, sorry. You testified that you did encounter the defendant while he was in custody when you did the gunshot residue test?

A Correct.

Q Had he been injured?

A I checked him for injuries. He was not bleeding. I checked his hands, spent probably 10 minutes looking at his hands, there were no on his hands.

Q So no injuries?

A That I saw.

MS. WALTER: Thank you.

THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. BARR

Q You would agree that if the shotgun was fired it didn't necessarily have to have No. 8 bird shots, did it?

A We only found No. 8 bird shot.

Q I understand what you found. You found two No. 8 shots, which we shoot quail with, dove, but that does not necessarily mean that that is the only kind of

shell that that gun can fire, buckshot?

A Certainly not --

Q No. 5, 4?

MS. WALTER: I ask that he allow the witness to answer.

THE COURT: Let her respond, Mr. Barr.

A It is not the only shell that could have been fired. It is the only shell we found.

Q And the only way you would have found a scratch mark is if the gun was shot and hit something -- something physical that you could go look at?

A Well, that is correct, yes.

MR. BARR: Thank you, ma'am.

THE COURT: Thank you. You may step down.

MS. WALTER: I'd ask that she be released.

THE COURT: Any objection?

MR. BARR: No, sir.

THE COURT: You are released. Thank you, ma'am.

MR. HIXSON: Dr. Edward Proctor.

(EDWARD PROCTOR, having been duly sworn, testified as follows:)

WITNESS: I'm Edward Leroy Proctor, Junior.

DIRECT-EXAMINATION

BY MR. HIXSON:

Q Can you tell this jury what you do for a living?

A I'm a medical doctor engaged in the practice of pathology, to include anatomical, clinical and forensic pathology.

Q Just so you are aware we had a discussion, Mr. Barr and I, and you are to testify and are qualified and we've stipulated to your qualifications as it relates to being an expert.

THE COURT: Is that right?

MR. BARR: Yes, it is.

THE COURT: He is qualified in the field of forensic pathology.

MR. HIXSON: That is correct.

THE COURT: Ladies and gentlemen, normally a witness is not allowed to testify as to opinion; however, there is an exception for witnesses who have been qualified as an expert in some field, art or science. In this case, Dr. Proctor has been, by stipulation, admitted as an expert, and he may give an opinion and reason for his opinions.

Q (MR. HIXSON) Even though we jumped ahead, tell the jury -- because they haven't heard you testify before a little bit about what you do, how often you do it?

A I'm a forensic pathologist. Forensic pathologist is engaged in the medicolegal investigation of a death.

I work at the request of the coroner's office and contacted to do a forensic evaluation which includes an external exam, an anatomical dissection taken of specimens, taken specimens for toxicology, getting all of the information together, and based upon my findings coming up with a cause of death.

Q And you have testified in South Carolina?

A Many, many times, yes, sir.

Q So did you have an opportunity to perform a session, or what is commonly referred to as an autopsy, on the victim in this case, Michael Rogers?

A Yes, sir.

Q What is your basic findings, age and things like that, just generally upon your initial observations?

A Mr. Rogers was an African-American male, appeared to be approximately 40 to 50 years of age, greater than 6 feet tall, weighed around 175, 200 pounds. My examination revealed a gunshot wound to the anterior neck, midline, and a wound in the right posterior sternocleidomastoid towards the shoulder area. This wound traversed anterior to posterior and to the victim's right causing extensive destruction of the carotid artery, the veins. It hit the vertebral bodies around the C2 level, up high, and was trajected to the victim's right side. There was an exit, but within the

body we found a jacket from a projectile.

Q So to clarify, a lot of times when we hear wounds, we don't think about penetrating wounds and what that means, entrance versus exit. So you referred to two wounds. Can you be specific about in your expert opinion does one projectile cause that?

A That's correct. I feel like one projectile caused that. The entrance was within the anterior part of the neck based upon the tissues being forced in an anterior to posterior direction, you can trace the path of the projectile as well as the jacketed piece that came loose from the main projectile, which then exited the body.

Q So when you talk about deflecting this and exiting here, potentially the body of the victim is here and coming out this way (indicates)?

A Correct.

Q Was there any particular artifact of that penetration, any stippling or anything that you discovered around the area of the wound?

A No stippling around the wound.

Q What does that tell you as an expert?

A When a wound, a gunshot wound, is examined, we look for what is called "residue" and, "stippling." Stippling is actually the burning powder that comes out

of a gun and burns the skin. Residue is the smoke, the soot, that comes out as well. If you do not see that, the distance away from the body is at least greater than 18 to 24 inches. If you see residue, it means they were close to the victim, probably within 2 feet.

Q So based on your expert opinion, the absence of stippling, or the artifact, coming from the weapon indicates to you that they were at least 24 inches or further to an indeterminate range away?

A Yes, sir.

Q Is there any substantial findings relating to your examination of Mr. Rogers?

A The most significant things were the extensive degree of injury to all of the blood vessels in the neck. The carotid artery, which was just totally destroyed, is the main artery that comes off the right side of the aorta out of the heart going to the head, it was missing. It was gone. As a part of that, the destruction of the jugular vein beside it, it was also totally destroyed. The soft tissues were extensively macerated and torn apart. The bone in that area was fragmented, and then the muscle going through towards the right side had extensive damage to it.

Q This obviously goes without saying, but in court you have to say it, a wound of that nature would lead

to substantial bloodletting and bleeding by this victim?

A That wound with the destruction of the carotid artery, every time the heart would beat, blood would just spew.

Q As it relates to Mr. Rogers' ability to act after receiving an injury such as that, how viable do you believe, in your expert opinion, he might be in the seconds and minutes sustaining a wound like that?

A The heart would rapidly make him extenuate without immediate pressure on the would site, probably could not do a whole lot.

Q I ask you this question to a reasonable degree of medical certainty, Dr. Proctor, were you able to form an expert opinion as to the cause and manner of death relating to Michael Rogers?

A Yes, sir.

Q Could you please tell the jury.

A The cause of death was a gunshot wound to the neck area with extensive visceral -- which means tissue -- damage and hemorrhage. Manner of death being homicide.

MR. HIXSON: Beg the Court's indulgence.

Q (MR. HIXSON) In this particular case, do you recall if law enforcement agents were around you for

the purpose of protecting any -- processing or handing off any evidence to you from any other agencies?

A There would have been a crime scene person available. I do not have it documented, but they are always in these cases -- crime scene investigators and detectives.

MR. HIXSON: Thank you very much. Nothing further.

CROSS-EXAMINATION

BY MR. BARR:

Q I'm Charles Barr and I'm defending Antwuan Nelson. You and I met about 30 years ago in the case of the Misnalt (phonetic)?

A That is correct.

Q Do you remember that case?

A I do.

Q Years have treated you well.

A And you too, sir.

Q I just have two questions for you. You did a toxicology?

A That is correct.

Q And was it significant?

A The blood that I removed from the deceased was sent to National Medical Services Laboratory, which is a national forensic laboratory, and they examined the

blood for ethanol, and they do a drug screen. The blood ethanol was negative. Blood drug screen was positive for marijuana, marijuana metabolite and cocaine metabolite.

Q Marijuana and cocaine? Thank you, sir.

MR. HIXSON: Briefly.

REDIRECT-EXAMINATION

BY MR. HIXSON:

Q What does a metabolite mean?

A The breakdown product of the actual drug. Marijuana, the metabolite can be present for, gosh knows, a couple of weeks. Cocaine -- cocaine is very rapidly metabolized to its metabolite, which can be present two, three days.

Q So no question there is no drinking in the blood. THC, so recent use of THC, but the fact that it is metabolite, it is past marijuana use, and the metabolite of cocaine means past cocaine use maybe even as far as a few days prior to the passing, his death, and of course his body stops metabolizing when he passes?

A There was no evidence to any active drug, to include the active component of THC, which is the main component of marijuana, or cocaine, which is cocaine.

Q So metabolites are like an artifact of what

happened days earlier?

A It is a breakdown, yes, sir.

MR. HIXSON: Nothing further.

MR. BARR: No, sir.

THE COURT: You may step down. Any further use?

MR. HIXSON: I do not.

THE COURT: Dr. Proctor, you are released from your subpoena. Thank you for coming.

MR. HIXSON: May we approach?

(Whereupon, a bench conference was had.)

THE COURT: Ladies and gentlemen, it is 5 o'clock, and I do hate to keep you past 5:00, so I'll let you go home. Please don't discuss the case with anyone or allow anyone to approach you about the case. Don't do any research on your own, and be back in the morning. Mr. Ropp will have something for you. Thank you.

(Whereupon, the jury exits at 5:05 p.m., and the proceedings for June 13, 2017 concluded. The following is had on June 14, 2017 out of the presence of the jury.)

(State's Exhibits 47D and 47E marked.)

THE COURT: Ready? Okay. Bring them in.

(The jury enters at 9:40 a.m., and the following is heard in the presence of the jury.)

THE COURT: We have our jurors and alternates back in the courtroom, and they are ready to go.

MR. HIXSON: Counsel and I have had discussions relating to either taking judicial notice of Section 16-1-160, which defines violent crimes. I don't know -- we ask the Court to take judicial notice of the statute.

THE COURT: We'll take that up in a charge conference.

MR. HIXSON: I didn't know if it had to be prior to us resting or not.

THE COURT: We'll put that on there, okay.

MR. HIXSON: Thank you, Your Honor.

(State's Exhibits 49 and 50 marked.)

THE COURT: At the first opportunity outside of the presence of the jury.

MR. HIXSON: Thank you.

MS. WALTER: State calls Officer William Stair.

(WILLIAM STAIR, having been duly sworn, testified as follows:)

THE CLERK: State your full name and spell your first and last for the Court.

THE WITNESS: William Stair, S-T-A-I-R.

DIRECT-EXAMINATION

WILLIAM STAIR - DIRECT EXAMINATION

BY MS. WALTER:

Q Good morning, Officer Stair. Where do you work?

A Myrtle Beach Police Department.

Q How long have you been there?

A Almost 11 years.

Q So fair to say you were working in January and February of 2014?

A Yes.

Q What was your position at that time?

A At that time I was assigned to the Crime Scene Unit.

Q As part of your duties as a crime scene officer, did you attend the autopsy of the victim in this case, Michael Rogers?

A Yes, I did.

Q When you attend an autopsy as a crime scene officer, what are your duties or what is your function?

A We photograph injuries, photograph the victim. We also collect any evidence that we locate and take DNA samples.

Q Would you also receive any evidence that the doctor takes from the body during the actual autopsy?

A Yes. Anything that the doctor locates, he hands over to us.

Q Now, thinking specifically to this case, when you

arrived at autopsy, did you notice anything about the victim's hands?

A His hands had paper bags over them and taped to his wrists.

Q What is the purpose for that?

A Contain any potential evidence.

Q With respect to the victim's hands, did you perform any kind of tests?

A Once I photographed and removed the bags, I completed a gunshot residue test, which at that time for a gunshot residue test, it is a four adhesive vials. You open each vial and they are labeled for left hand front, left hand back, right hand front, right hand back. They are adhesive bagging that you apply to the front and back of each hand and it will pick up any trace evidence.

Q Once you perform that gunshot residue test on the victim, what did you do with the kit?

A The kit, along with any evidence I collected, was then brought back to our department and was turned into Property and Evidence Department.

Q I'm approaching with what is marked as 41B.

A Yes, that is the gunshot residue I collected from the victim.

Q How do you recognize it?

A It has my handwriting and the victim's name as well as mine and case number.

MS. WALTER: I ask that 41B be admitted into evidence. I believe 41A already has, and 41 is just the envelope they both came in.

MR. BARR: No objection.

(State's Exhibit 41B admitted.)

Q (MS. WALTER) Did you receive any evidence from Dr. Proctor removed from the victim's body?

A There was a partial copper jacket removed from the victim's right shoulder.

Q I'm approaching with State's 47E; do you recognize that?

A Yes, that would be a copper jacket that was located just under the skin in the right shoulder.

Q And there is a paper bag in there also, is that how you originally packaged the evidence?

A Yes, it was placed into the container and then packaged inside the paper bag and sealed.

Q What did you do with it once you packaged it?

A After it was packaged, it was placed in Property and Evidence.

MS. WALTER: Your Honor, I ask that 47E be admitted and published?

MR. BARR: Without objection.

THE COURT: Without objection, it is admitted.

(State's Exhibit 47E admitted.)

Q (MS. WALTER) Lastly, did you have an opportunity to go through the victim's belongings?

A Yes. They were collected and packaged when he was originally brought to the hospital, and when I got back to our office and our lab, I laid out all of his belongings to photograph and document and collect anything that was inside the pockets.

Q As you were going through the belongings, did you come across any unfired shotgun shells?

A Yes. He had two unfired shotgun shells, one was in his left, and the other was loose amongst all of his belongings.

Q I'm approaching with Exhibit 43, and I won't open it because it is marked "biohazard." Can you tell me if you recognize Exhibit 43?

A This would be the box I placed the two recovered shotgun shells with my initials on the back of it.

Q And just to be clear, it is marked as "biohazard" because it was collected during autopsy?

A Yes, it was with his clothing, which had blood on it.

MS. WALTER: Your Honor, I ask Exhibit 43 be admitted.

MR. BARR: Without objection.

(State's Exhibit 43 admitted.)

MS. WALTER: I believe at this time, if we can, admit, if possible, the remainder of 47. Everything in there has been testified, so that would be 47A through E.

THE COURT: Is that correct?

MR. BARR: Yes, sir.

(State's Exhibits 47A through D admitted.)

Q (MS. WALTER) Now, with the items of evidence that you collected, you said you turned them into Property and Evidence, specifically in this case, do you recall who you turned them over to in Property and Evidence?

A Property and Evidence technician, Lynn Grayden Labiak.

Q That is G-R-A-Y-D-E-N, hyphen L-A-B-I-A-K.

A Yes.

MS. WALTER: Nothing further. If you would answer any questions Mr. Barr has for you.

CROSS-EXAMINATION

BY MR. BARR:

Q Could you tell me how you spell your name again?

A S-T-A-I-R.

Q You were the representative from the Myrtle Beach

Police Department attending the autopsy with Dr. Proctor?

A Yes, I was.

Q And the clothing you said that belonged to the decedent, did the clothing ever get to the autopsy?

A Yes, clothing was in the autopsy room.

Q And you packaged the clothing?

A The clothing was already packaged. It was removed when he was brought into the hospital, it was in a bag, and I took that bag back to our office, separated everything and packaged it individually.

Q So you had an opportunity to look at the clothing?

A Yes, I did.

Q And do you have a recollection of what they consist of?

A I would have to go through the Property and Evidence report, but it was -- I think it was a pair of camouflaged sweatpants, T-shirt, shoes, socks. I'm not sure what other clothing was with him.

Q What color were the sweatpants?

A Camouflage.

Q Camouflage?

A Yes.

Q And the shotgun shells you removed from the

victim's pocket, were they -- what were they, No. 8 shells? Did you look at them?

A Remington 12-gauge shotgun shells.

Q Do you know what kind of load they were?

A No, I don't.

Q Now, you indicated that you were also a crime scene investigator, and that is principally the position that you have with the Myrtle Beach Police Department?

A At that time, yes.

Q And so did you participate in the gathering of evidence from the incident location?

A No, I did not.

Q You were a crime scene investigator, you did not participate in investigating in the crime scene?

A I was working the autopsy. I did not work the night the incident occurred.

Q Have you ever been to the crime scene?

A No, I have not.

MR. BARR: Thank you, sir. Nothing further.

MS. WALTER: Briefly, I'll open up the box so we can see what the shotgun shells are. Can I borrow the scissors again, please?

REDIRECT EXAMINATION

WILLIAM STAIR - REDIRECT EXAMINATION

BY MS. WALTER:

Q I'm handing you Exhibit 43; is that sealed right now?

A Yes, it is.

Q Tell me if I need to turn it this way. Is that telling you -- (indicates) does it have any indication on it as to what it is?

A 70-millimeter and eight gauges -- yeah, eight.

MS. WALTER: Did you want to see these, Mr. Barr?

MR. BARR: Yeah. No. 8.

MS. WALTER: It says No. 8 bird shot. Nothing further, Your Honor.

THE COURT: Mr. Barr?

MR. BARR: Sir?

THE COURT: Any recross?

MR. BARR: No, sir.

THE COURT: You may step down.

MS. WALTER: We call Lynn Grayden-Labiak.

(LYNN GRAYDEN-LABIAK, having been duly sworn, testified as follows:)

THE CLERK: State your full name and spell your first and last for the Court.

THE WITNESS: Lynn, L-Y-N-N, G-R-A-Y-D-E-N, hyphen, L-A-B-I-A-K.

DIRECT-EXAMINATION

BY MS. WALTER:

Q Is it Officer Grayden-Labiak, Technician Grayden-Labiak?

A Lynn is fine.

Q Lynn?

A Yeah.

Q Where are you employed?

A I'm employed by City of Myrtle Beach Police Department.

Q How long have you been there?

A A little over five years.

Q So you were working in January and February of 2014?

A Yes, ma'am.

Q What was your assignment then?

A I am assigned as a property and evidence technician for the Property and Evidence room.

Q Call you tell us what a property and evidence technician does?

A Yes. We take in evidence that has been gathered by police officers, and we house them securely in the evidence room.

Q When you say "securely," do you house items of evidence so that they cannot be accessed by unauthorized personnel?

A Absolutely. Correct.

Q Is there any type of recordkeeping to show who is submitting evidence, who receives it, et cetera?

A Yes, ma'am.

Q Now, specifically in this case, did you receive some items of evidence from Officer Stair, that just testified?

A I did.

Q Do you recall what you received from him?

A May I?

Q Yes. What are you referring to, for the record?

A My notes.

Q Yes.

A On February 24, 2014, I received a GSR kit, copper jacket from a bullet, as well as shotgun shells.

Q And if I can just approach. I'll show you 47, 47E and 41B. Are those the items you are referring to?

A Yes, those are.

Q Once you received them from Officer Stair, what did you do with them?

A I take the item in. I give it a home in the room. I put it in a certain secured location, and that is where it remains until it is needed for other reasons, and chain of custody is taken.

Q Did you receive videos in this case?

A Yes, ma'am, on February 11th.
Q From?
A Officer Steven Clothier.
Q And these are just videos of interviews, correct?
A Correct.
Q Is it fair to say that Evidence Technician Malinda Shadoan received the bulk of the evidence in this case?
A Absolutely.

MS. WALTER: Nothing further.

THE COURT: Mr. Barr.

MR. BARR: No questions.

THE COURT: You may step down. Thank you.

MS. WALTER: State calls Malinda Shadoan.

(MALINDA SHADOAN, having been duly sworn, testified as follows:)

THE CLERK: State your name and spell your first and last for the Court.

THE WITNESS: Malinda Shadoan, M-A-L-I-N-D-A, S-H-A-D-O-A-N.

DIRECT-EXAMINATION

BY MS. WALTER:

Q Where do you work?
A City of Myrtle Beach Police Department.
Q How long have you been there?

A Nine years in July.

Q What is your current position?

A Property and evidence technician.

Q Did you have that same position back in January and February of 2014?

A I did.

Q And did you, as part of your -- first of all, are your duties as an evidence technician the same as what Ms. Grayden-Labiak just stated?

A They are.

Q Do part of your duties include receiving evidence in this case?

A I did.

Q Did you actually receive all evidence other than what Ms. Grayden-Labiak testified to?

A Yes, I did.

Q Let's deal specifically with a couple of pieces of evidence. Did you receive 41A, which is the gunshot residue kit already admitted taken from the defendant?

A Yes, ma'am.

Q Did you receive item 47A, B, C and D?

A Yes, ma'am.

Q Did you receive the AR rifle that you've seen displayed in court?

A I did.

Q What did you do with those items once you received them?

A Once they come into our room, we assign an unique number to each one; it is called a property record number. From there, we stick the white labels that you see on that box right there and secure it in our division within the evidence room.

Q Now, directing your attention to Exhibit 32 and 33 --

A Yes, ma'am.

Q -- do you recognize those?

A I do.

Q And they've already been admitted. Can you tell us what they are?

A This particular one is called a BEST packet, and it housed the cocaine that was in this case. These others were apparently the baggy that the drugs were housed in originally, and the BEST tab that comes off where Michelle McSpadden told you yesterday in reference to taking it off when they secure it in the BEST kit.

Q So you received these items and secured them as well?

A I did.

Q At some point, were you asked to take these items

to SLED -- and I can detail them -- so that would be the rifle, the two gunshot residue kits, the BEST kit -- or SLED BEST kit, the shell casings and the projectile?

A Yes.

Q And how does it get to SLED? Can you describe that process for me?

A First it needs to be requested for analysis, and that is informative of an I-lab, which is basically a piece of paper requesting it. And from there, I take all of the items out off the secured location and drive it to Columbia at the State Law Enforcement Division.

Q With Exhibit 47, which has all of these different -- A through E?

A Yes, ma'am.

Q So Exhibit 47 is a box. Did you put the times in this box?

A No, ma'am. I watched the log-in tech at SLED put them into the box.

Q Do you recall who that was?

A I believe that was Doris Yarbrough.

Q Once the items were placed in the SLED box, were they sealed in any way?

A They were. There is this yellow evidence tape from SLED, and from there they initial and date, and I

watch them to do that.

Q So this box was sealed in your presence?

A It was.

Q When you get to SLED, if you are aware, do they have any type of electronic recordkeeping to track the chain of custody for items they receive?

A They do. There is an actual bar code on what the I-lab is called, and they scan that and scan all the pieces of evidence into their room, and then they give the receipt that shows the scan and the electronic signature that I do on a signature pad.

MS. WALTER: So this is marked for identification as Exhibit 50, Your Honor.

Q Do you recognize Exhibit 50?

A Yes, ma'am. That is my signature.

Q That is the SLED chain of custody report?

A Yes. That means they have that now in custody.

Q After SLED finishes with whatever analysis or testing that they are going to do, how does the evidence get back to Myrtle Beach?

A When I drive other items for other cases there, then at that point they give me everything that has been done with the analysis.

Q So did you at some point then pick up all of the items we just went through?

A I did.
Q That you would originally deliver?
A Yes, ma'am.
Q Are you familiar with the process of how 911 calls are gathered for a particular investigation?
A Yes, ma'am.
Q Can you describe that for the jury?
A We have a database with all of the phone calls we get, usually the retention is only 30 days. They will pull the date and time of which an event occurred, and pull all the 911 calls for that particular case or that particular incident and put those -- burn them onto a disk, which they take that disk and voucher it into my system, and I assign them a PR number. So I will have the original calls on the original disk.
Q What do you mean by "PR"?
A Property record number.
Q Did you have an opportunity to review the 911 calls in this case?
A I have.
Q How many 911 calls were received?
A Total of five 911s.
Q If you just mentioned this, I'm sorry, but the 911 calls, do they all come in directly to Myrtle Beach Police Department?

A They first go to Horry County, which is up the road here, and then Horry County knows what jurisdiction they need to send it to, and then transfer it to whatever division they need to, and that would have been ours.

Q So your jurisdiction received five 911 calls relating to this incident?

A We did.

Q Did you have an opportunity to listen to those five calls?

A All of them, yes, ma'am.

Q Did any of those calls come from the defendant?

A No.

Q And you mentioned that you put a CD of the 911 calls in evidence along with everything else; is that evidence secured throughout the normal course of business?

A It is. It is.

Q No one is allowed to access it without specific authority and without some record being made?

A Some kind of chain, correct.

Q Does that essentially summarize your involvement in this case?

A Yes, ma'am.

MS. WALTER: Thank you. Answer any questions

that Mr. Barr has.

CROSS-EXAMINATION

BY MR. BARR:

Q The CDs for the five 911 calls, where are they at?

A They more than likely are still housed in my evidence room in Myrtle Beach.

Q And you did not bring them here today?

A Not the original copy, no.

Q So with respect to Myrtle Beach Police Department, if I wanted to authenticate the calls and play them in this courtroom, would you be the person with Myrtle Beach Police Department that could authenticate the calls?

A I was not the one to put them on the CD, I was just the one that housed them into my evidence room.

Q But you said earlier that you listened to them?

A Yes. The communication supervisor is the one that put them onto the original CD and vouchered it for me to put it into my room.

Q How do I determine the identity of the person that took these calls in order to have that person to come here and play it?

A They would be on that CD, sir.

Q It is on the CD?

A Their names would be on the CD. When a 911 call is taken, we have to ask them their name and number.

Q Would not the 911 calls -- or all of the 911 calls for this incident, were they all taken by the same person?

A No, sir.

Q They were not?

A No, sir.

Q But the original recording of the 911 calls you got then are under your authority now, because you have them in a particular place, but no one else has access to them?

A The original CD they put it onto, yes, sir.

Q Ms. Walter asked you if you reviewed the 911 calls, and you indicated that you had, you said that none of the 911 calls came from Antwuan Nelson?

A Correct.

Q So, now, apparently you had actually looked at -- or listened to the content of the 911 calls and essentially know what information they contain?

A I listened to it in its entirety, yes, sir.

Q Now, the 911 calls there were -- was it six or was it seven?

A There were five, sir.

Q Six or five?

A Five, sir.

Q Does the 911 dispatcher indicate that there were six?

A No, they wouldn't do that, sir.

Q I'll show you a transcript of one of the 911 calls and I'll --

MR. HIXSON: We'll object to the content. You have to offer that into evidence, the transcript, but it doesn't get in the transcript of it, just the existence.

THE COURT: The Best Evidence Rule -- don't you have the tapes, Mr. Barr?

MR. BARR: I have copies of the tapes, Judge.

THE COURT: Okay.

MS. WALTER: Those were provided in March of 2014.

THE COURT: Do you have the evidence tapes -- I mean evidence --

THE WITNESS: I have the original in my room in Myrtle Beach, the original that the communications supervisor dropped into our property and evidence room.

THE COURT: Is there any doubt that yours is not --

MR. BARR: I'm just refreshing her memory here.

I'm not attempting to put it into evidence.

MS. WALTER: Excuse me, Mr. Barr. She hasn't said yet that she needs her memory refreshed.

THE COURT: That is the rule, Mr. Barr. Ask her if she needs her memory refreshed, and then give her an opportunity to inspect that document and say whether or not it is a true transcript of the actual -- you have a transcript, you must have the tape. Couldn't you play that for her?

MR. BARR: Pardon me?

THE COURT: If you have a transcript, you must have the CD.

MR. BARR: I have the CD, Judge, but the CD is back with the court reporter to transcribe.

MS. WALTER: I can provide a second copy if he would like to introduce it into evidence.

MR. BARR: Well, here is what I'll do then. You have all six of them?

MS. WALTER: I have five. There were only five calls. I have the same discovery that was turned over March of 2014, I have another copy here of five calls.

MR. BARR: Your Honor, then I would like to introduce them into evidence, and we would be out of turn now, but if that is the case then I would --

THE COURT: Do we agree, Counsel, that that is an

authenticate reproduction of the calls received in reference to this matter by the 911 operators?

MS. WALTER: Yes, Your Honor. And I can show --

THE COURT: Well, let's mark it for identification so Mr. Barr will have access to it, and then at the proper time Mr. Barr may introduce it.

MS. WALTER: If I may, Your Honor, this is a copy that is provided to us. It is marked "Solicitor's Copy," it has the Myrtle Beach Police Department logo on it and it says "audio 911 recordings." This is my only copy, so we made a duplicate of it, but it is the same thing.

THE COURT: Mr. Barr is familiar with it and he has a transcript, it is transcribed. So we'll mark that, and if it turns out that it's not, we certainly will know it. Defendant's 1.

(Defendant's Exhibit 1 marked.)

THE COURT: The 911 tape by agreement of the State, subject to your inspection.

MR. BARR: Based on what she said, there were a number of dispatchers. In order to get it into evidence, I would have to have each dispatcher, but if the prosecution is willing to stipulate, then.

MR. HIXSON: I don't know what he's asking to stipulate to.

MR. BARR: The admissibility of the 911.

MR. HIXSON: I won't stipulate to admissibility. You have to lay a foundation. You can ask the witness to lay a foundation, but I can't stipulate to the content. I know we have five 911 calls and we've listened, and Antwuan Nelson is not on it. That's the only reason we're offering it. If you want to flush that out in your case in chief, then --

THE COURT: Let's send the jury out for a moment.

(The jury exits at 10:13 a.m., and the following is heard out of the presence of the jury.)

THE COURT: Mr. Barr, we're not all on the same page as to this evidence. The State, as I understand it, offers this witness to say that she has retrieved the 911 tapes or conversations. They have been reduced to a single CD that there is five, and there is no conversation from the defendant. That is the purpose of the offer, right? The defendant didn't talk?

MS. WALTER: That is the purpose of the offer. She did not physically pull the calls in, but she reviewed it.

THE COURT: I understand, but she has the tapes and there is no tape from the defendant.

Now, Mr. Barr, my understanding is you want to

introduce the contents of those tapes, and we don't know who called or what is on them. Now, aren't you going to have to go beyond this witness' testimony? This witness just said I don't have one for Antwuan Nelson. Now, where are you going with this? What are you trying to put in?

MR. BARR: Judge, ordinarily, and of course from the standpoint of this witness I don't think that that witness' -- I didn't realize that she was the person that had the 911 calls -- the disk, but if she does have the disk, then in order to get the 911 calls into evidence, I would have to get the dispatcher for each call.

THE COURT: Yes.

MR. BARR: That is why I asked -- now, if I've got to subpoena to dispatcher for each call, I can do that, but I don't know the identity of the dispatcher for each calls.

THE COURT: Mr. Barr, maybe I'm missing something here. Ms. Walter just told me that she gave it to you on --

MS. WALTER: March 2014, March 3rd, so well over three years ago.

THE COURT: She gave them to you three years ago, and you tell me that you've had transcriptions made of

those tapes?

MR. BARR: I have.

THE COURT: So you should be well familiar with the tapes and who may have been on those tapes.

MR. BARR: I am familiar.

THE COURT: Why have you not subpoenaed those people if they are pertinent to your case? I don't know. I don't know if there is anything on there that makes a hill of difference, because I don't know what is on them.

MR. BARR: She said she reviewed the tapes. Now -- now -- and apparently to tell whether or not Antwuan Nelson is on them, she obviously had to listen to them.

THE COURT: Certainly she reviewed them, but that does not make her a witness who can testify as to what is on the tapes.

MR. BARR: I'm not trying to get --

THE COURT: She can give you the tape and say here it is. I understand you already have the tape. In fact, counsel for the State just stipulated that that item just marked is a true and accurate copy of the tapes as they exhist right out of evidence. You don't have to prove that. Now, if you want to talk about who said what, if you want to go into any of

that, you're going to have to have the speaker here, you're going to have the dispatcher, going to have something.

MR. BARR: Well, Judge, this is what I'm saying. I've got the tapes. I've transcribed the tapes, but the tapes don't identify the dispatcher, and I don't know who the dispatcher is for each tape.

THE COURT: But you have had them three years.

MR. BARR: I've had them quite a while.

THE COURT: Have you --

MR. BARR: Judge.

THE COURT: Have you filed a Freedom of Information Act to request to determine who was on duty or anything like that? Does this witness know -- do you know who the specific dispatchers are?

THE WITNESS: There is a difference between dispatchers and call summaries from our dispatch room.

THE COURT: I think we're talking about call takers.

THE WITNESS: I heard two call takers who I obviously knew who they were, but I can't be certain if they were the only two. I know for sure there were two.

THE COURT: You know of two?

THE WITNESS: I know of two.

THE COURT: Well, you can ask her that, Mr. Barr, who they are.

THE WITNESS: We don't hear the police dispatcher on the 911 calls, just the call takers.

THE COURT: I don't know what is on these tapes. I don't have any idea. I don't know whether what would be on the tape would be relevant to this case. I don't know the circumstances of each call. We need to --

MR. BARR: Of course if this witness claims she reviewed the tapes and she knows that Antwuan Nelson did not make a call, then apparently she's reviewed the tapes and knows the content of the tapes.

MR. HIXSON: Your Honor --

THE COURT: That's hearsay on hearsay.

MR. HIXSON: If I may. We have a certified court reporter that has done a transcript of the contents of the tapes. Mr. Barr knows exactly what is on the tapes. He has it in writing by the court reporter, and he knows Antwuan Nelson is on there. If he is on there, he can impeach her with the transcript.

THE COURT: I think he may be going somewhere else and looking for something that someone else may have said.

MR. HIXSON: Perhaps.

THE COURT: Perhaps. That is the only thing I could envision him wanting to do with this. I'm just not going to let him have this lady say what somebody else -- who is unknown to the Court, who is not present for cross-examination -- may have said about this case.

MR. HIXSON: That's exactly right. That is our opinion. Just for the Court's edification, the reason the State offers that is because in Antwuan Nelson's recorded statement he maintains that he's the one that is calling 911, and that is what is probative.

THE COURT: Mr. Barr, when people call 911, don't they have to give their names and all?

MR. BARR: They gave their names.

THE COURT: Well, if that person has some information that that person, he or she, revealed or indicated on the tapes, we're going to have to have that person come and testify, and the State would have an opportunity then to --

MR. BARR: All right, Judge. So in terms of your final ruling --

THE COURT: I don't know what I'm ruling.

MR. BARR: Ruling on the admissibility of the 911 tape based on the fact that she's --

THE COURT: What I'm saying is this witness --

this witness is not in a position -- she can identify that -- that -- that tape, and I think she has. Whether she has or not, Mr. Hixson and Ms. Walter have said this is it, this is authenticated, we will not fuss at you with that.

Now -- so this witness has done what she can do on this. She identified the documents. She didn't make it. She didn't take it. It was just -- her only testimony in regard that is germane in this case is I received it and I did not receive one from the defendant to the call taker.

MR. HIXSON: We're not advancing content, we're advancing the non-existence of evidence.

THE COURT: Precisely. And I understand that. But your purpose is to show that 911 didn't receive a call from the defendant Mr. Barr may be going somewhere else with this, but I don't think he can prove this.

MR. HIXSON: Perhaps. Before I forget this, just as it relates to discussions of the -- this is a copy of South Carolina Code, Section 16-160, violent crimes --

THE COURT: You all stipulate that voluntary manslaughter or murder is a violent crime?

MR. HIXSON: Yeah. I'm showing Mr. Barr State's

49. We ask for a stipulation; if not, then we ask for judicial notice. I thought I needed to put it in case in chief, is why I'm asking it now.

THE COURT: I'm familiar with the statute. We've gone that far with our preparation of the charge. Mr. Barr, you want to respond?

MR. BARR: No, sir, Judge. I'm withdraw any further question from this particular witness.

THE COURT: I'm talking about do you concede that murder or voluntary manslaughter are statutorily --

MR. BARR: They are violent crimes under the statute, yes, sir.

MR. HIXSON: We moved State's 49.

THE COURT: You may place it into evidence.

(State's Exhibit 49 admitted.)

(A recess was taken.)

MR. BARR: Before the jury comes in, and I'm not going -- all I'll do is ask this young lady to identify the two people she says were --

THE COURT: Okay. All right.

MR. BARR: Can you identify those two people?

THE WITNESS: I can.

THE COURT: You don't want this on the record with the jury?

MR. BARR: Well, I'll put it on the record, but

before the jury came back in, there was a point we stopped yesterday and I think we indicated we would put something on the record, and we never did. We object -- I objected to it coming into evidence of a copy -- this was -- I think it may have been the K-9 officer who found.....

THE COURT: The drugs?

MR. BARR: Yes. And I objected to the copy coming into evidence.

MS. WALTER: Copy of what?

MR. BARR: He had a copy of the little bag he found beside the fence.

THE COURT: You mean a photograph?

MR. BARR: Photograph of it, yes, sir.

THE COURT: Oh, okay. I thought I ruled on it.

MS. WALTER: You did.

MR. BARR: You ruled on it, but we didn't rule on it on the record.

MS. WALTER: I believe it was ruled and published to the jury.

MR. HIXSON: We had a discussion on 401 and 403.

MR. BARR: The 403 balancing issue was not even -- I didn't -- that wasn't even an issue regarding that.

THE COURT: You said it wasn't. You said we

didn't even get there, but I certainly did. I do it in every case whether -- in fact, I set out the standard very specifically, the probative value substantially outweighs by the prejudicial -- unfair prejudicial --

MR. BARR: Judge, I thought I recall --

THE COURT: You said that that wasn't your argument.

MR. BARR: -- bench conference and we said that we would put this on the record at a later date.

THE COURT: We'll put it on the record. I admitted the photographs --

MR. BARR: Yes, sir.

THE COURT: -- of the drugs or the object -- I don't think we heard from SLED yet, have we?

MS. WALTER: No, Your Honor.

THE COURT: In its place as found, the photograph that was made, we had the crime scene officer who then came in and identified and said she was the person who made the photograph, and that was the photograph of the drugs as found.

Now, your objection was, I think, that it can't be admitted until they're analyzed; isn't that what you were saying?

MR. BARR: Yes, Judge. My objection was in terms

of relevance. At that point, the photograph of whatever it was that was on other side of the fence was not relevant and should not have been admitted into evidence.

THE COURT: And not relevant, we have a case here where a defendant has been charged with possession with intent to distribute crack cocaine I think. I think that is what it is. I haven't seen the analysis. We have a witness who testified that she actually felt -- not only heard, but felt the thud, if you will, of the bullet that entered her apartment. She immediately stood up. The defendant -- no question by his statements -- was the shooter. We have lots of testimony as to what he was wearing. The witness says I saw a young, black male at the fence, appeared to have dropped something over the fence at that location immediately following the time I heard the shots. I think that it is so well connected, Mr. Barr, it certainly is relevant to this case.

The relevance is as to where you find it. We're going to hear, I assume, someone testify as to an analysis of that substance. If it turns out it is not drugs, I'll give this jury a curative charge that they should disregard it, but I don't think it is relevant in this case, but it was offered to show where this

substance, whatever it may be, was found. It is admissible, and I'm going to enter it or have it admitted.

Mr. Palmer, bring the jury in.

(The jury enters at 10:36 a.m., and the following is heard in the presence of the jury.)

THE COURT: Mr. Barr, you may continue.

MR. BARR: Nothing further, Judge.

THE COURT: Anything further?

MS. WALTER: Nothing further.

THE COURT: You may step down. Thank you.

MS. WALTER: State calls Suzann Cromer.

(SUZANN CROMER, having been duly sworn, testified as follows:)

THE CLERK: Please state and spell your first and last name.

THE WITNESS: My name is Suzann Cromer, S-U-Z-A-N-N, C-R-O-M-E-R.

MS. WALTER: May I?

THE COURT: Yes.

DIRECT-EXAMINATION

BY MS. WALTER:

Q Ms. Cromer, by whom are you employed?

A Employed by the South Carolina Law Enforcement Division, commonly referred to as SLED.

SUZANN CROMER - DIRECT EXAMINATION

Q What is your position with SLED?

A I'm a firearm and tool mark examiner in the Forensic Services Laboratory.

Q Can you tell us what education and training you've had to get into that position?

A I have a bachelor's degree from Clemson University. I did some graduate work at the University of South Carolina in criminal justice where I did an internship in the Forensic Services Laboratory. I was hired at SLED and started their in-house training program for fireman and tool mark examiners. It is a three- to five-year intense study program. We take written tests, oral tests, practical exercises and work under court-qualified firearm examiners.

Upon completion of that training, we're given a comprehensive final exam, which is graded by your training officer and your lieutenant, before you are allowed to take casework on your own. I have taken classes through the Association of Firearm and Tool Mark Examiners, which is an international organization for our profession. They meet once a year for week-long seminars. I've been fortunate enough to attend several of those seminars and take extra classes at those seminars, such as barrel making, machine gun conversion, gunshot residues, ethics, high

point firearm familiarization. I've also taken classes through the South Carolina Chapter of the International Association of Identification, most pertinent being a three-day shooting scene reconstruction workshop. I've taken classes with the Bureau of Alcohol, Tobacco and Firearms on serial number restoration, and in conjunction with the ATF and Forensic Technology International, I've taken classes on the International Ballistics Integrated System, which is a digital searchable database of pictures of cartridge cases, which I'm also sitting on the users conference for the ATF and representing North and South Carolina.

I've toured numerous firearm manufacturers, some being Smith and Wesson, Ruger, FN, Daniel Defense, Parry USA, and also toured tool manufacturers.

MS. WALTER: Your Honor, Mr. Hixson just conferred with Mr. Barr and I believe Mr. Barr will stipulate that she is an expert in the area of firearms identification.

MR. BARR: Yes, sir.

THE COURT: She is so qualified. I spoke to you earlier about experts being the only people who are normally permitted to give opinions and the reasons for their opinions in this court. This witness, by

stipulation and agreement, will be admitted as an expert in the field of firearms identification, so she may give an opinion and the reasons for that opinion. You will judge her testimony and give it such weight and faith such as you, the jury, determine to be appropriate in this case. Okay.

MS. WALTER: Thank you, Your Honor.

Q (MS. WALTER) And just to be clear, you -- have you been qualified in other areas other than simply firearm identification?

A No. I've just been qualified in firearm identification approximately 98 times, that includes federal court and state court.

Q Very good. How long have you been employed by SLED?

A Over 18-and-a-half years.

Q So fair to say you were working there from 2014 until present?

A I've been there since 1998.

Q When you -- can you describe for the jury what firearms identification entails?

A Firearms identification, we look at ammunition components, bullets, cartridge cases, shotgun shells, waddings, unfired cartridges to determine whether they were fired by or loaded into and extracted out of a

specific weapon. If we do not have a specific weapon, we can look at the ammunition we receive from the case and give investigators a clue of how many firearms they could be looking for. We also do tool mark identification, bolt cutters on padlocks, pry marks on safes.

Q When you are looking -- let's focus in on what I call firearms or ballistic evidence. How is it that you are able to potentially match something such as a fired cartridge with a gun?

A A fired cartridge case can be marked by the firearm in five different locations. It can be marked by the breach face of the gun. The breach face is the part of the firearm that holds that cartridge, unfired piece of ammunition still during the firing process. So any defect left during a manufacturing process on that part of the firearm can be imprinted into this cartridge case head.

There is also the firing pin. The firing pin is what comes through the breach face, hits the cartridge on the primer and causes that initial spark that lights the gun powder that causes the burning of the pressure of the gasses that pushes that bullet down the barrel, but it also pushes that cartridge case back into the breach face. Any defect on the firing

pin can be imprinted on the primer of that cartridge.

There is also what we call the "extractor." It is a claw that holds that cartridge in place that -- during the firing process. So if it is a semi-automatic weapon, that cartridge is going to hold it still, and when you see -- if you have seen it in the movies, that slide comes backward and forward on the firearm, that will hold that cartridge in that slide. Any marks or defects made from that cartridge or that claw holding that cartridge can be imprinted on that cartridge case. That claw is going to hold it until it hits what we call the "ejector." That ejector is going to kick the cartridge out of the semi-automatic firearm, and that can also leave markings.

The last place that the cartridge can been marked by the firearm is the chamber itself. Any defects in the chamber, which is the part of the firearm that holds that whole cartridge still during firing, can be imprinted on the cartridge case.

The bullet is a little different. The bullet goes down the barrel of the gun. What is put in the barrel of the gun is called "rifling." Rifling is put there by the manufacturer to put a spin, rotary motion, on that bullet, very similar to a quarterback

who throws a football, he wants to go into a tight spiral so it goes more accurately towards its target, that is the premise towards rifling, it makes the bullet spin. Rifling is made of up what we call "lands" and "grooves," raised and depressed areas. You can have any number of lands and grooves, 4, 9, 8. So we have the number of lands and grooves, we have the rifling.

And then we have the way that the rifling is going to spin. Is it going to spin to the left or to the right? So we have lands and grooves, the direction of the twists, direction of the spin, and then the actual size of those lands and grooves, too, is an indication. Is it small lands or big grooves? Those are indications of the particular rifling that fired that bullet.

When -- during the manufacturing process, when that rifling is pressed inside that gun barrel, it leaves defects, and those defects can be imprinted on the bullet during the firing process.

Q Specifically -- and I'll direct you to your SLED lab number -- were you assigned to do a firearms identification analysis under SLED Lab L-1402331?

A Yes, ma'am, I was.

Q And the information on that was that the victim

was Michael Rogers and the suspect was Antwuan Nelson?

A Yes, ma'am.

Q I'm going to approach you with two different pieces of evidence. This has been admitted in evidence as State's Exhibit 29. I can show you the box if you need that as well. From Exhibit 47A, B C, D and E, and 47 is the box, which I'll show you. Do you recognize -- start with Exhibit 47; do you recognize 47?

A Yes, ma'am, I recognize this. This still has my lab number and my initials.

Q And can you briefly describe the intake process? We had Evidence Technician Shadoan explain how she drops something off at Sled, so once it gets to SLED, what happens?

A Once it gets to SLED, people drop off evidence in our Evidence Control Department, and it should be sealed once it gets there. What they do is give it a bar code, and that bar code tracks that particular case or that particular piece of evidence through the whole building. So then they log it into our computer system, and our computer system lets them know you have a firearms request on this case. So then they will put it in part of the Evidence Control Department, called Firearms Intake Holding, until I go down and physically pick it up from the location and take it upstairs, and

all of that time it is still sealed.

Q What would happen if you received it and the seal was broken?

A If the seal was broken, I would photograph that and I would call the submitter and let them know that the seal was broken.

Q Is there any type of documentation that is done to document the different individuals at SLED that handle evidence?

A Yes. Any time you take a piece of evidence into your custody, you scan that bar code showing that it is in your custody. So even when the evidence control technicians put it into the Firearms Intake Holding, they will scan it to that location. When they take it out to hand it to me, they scan it to them. Then I scan it to myself, and then when I take it back downstairs to await pickup from the submitting agency, it is scanned back there. So this bar code tracking system stays accurately with everywhere it goes.

Q Would all items submitted -- strike that.

If different items of evidence are submitted to SLED, but would be going to different sections, would -- are they assigned the same SLED number?

A Yes, ma'am, they are. Each case that comes in from an agency, as long as it is the same case number,

is given one SLED lab number. It does not matter which department in SLED it is going to it, it all has that same SLED lab number.

Q Does SLED create or have the ability to create what we call a "chain of custody report" that would show where all of the evidence assigned to a particular SLED lab case number goes?

A Yes, they do.

Q And I'm showing you what is marked as State's Exhibit 20; do you recognize that?

A Yes, ma'am, I do. There is a chain of custody report for SLED Lab L-1402331.

Q So that would be this case, correct?

A That's correct.

Q Now, when you -- you told us a little bit about how you can compare fired cartridge casings to projectiles to a particular weapon. What are the possible conclusions that you can draw?

A In the firearms department we reach four conclusions: Positive, yes, it was fired by this gun or, yes, they were fired by the same gun. Negative, no, it was not fired by this gun, or these were not fired by the same firearm. Unsuitable, meaning that this piece of evidence doesn't have enough of those individual markings or it is too damaged for us to

reach a conclusion at all about this piece of evidence. Or we have "inconclusive," meaning that we can't rule this piece of evidence in, but we can't rule it out. We just can't render a conclusion because there is not enough of the information that we need to make an informed decision.

Q So let me start -- I'll start with the fired cartridge case, that should be 47B, C and D. Can you, again, briefly describe the process that you go through to determine whether or not -- first of all, what were you comparing those to?

A What I do first, when I work a case, I'll open up and look at my fired evidence, I'll see what I have. In this case, State's Exhibit 47B, C and D were fired -- hold on one second -- 223 Remington caliber cartridge cases, brass case with brass primers. Then I'll move to my firearm I have, and then I'll shoot the similar or the same type of ammo in that firearm so I can compare those test specimens that I knowingly fired from this firearm to each other and then microscopically compare those five areas that I talked about earlier, the breached face, the firing pin, the extractor, the ejector and the chambers marks against my unknowns or questions.

Q Did you do that in this case?

A Yes, I did.
Q And were you able to make any of those four conclusions that you just spoke of with respect to 47 -- I think it is was B, C and D and E?
A Yes. I concluded in my opinion that there was enough of the individual agreement between my test specimens that I knowingly fired from the firearm to say that these were, indeed, fired from this firearm.
Q Did you also receive 47A and 47E?
A Yes, ma'am, I did.
Q Start with 47A.
A 47A was my "Item 1." It is in sealed container still sealed with my initials and sealed date. This is a fired 223 or 556 Nato caliber bullet. I did a microscopic comparison against this bullet versus test bullets that I fired from the firearm I received in this case.
Q Does the packaging on that indicate where that fired projectile was recovered from?
A Packing does not, but our intake documents have it labeled as recovered from 3768 Citation Way.
Q So were you able to draw any of -- which of the four conclusions did you draw with respect to that?
A It was inconclusive, meaning I did not have enough evidence to say it was fired by this firearm,

but I also could not rule this firearm out. When I do microscopic examination of the bullet, when I talked about all of those things that create the markings, lands and grooves, direction of twists, we have to have all of those. I call it "climbing the ladder" to my microscope.

First, is it the same caliber of the firearm I fired? Is it the same number of lands and grooves? Then I can step up the next step. Is it the same type of riffling, because there is two types of rifling, conventional or polygonal. If it is, I can step up. Is it the same direction of twist? If it is, I can step up. Anywhere along the way if it doesn't meet the agreement, I don't even have to go to my scope, I know it wasn't fired by the firearm.

During microscopic examinations, it was determined inconclusive. I could not say it was fired by there gun, but I could not rule it out.

Q Meaning it met all of the step-up requirements, you got to the microscopic analysis, and at that point you weren't able to draw the conclusion?

A That's correct.

Q This is probably obvious to everyone, but when you say it is consistent with being fired from that weapon or something similar, that would not have been

fired from a shotgun, correct?

A That's correct.

Q And if you could move to I think it was 47E.

A 47E was my "Item 9." Again, it is still sealed in a container with my initials and seal date. It is another fired 223 Remington or 556 Nato caliber bullet.

Q Did you do the same type of comparison to make a determination whether or not it had been fired from Exhibit 29, which is the AR rifle?

A Yes, I did. Again, it met all of the criteria to go to the microscopic examination, but, again, my result was inconclusive. There just wasn't enough of the individual agreement that I needed to either say, yes, or enough difference to say, no. So it was inconclusive.

MS. WALTER: At this time I would simply ask that Exhibit 50 be admitted into evidence, and I would have no more questions for Ms. Cromer.

MR. BARR: What is 50?

MS. WALTER: The SLED chain of custody.

MR. BARR: No objection.

THE COURT: Without objection.

(State's Exhibit 50 admitted.)

THE COURT: Mr. Barr.

CROSS-EXAMINATION

BY MR. BARR

Q The SLED case number assigned to Antwuan Nelson with Michael Rogers, did you not receive a shotgun?

A No, sir, I did not.

Q If you would, please, ma'am, tell me again -- identify your particular specialty? I know you're in the Firearms Department at SLED, but what particularly -- what is your specialty? I mean what do you do?

A We do firearms identification.

Q As a part of firearms identification -- and I know you've been doing this a long time -- is it possible to examine or -- that has not be fired -- let's do it this way.

Is it possible for you to examine a firearm that has been recently fired and make that determination?

A No, sir, we cannot determine when the last time a firearm was fired.

Q Even if it was fired, say, for instance, within two, three days?

A No, sir, I cannot pick up a gun and just say this was fired two, three days ago.

Q You don't participate in -- you don't participate in making the decision as to where evidence goes when it comes to the SLED lab? Say, for instance, whether it goes to the DNA Department or Serology Department or

Trace Department, you don't participate in that decision?

A No, I don't.

Q The decision is already made when it comes to you in firearms?

A That's correct. Usually the firearms is the last person to receive evidence.

Q You identified an item in your report from your analysis which indicates that an item that you examined came from the body of Michael Rogers?

A Yes. It was labeled as -- I put, Described as recovered from the body of Michael Rogers at autopsy.

Q And I believe you said based on your analysis it was inconclusive as to whether or not that particular projectile was the projectile that entered Michael Rogers' body?

A I said it was inconclusive with the firearm.

Q Inconclusive with the firearm?

A That's correct.

Q And that is the AR rifle?

A Yes, it is a AR type rifle.

Q AR type rifle. It is not the kind of ones you usually get probably, but. And of course you did say that -- and I can't remember what exhibit it is, but its shell casings, you did say that the shell casings

that were given to you, that you recall analyzing, you conclusively found that they were fired from the AR rifle?

A In my opinion, they were fired by the AR rifle due to matching individual identifying characteristics in the breach face, extractor, ejector, cycling works.

Q But, of course, shell casings don't kill people; bullets do, right?

A I can't attest to that. Bullets can and can't kill people. That is a medical examiner issue.

Q Well, I mean, you don't shoot people with shell casings, you shoot them with bullets?

A When this was fired it had a bullet in it.

Q But you don't know whether or not the bullet came from any of those shell casings?

A No, I can't determine whether the bullet came from any of these shell casings.

MR. BARR: Thank you, ma'am.

REDIRECT-EXAMINATION

BY MS. WALTER:

Q Briefly, there are two fragments of projectile evidence that you examined. Are they similar or consistent with the fired cartridge casings you examined?

A They are similar in brand -- in caliber, yes.

SUZANN CROMER - RECROSS EXAMINATION

MS. WALTER: Nothing further. I ask that she be released from subpoena.

THE COURT: Mr. Barr?

RECROSS-EXAMINATION

BY MR. BARR:

Q When you say "in caliber," you mean just for that particular caliber of weapon?

A No. I mean the caliber of the ammunition. The caliber was consistent with a 223 Remington or 556 --

Q That's what I thought, yes, ma'am. Yes, ma'am.

A Both my cartridge cases -- all three of the cartridge cases were 223 Remington, and both of the fired bullets were consistent with 223 Remington or 556 Nato, which you can load that type of bullet in either one of those caliber cartridge cases.

Q In other words, if I went back to Walmart or went to Walmart--

MR. HIXSON: Objection. Outside the scope of redirect.

THE COURT: I'll let him ask it. You were saying, Mr. Barr?

Q There might be another gun wherever this was purchased -- they are in all of the gun stores that would have 223 Remington, the shell casings would be consistent with that, right?

A These shell casings, in my opinion, were fired by this gun.

Q All right.

(A brief pause in the proceedings.)

Q (MR. BARR) The shell casings. All right. Thank you.

MS. WALTER: Nothing further. I ask her to be released.

THE COURT: Any objection?

MR. BARR: No, sir. No, sir.

THE COURT: You are released from your subpoena. Thank you.

MS. WALTER: State calls Doug Robinson.

(DOUGLAS ROBINSON, having been duly sworn, testified as follows:)

THE COURT: State your full name and spell your first and last to the court.

THE WITNESS: Douglas, D-O-U-G-L-A-S, R-O-B-I-N-S-O-N.

MS. WALTER: May I, Your Honor?

THE COURT: Yes.

DIRECT-EXAMINATION

BY MS. WALTER:

Q Where do you work?

A South Carolina Law Enforcement Division, commonly

known as SLED.

Q Do you work in a particular area?

A Yes, ma'am. I'm a forensic chemist assigned to the Drug Analysis Department.

MS. WALTER: And, your honor, Mr. Barr has agreed to stipulate to Mr. Robinson's expertise in the area of chemical analysis of controlled substances.

THE COURT: Is that correct?

MR. BARR: Yes, it is.

THE COURT: Again, ladies and gentlemen, this witness has been qualified by stipulation as an expert, and as such, he may give an opinion in the field of --

MS. WALTER: Chemical analysis of controlled substances.

Q (MS. WALTER) I'm approaching with State's Exhibit 33, which is already admitted into evidence. Mr. Robison, do you recognize that exhibit?

A Yes, ma'am.

Q What do you recognize it to be?

A This is drug evidence that was submitted and analyzed under SLED Lab No. L-1402331. I recognize my initials on several different items.

Q That packaging refereed to as the "SLED BEST packaging," is that fairly typical for how drug

evidence comes to you?

A Yes, ma'am. We have several different layers here. The outer packaging is actually the K-pack. This is a heat-sealed bag we use within the department to reseal the evidence after analysis. The bag inside with the green strip across the top and blue swirl pattern across the other sides, that is referred to as the "BEST bag," BEST is short for Best Evidence Sample Testing. It is a uniform procedure that SLED uses to issue these bags to agencies throughout the State as a uniformed way to package drug evidence potentially on scene and have it sealed in a uniform manner throughout the chain of custody to us.

The word "seal intact" with my initials and the day I inspected are written on the bag. On the reverse side you have the actual drug evidence that was submitted, and in Ziploc bags. Each of the Ziploc bags has the lab number, item number and bag and my initials and the word "bag added." The "bag added" signifies that I added the Ziploc as a way to contain each individual item during analysis.

Q Now, you noted that you had written "seal intact," so let me back you up.

A Sure.

Q When something is brought in by law enforcement

that would require your expertise, can you tell me how it is that you get that evidence?

A Yes, ma'am. All evidence is submitted through the Evidence Control Department. We do not have technicians in our department, we physically retrieve our own evidence per analyst. So I would go and retrieve this evidence and bring it back up and store it in a secured location until it was time to do the analysis. When that time comes, the first thing that happens is the BEST bag is removed from an outer manila envelope used for transporting and protection of the bag. The seals are checked at that point before any analysis starts. The note "sealed intact" appears here, and it is noted on my analysis worksheet. So it is verified that that seal is intact.

Q If it had not been intact, would you have noted that as well?

A Absolutely.

Q After you verify the seal is intact, very briefly, if you could describe the process you go to to analyze a controlled substance.

A Every case is a little different, so once the case is opened, all the evidence is separated and itemized accordingly. Once it has been determined how the evidence will be itemized, each item is worked

independently from the other items as a separate unit.

Per item, individually, all packaging is removed from that item and an initial weight is taken. Once the weight has been recorded, an initial or presumptive test is performed. This gives us a general idea of what the substance could be of classification. Based on that, additional confirmatory testing is performed to identify the substance to the exclusion of all other compounds.

Q Did you, in fact, do that testing on the items in that SLED BEST packet?

A Yes, ma'am.

Q Were you able to form an opinion to a reasonable degree of scientific certainty as to what the items were?

A Yes, ma'am.

Q What were they?

A May I refer to my notes?

Q Yes, please.

A For Item 7.1, heat-sealed bag containing the following:

Item 7.1.1: Plastic corner bag containing rock substance. Cocaine base crack C2 found in sample tested. One tested. Net weight, 0.108 grams, 1.666 grains.

Item 7.1.2: Plastic corner bag containing rock substance. Cocaine base crack C2 found in the sample tested. One tested. Net weight, 0.108 grams, 1.666 grains.

Item 7.1.3: Plastic corner bag containing crystal substance. Methylone C1 found in the sample tested. One tested. Net weight, 0.149 grams, 2.299 grains.

Item 7.1.4: Plastic corner bag containing crystal substance. Methylone C1 one found in the sample tested. One tested. Net weight, 0.155 grams, 2.391 grains.

Item 7.1.5: Plastic corner bag containing crystal substance. Methylone C1 found in the sample tested. One tested. Net weight, 0.161 grams, 2.484 grains.

Item 7.1.6: Plastic corner bag containing crystal substance. Methylone C1 found in the sample tested. One tested. Net weight, 0.189 grams, 2.916 grains.

7.1.7: Plastic corner bag containing crystal substance. Methylone C1 in the sample tested. One tested. Net weight, 0.182 grams, 2.808 grains.

Item 7.1.8: Plastic corner bag containing crystal substance. Methylone C1 found in the sample

tested. One tested. Net weight, 0.194 grams, 2.993 grains.

Item 7.1.9: Plastic corner bag containing crystal substance. Methylone C1 found in the sample tested. One tested. Net weight, 0.141 grams, 2.175 grains.

Item 7.1.10: Plastic corner bag containing crystal substance. Methylone C1 found in the sample tested. One tested. Net weight, 0.173 grams, 2.669 grains.

Item 7.1.11: Plastic corner bag containing rock substance. Cocaine base crack C2 found in sample tested. One tested. Net weight 0.090 grams, 1.388 grains.

Q To be clear, when you opened the evidence, there were 11 doses -- for lack of a better word -- of controlled substances?

A 11 different bags. Because they appeared to be two different substances, and there was some ambiguity as to what would go with what or what would be the same substance, all were broken out separately and tested as separate reporting items. For recording purposes, they were all separated into 11 different items as well.

MS. WALTER: Nothing further at this time. If you would, answer any questions by Mr. Barr.

A Yes, ma'am.

MR. BARR: No questions.

THE COURT: Anything further need for this witness?

MS. WALTER: No, Your Honor.

THE COURT: Mr. Barr?

MR. BARR: No, Your Honor.

THE COURT: You are released.

MS. WALTER: State calls Jennifer Nates.

(JENNIFER NATES, having been duly sworn, testified as follows:)

THE WITNESS. J-E-N-N-I-F-E-R, N-A-T-E-S.

DIRECT-EXAMINATION

BY MS. WALTER:

Q Where do you work?

A South Carolina Law Enforcement Division in the Trace Evidence Section.

MS. WALTER: Your Honor, Mr. Barr agreed to stipulate to Ms. Nates' expertise in the area of analysis of trace evidence.

THE COURT: Trace evidence, and likewise she has been, by stipulation and agreement, offered as an expert in that field, and you may give her testimony such weight as you feel is appropriate. Thank you.

Q (MS. WALTER) Have you been qualified as an

expert before?

A I have, 108 times.

Q How long have you worked for SLED?

A 20 years at the end of this year.

Q Part of being an expert in the analysis of trace evidence, would that also include the area of gunshot residue?

A It does. Trace evidence includes several different areas. We are qualified in paint, fiber, glass, explosives, fire debris, tape and gunshot residue.

Q So specifically for this case -- and I'll direct you to SLED Lab No. L-1402331 -- were you called upon simply to do a gunshot residue analysis?

A Correct. In this case I was asked to perform a gunshot residue analysis on two gunshot residue kits.

Q Can you describe briefly for the jury what is involved in a gunshot residue analysis?

A Gunshot residue analysis is a test that is usually performed on a subject's hands. The test or kit is commonly collected in the field by the investigating officer, by the coroner or by a crime scene unit. The kit is -- it contains particle lifts, which are small -- it is a round area that has a light adhesive on it. The officer or coroner will use one

particle lift for each area of the hands. They dab over each area to pick up any material that is present on that person's hands. The evidence is then preserved on the particle lift until it is submitted to the laboratory for analysis.

We will open up the kit and determine if they were collected within the right amount of time. Gunshot residue is very fragile, and there are time limits on how long after the incident the kit can be collected for the evidence to be viable. Once we determine that, we put our samples on a microscope. The particles we're analyzing are very, very small. You can't see it with a naked eye. They have to be magnified. Usually we perform analysis at 670 times what the actual size is. When we focus on these particles, sometimes I have to go up to 18,000 times to actually obtain a picture of the particle.

We load the samples onto the instrument, set up the parameters for the analysis and the instrument performs an automated analysis overnight. We then go in and determine each category that the instrument put these particles into to verify if gunshot residue is present or not by the sample.

Q You mentioned the collection has to be done within a certain time period; what is that time period,

typically?

A The time frame for collection for our state is six hours, and this only applies to living subjects. Once a person is deceased, anything that can remove the residue from the hands no longer comes into play. If I fire a weapon and wash my hands, or I sweat, put my hands in and out of the pockets, touch things, anything I do can remove that residue. Once a subject is deceased, they are no longer moving or breathing or absorbing that residue, and it would have to be removed from an outside force. So six hours is the limit for living subjects for a collection of a GSR kit.

Q We heard testimony in this case that the victim's hands were bagged with tape around the bottom, does that preserve any gunshot residue that might have been there?

A Usually, agencies bag a victim's hands to prevent any removal of the evidence during the transport of the person either to the hospital or morgue. So that will allow outside objects not to interfere with the hands or come into contact with them.

Q I'm approaching you with what is admitted Exhibits 41A and 41B. Let's start with 41. That would be the gunshot residue test taken from the defendant, Antwuan Nelson, correct?

A That is.
Q Did you perform the analysis on that exhibit?
A I did.
Q Can you tell us to a reasonable degree of scientific certainly whether or not the defendant had gunshot residue, or whether the test indicated that the defendant had gunshot residue on his hands?
A On the evidence that I received from Antwuan Nelson, I received four particle lifts collected from his hands. During the testing, I found particles of gunshot residue were present on the right hand, and one particle of gunshot residue was present on the left hand.
Q When you say particles of gunshot residue were found on his right hand, is there any way -- and I know you testified to how microscopic these -- this residue can be, is there any way to quantify how much gunshot residue was there?
A How many particles were present?
Q Yes.
A May I refer to my notes?
Q Yes.
A When we do reporting for gunshot residue, we don't report exact number of particles unless it is one, because if it is one, I cannot use the term

"multiple" or plural form. So if there is more than two, it is "multiple." In this case, I found two on his right hand, and one particle on his left hand.

Q Turning to Exhibit 41B, which is gunshot residue kit taken from the victim in this case, did you perform that same analysis kit?

A I did.

Q What were your results or conclusions to a reasonable degree of scientific certainty?

A In a kit submitted from Michael Rogers, I did not find the presence of gunshot residue on the sample submitted.

Q So on either of his hands?

A Correct.

Q And, again, the adhesive pads would have tested the backs of both hands and palms of both hands?

A Correct.

MS. WALTER: I have no other questions. Please answer any by Mr. Barr.

CROSS-EXAMINATION

BY MR. BARR:

Q In addition to your findings in your trace evidence report, you've indicated at least -- and really you talked about -- I think you basically covered all of them today, but I want to talk about one

in particular, briefly.

Negative results can occur under certain -- when six hours pass between firing and sampling. So if somebody's sample is taken say, for instance, 12 hours, 13 hours, even longer than that, it's quite possible to get a negative result?

A On a living subject, not deceased.

Q And how about deceased?

A Not on a deceased. On a deceased subject, once they are pronounced dead, at that point the time frame stops and the requirement no longer applies to that.

Q And I noticed that you also mentioned the firing of a firearm that does not produce primer --

A Can you repeat that please?

Q Firing a firearm that does not produce primer, the --

A Right. That is one instance we have seen in some of our test firing that -- actually, with a Glock we test fired and the shooter did not have any gunshot residue on their hands. So we've seen it in some limited instances where the firearm doesn't produce enough primer residue to be deposited on the hands.

Q Have you seen it in a shotgun?

A Have not. Normally, a shotgun produces much more residue than the smaller caliber weapons. With gunshot

residue, 22 or a 380, smaller guns don't produce as much residue because there is not as much primer in that weapon. Larger caliber weapons produce more residue.

Q All right. High powered shells have more primer or less primer?

A Depends on the shell, but usually has more than a 22.

Q More powder?

A Yes. All guns are different.

Q But the actual shell themselves, depending on the load that they are designed to carry, more powder carries a heavy load?

A Can't answer a firearms question. All I can tell you if the gun contains a higher load and has more primer, more primer will be produced, but I can't tell you which guns, other than high caliber/low caliber, would fall into these categories.

Q And you couldn't say ordinarily with a light load, less primer?

A That is what I can say, light load versus --

Q Okay. Good. Good. Thank you.

MR. BARR: Nothing further.

REDIRECT-EXAMINATION

BY MS. WALTER:

Q There has been evidence admitted in this case about a shotgun and shotgun shells of that size. You would believe that shotguns of this size would have more of a load or less of a load, if you can tell us?

A I can't answer that question. I can testify to what I have seen with larger caliber weapons, we see more primer produced on the hands when shooting.

Q And you included shotguns as a larger caliber?

A I did, yes.

MS. WALTER: Nothing further at this time.

THE COURT: Mr. Barr?

RECROSS-EXAMINATION

BY MR. BARR:

Q Larger caliber, but not necessarily coinciding with the load?

A Primer residue -- what we look for -- is actually in the primer cap of the cartridge. So you can have whatever type of bullet in there, but it may take more primer residue to ignite a larger load. That is just basic -- what we are taught with a primer. I can tell you that with the majority of the guns produce gunshot residue, we will see gunshot residue on a person up to four to six hours after they have fired a weapon if they are living. On a deceased individual, the residue

remains on the hands until it is physically removed by an outside force. So if a weapon was fired and primer was produced, we should see it on that person's hands.

Q Blood affects it as well?

A It can dissolve the residue.

MR. BARR: Thank you.

MS. WALTER: Nothing further.

THE COURT: You may step down. Any objection to releasing this witness from her subpoena?

MR. BARR: No, sir.

THE COURT: Ms. Walter, any objection?

MS. WALTER: No, Your Honor.

THE COURT: You are released from your subpoena.

MR. HIXSON: May we approach?

THE COURT: Yes.

(Whereupon, a bench conference was had.)

THE COURT: Let's take about a 10-minute bathroom break. Ladies and gentlemen, the next witness -- they tell me -- could be rather long, so what I'll do is -- it is 11:30. I'll let you go to lunch until 1:00. That is an hour-and-a-half. Be back and we'll be ready. Mr. Ropp, take the jury to the jury room.

(The jury exits at 11:28 a.m., and the following is heard out of the presence of the jury.)

MS. WALTER: I believe I neglected to have some

JURY OUT

of my witnesses released on their subpoenas on the record.

THE COURT: Any problem with them? Who do you have that you think you are done with?

MS. WALTER: My evidence technician and my crime scene specialist, Mr. Stair and Officer Harlow from yesterday.

THE COURT: Any objection to releasing those?

MR. BARR: Who did you say now?

MS. WALTER: Stand up that has not been released. There you go. Shadoan, Ms. officer Stair --

MR. BARR: No, sir.

MS. WALTER: No objection.

THE COURT: They are all released from their subpoenas.

(A lunch recess was taken.)

THE COURT: How many more do you have, Mr. Hixson?

MR. HIXSON: We believe this will be the last one. Kristen Bloomer.

THE COURT: Oh, yeah, that's right.

MR. HIXSON: She did CPR and all of that. We'll see what develops with Ms. Bloomer, but most likely.

THE COURT: Is there any criminal history that you intend to use that you gave Mr. Barr?

MR. HIXSON: I don't think he has any impeachment or conviction -- I'll check in a second.

(A recess was taken.)

THE COURT: Are we ready? I see -- it's 1 o'clock. Is he up here? As soon as he is up -- okay. We're ready. Bring the jury in.

(The jury enters at 1:10 p.m., and the following is heard in the presence of the jury.)

THE COURT: We have everyone back, Mr. Hixson. I believe you have a witness.

MR. HIXSON: The State calls Kristen Bloomer.

(KRISTEN BLOOMER, having been duly sworn, testified as follows:)

THE CLERK: State your full name and spell your first and last for the Court.

THE WITNESS: My name is Kristen Bloomer, K-R-I-S-T-E-N, B-L-O-O-M-E-R.

DIRECT-EXAMINATION

BY MR. HIXSON:

Q Good afternoon. How are you?

A I have been better.

Q That is just a test drive so you get used to the mic. Let's take you back to January 2014. Did you know a man by the name of Michael Rogers?

A Yes, I did.

Q How do you know Michael Rogers?
A We were in a committed relationship together. We shared a residence and we also shared a child together.
Q And so you have a child in common?
A Yes.
Q Boy or girl?
A A girl.
Q What is her name?
A Cameron. She's four.
Q So when this happened years ago, she was a little over one around January 27, 2014?
A She just turned one.
Q Were you taking care of her at that time, in daycare, where was she in the afternoon of January 27 of 2014?
A Earlier in the day she was in daycare. Towards the afternoon is when I would -- I usually picked her up from daycare around 5:00, 5:00 o'clock in afternoon.
Q Okay. So were you living -- just trying to set the stage for you -- were you living in the 37th Avenue area of the City of Myrtle Beach in Horry County?
A Yes, I was.
Q Do you remember the specific address?
A [redacted] 37th Avenue North, Apartment [redacted] in Myrtle

Beach.

Q Let me show you what is in evidence already, it's State's 1; do you recognize that?

A I do. That is the street I lived on.

Q Can you point to the building you lived on?

A This back building right here, and on the top level onto the apartment on this side.

Q And in order for you -- like where would -- if you were to go to your apartment right now, if you still lived there, where would you go?

A A little front entryway that leads into a little hallway and a staircase directly as you enter the doorway. So once you enter the doorway and go up to the stairs, you go to the apartment on the right.

Q So let me ask you this. Does Michael have a green pickup truck?

A Yes.

Q And if you were to pull into park -- let me show you and set the scene. Let me show you what is marked as State's 2; do you recognize that?

A Yes, I do.

Q Is that -- was that Michael's pickup truck?

A It was.

Q Is that where he normally would park, generally speaking?

A Either there or in the back driveway.
Q Can you point?
A Right over in here somewhere. He would only park it out here shortly after he was washing it.
Q So generally speaking, you park in here or sometimes out here?
A Correct.
Q And just normal every day, if you are coming home, how are you going to get up into your apartment?
A There is a little driveway right here where the shade is blocking, there is a driveway that leads up this way and it goes into the parking lot.
Q So no normal every day thing is, Hey, Honey, I'm home, and he is coming up this way?
A Yes.
Q And you have to go up the steps to get up to that apartment?
A Yes.
Q Thank you. So let's set the scene a little bit more. I'll show you what is marked as State's 3; do you recognize that? What is that?
A That is the two vehicles, and this is the entryway to the front building of the -- I would say -- complex.
Q Let me see if I can turn into an octopus here.

So that picture -- so this picture, if you are a photographer taking this pictures, where would you be standing taking the picture?

A You would be standing facing this building, so you would be facing north from the street.

Q So this entrance for this door is like right here?

A Correct.

Q And that goes upstairs to the second floor on that?

A Yes.

Q Okay. So let's take it back to January 27th. Anything particularly eventful for the trial of this case happened prior to 3 o'clock that day? I mean, I'm sure you did a bunch of stuff, but as it related to what happened, anything up to around 3 o'clock?

A Nothing really until about 3 o'clock. I remember dropping my daughter off at daycare that morning, coming back to the house, getting some laundry and old baby clothes ready for Beach Baby Kids Sales. So I was getting them ready and prepared to take those. Sitting on my couch watching TV, washing and folding them. That was pretty much about it until about 3 o'clock.

Q Let me show you what is put in evidence as State's Exhibit 8; do you recognize that?

A I do. That was my apartment.
Q What is on the sofa there?
A Baby clothes.
Q Doing laundry, folding clothes?
A Yes.
Q I'm showing the jury what is already in evidence State's 8.

(Published to the jury.)

Q (MR. HIXSON) And at some point in time -- I'm getting you to the point, and let me know if you need a break. At some point in time, does Michael Rogers and Antwuan Nelson come into the front door of your apartment?
A Yes, they do.
Q Let's start talking about them there, okay. If you can go from there, tell the jury what you saw and heard that afternoon somewhere after 3 o'clock on the 27th.
A As I said, I was sitting on the couch folding some clothes. Next thing I noticed was Michael and the defendant coming through the door of my apartment. They headed over to the kitchen area, which if I'm sitting on the couch, it is over to the right of me divided by a fish tank.
Q Let me show you what is State's 9 already in

evidence; do you recognize that?

A Yes, that's it.

Q Can you point to where the front door, the door in and out in that picture?

A Right here. This is the front door in and out. This is the kitchen area, and over in here is the couch in the living room where I was sitting.

Q So it's all one great big room, you have an alcove, but it's a great room, they call it?

A Yes. Yes.

Q I guess that's safe to say.

(Published to the jury.)

Q (MR. HIXSON) What is the demeanor when they come into the room? Are they screaming, happy, what is going on?

A Everything is fine, normal, not really any words or anything, just me sitting on the couch. They headed straight into the kitchen area, but nothing out of the ordinary as far as words or demeanor wise. It was pretty calm and collected.

Q Had you seen Mr. Nelson before? Did you recognize him from anything in the past?

A I had not.

Q As it relates to Mr. Nelson's appearance, is his hair different today when you first saw him?

A It is. He had really long dreads, and that day his dreads were kind of pulled back, so like you have a ponytail, your hair is long, so if you pull it down like this, he had dreads.

Q So take us from there then. Everything is okay. What happens?

A Yeah. So wasn't paying attention too much. All of a sudden, I hear Michael start saying --

MR. BARR: Objection, hearsay.

THE COURT: Repeat the question.

MR. HIXSON: I asked what happened, and just asking for presence sense impression.

THE COURT: Let me hear the response again.

MR. HIXSON: She has not responded yet.

Q (MR. HIXSON) What were you observing or perceiving?

A Well, what I was -- what I was perceiving at the point where I started hearing voices, other than my own, because I was not speaking, when I started hearing two male voices speaking, it was getting hostile. So I proceeded to look up and stand up. At that point, when I stood up, I saw the defendant throw a punch at Michael Rogers.

Q Back up for a second. When you say you went from folding clothes to suddenly paying attention to what

was going on in there, did you hear Antwuan Nelson say anything?

A I did.

Q What did he say to Michael Rogers?

A He was saying, No, you will buy these.

Q And do you know what they were doing in the kitchen?

A Initially, no. But once they started speaking, yes. It was a drug -- intended drug sale.

Q Did you see what they were arguing over?

A I did not. I did not.

Q Did you -- were you aware whether or not Michael ever used drugs?

A Here and there, yes.

Q Do you know whether or not Michael ever sold drugs?

A On occasion.

Q You don't know anything about Antwuan Nelson? You just testified that you didn't know anything about him as he is coming in the room?

A No. It was one of those things where I tried to keep it away from my home, so certain things that were conducted, I really was not a part of, per se, I would say.

Q So now we have a concept of what we're talking

about. So tell us again, when you first noticed something that takes you away from folding laundry?

A I heard Michael's voice and he was talking.

Q What did he say?

A He said, No, I'm not buying these, it does not look correct.

Q And what is your impression of what he was referring to when he said I'm not buying it?

A Whatever he was purchasing was not to the standard of what someone else would want to purchase.

Q And then in response to that, what does Antwuan Nelson tell Michael Rogers?

A He said, You will, you will buy these.

Q What happened after that? I think you mentioned at that time --

A Yeah, at that time I stood up because, of course, I heard things getting hostile. So I stood up and looked over to the right of me, and I saw Antwuan throw a punch at Michael.

Q And he hit him?

A Yes. And then from there they kind of just started scuffling around in the kitchen, kind of from one end to the other.

Q Let's get a picture so we can show what we're talking about. Can you point for the jury to see what

area you are referring to?

A Yes. Initially, they were standing over here, so when I saw the punch thrown, they were about in here, and then they ended up being over by the stove and the refrigerator initially when they were scuffling.

MR. HIXSON: Your Honor, she's referring to this area of the photograph.

THE COURT: All right.

Q (MR. HIXSON) Referring to this area of the photograph?

A Yes.

(Published to the jury.)

Q (MR. HIXSON) Basically by the kitchen counter towards the sink; is that safe to say?

A Yes.

Q You start to see a fight ensue; what do you do?

A I'm yelling at both of them to stop it, it is ridiculous. I can't remember my exact words, it was three years, but along the lines of, stop, this is ridiculous, you all need to stop fighting in my house. As I was saying that, they were still scuffling, and then both the defendant and Michael ended up being in between the kitchen table and the couch.

Q Let me ask you this. At some point in time, did Michael Rogers go to the ground?

A Yes.

Q Did Antwuan Nelson go on the ground on top of him and kick him and punch him?

A Yes.

Q Talk about that and go forward from there. I keep interpreting.

A No, you're fine. So when they were scuffling, they ended up on the floor, which was in between the kitchen table and the end of the couch, kind of diagonally. So they were on the ground and the defendant was on top of Michael, and he was continuing to hit him. They were scuffling that way. Then, at that point, Michael did tell me to get his gun. When he said that, I froze because of the situation going on and I also did not know where it was. So what I did was I went around them fighting, which was easy to do from where the placement was. I went around and opened up my front door. I opened up my front door and I told Michael hit him, get him out of the house, push him down the stairs if he had to. At that point, not long after I opened the front door, Mr. Nelson took off running and went out my front door and went down the stairwell out of the building that I lived in.

Q Were things in disarray inside the kitchen, inside your house during the scuffle?

A They were. The trashcan was knocked over, the tables and chairs were knocked over, refrigerator door handle had been taken off in the scuffle. There is just -- it was a mess.

Q When Michael said, Get my gun, get my gun, did you know specifically what type of gun or whatever he was referring to?

A I did.

Q Had you seen it in the apartment?

A I did.

Q Referring to a long gun or pistol?

A A long gun.

Q Shot gun?

A Yes.

Q Did you, in fact, go get that gun for him when Antwuan Nelson was on top?

A I did not. Like I said, I didn't know where it was, so I couldn't.

Q So Mr. Nelson goes down the steps. Tell us what happens in the apartment right after he goes down the steps?

A After he goes down the stairs, I shut my front door and I'm talking to Michael trying to get him to calm down, get him to stay in the apartment. That did not happen.

Q What is his mindset?

A He's furious. He was pretty much attacked in his own house and he has me and our daughter wasn't there at that time, but this is where we live. This is our house and he was just attacked, so he was in a protective defense mode for his family.

So I shut the front door, was trying to talk to him, trying to get him to calm down, like, okay, it's not a big deal, you know. I opened up the front door and started walking down the stairs, which in this passing we had passed his son, who was also kind of staying there at the time. We passed his son along the way, stopped and talked to him for a second and we all proceeded to go outside of the building and go around to the front buildings, and Michael did go a little ahead of me to the front building.

Q When you see -- when Michael goes down the steps, do you see if he had a gun on him at that time?

A I don't know. It is three years ago. I can't -- I don't remember. At this point I don't remember if I did or not.

Q Can you point to the direction where you recall -- let me ask another question. From the time that Mr. Nelson, the defendant, leaves the house, your house, until you go down the steps, about how much time

do you think passed between --

A When?

Q When says, Get my gun, get my gun. Mr. Nelson goes down the steps, you talk to Michael try to get him to calm down, he decides he's going down the steps; how much time do you think went by?

A About two minutes maybe, give or take. But no -- I would say no less than a minute-and-a-half, probably two minutes on up.

Q So he was right on his heels, but it was also directly as a result of --

A Correct.

Q Fair enough. Did you see where the defendant went after he left the building?

A I did not.

Q And let's talk about Michael. What did Michael do?

A Michael ran down the stairs, and I did not see which way he took, but he -- when I went down the stairs, I walked around this way down the driveway and to the front of the building, which is where I saw Michael standing.

MR. HIXSON: Your Honor, she goes this way and goes here and sees Michael general down here (indicates).

THE COURT: Okay.

MR. HIXSON: Can you all see that?

Q (MR. HIXSON) So the next time you see Michael, you testified that you and he are standing in this area?

A Correct. A little bit closer to this front door kind of where the truck was parked, kind of in front of that, in that area.

THE COURT: Let's mark on the exhibit.

MR. HIXSON: Mark on the big one, Judge?

THE COURT: So it will be complete.

Q (MR. HIXSON) Mark on there where you and Michael -- when you have come down and around?

A (Witness complied.)

Q Good job. All right.

THE COURT: For the record, how did she mark it?

MR. HIXSON: With her initials, with a dot and with that "KB".

A Yes.

THE COURT: Thank you.

Q (MR. HIXSON) What is Michael doing at this point in time?

A He's standing there pretty outraged. He's yelling up to the top of the stairs of the front building that you all were showing earlier. He was

yelling, outraged. He was kind of popping around, but yelling -- I can't say exact words, but along the lines of, Come on, come out, fight like a man, to where he believed where the defendant was.

Q The words he was using, was he threatening to kill Antwuan Nelson?

A No.

Q This is offered for presence sense impression, state of mind, what is in the mind of this individual. Is he saying, I'm going to kill you, or, Come down and fist fight like a man? What is your testimony?

A No. My overall impression was, Come down and fist fight.

Q I'll show you State's 3. When he is saying that, did he have a weapon in his hands?

A He didn't.

Q Do you recognize that?

A I do.

Q Where are you located when Mr. Rogers is yelling up the steps to where he believes Mr. Nelson to be?

A Pretty close to his proximity, two, three feet away.

Q Pretty much standing there with him?

A Yes.

Q When this is going on, does Mr. Nelson -- do you

see Mr. Nelson -- does he come down the steps? Do you see him?

A No.

Q At some point in time -- please, go ahead with your story. I'll stop asking questions.

A So after he yelled for a few minutes, I guess he was kind of -- not really calming down, but I realized the time and I know it was closer to picking up our daughter from daycare, so I was trying to get him out of the situation, Come on, let's go, let's go get Cameron, leave it alone, let's get Cameron.

At that point, he agreed to go ahead and go. So we walked back up to -- back around that front way back to our apartment.

Q Was Jerome -- or his son -- around there at that point?

A Yes. Yes. He was standing within proximity of us, and we all headed up to the apartment.

Q Prior to him turning and going out of the apartment, did he get anything out of the truck?

A He did. He grabbed a shotgun out of the bed.

Q So the shotgun was downstairs at that point in time?

A Yes.

Q Is that the first time you remember seeing the

shotgun?

A Yes.

Q Let's talk about that. Let's use this diagram. This is State's 23. It is a sketch with a truck. So point to that area where you remember the front entrance and where you were standing?

A Front entrance is about here, and we're standing about here.

Q And then when you are talking about leave him alone, let's go, in more detail now, because there is a piece in there, you see him reach in the back of his truck and get a shotgun. So talk about that in more detail.

A So I convinced him to come with me. He grabbed his shotgun out of the trunk of his car.

Q Is that a pickup truck?

A I'm sorry, out of the bed of the truck. He was holding it in his hand, and all three of us proceeded to just -- I would say casually walk back around this way back up to our apartment.

Q What was his demeanor there? You mentioned he was calming down. Is he still agitated?

A He was -- I mean, I'm sure -- can't say state of mind, but it was calmer than initially, but it was probably -- he knew we were going to go get our

daughter, so it was kind of cut-a-loss kind of thing.

Q Do you recall what time this was that you started to think, hey, we need to go get our daughter?

A I want to say maybe like 4:15-ish. Maybe a little before that. Maybe a little afterwards.

Q Because I think you testified earlier that you had to pick her up at 5:00?

A Correct.

Q So up to this point, how long do you think this has been going on since the initial altercation downstairs, time goes by and now you are thinking have to get moving?

A At least 20 minutes. At least 20 minutes.

Q Up until the time he leaves and goes back up?

A (Witness nods head.)

Q At some point in time, do you come back down here as you are -- what vehicle are you going to drive to pick her up in?

A The green truck.

Q So you have to go back where that is. So at some point in time, do you come back down towards the green truck?

A I do. At some point in time, we actually all -- I cannot say "all." I know me and Michael definitely walked back down to the truck from the apartment after

having been up in the apartment for about five minutes cleaning up the mess. We walked back down to the truck.

Q When you are down towards the back of the truck a second time, do you see Antwuan Nelson?

A No.

Q At some point in time, do you see Antwuan Nelson come back and get in the red Crown Victoria?

A I do.

Q Tell us about that.

A I can't remember exactly why Michael decided not to come with me to pick up my daughter from daycare. So he started to walk back up to the apartment, and I was going to get in the truck to go get her. Mr. Nelson came down from the stairs from the top of that building. Came down the stairs. He kind of crouched down, looked around for a second and ran to the trunk of his car. When he ran to the trunk of his car, he opened it. I couldn't necessarily see what he was doing, but I could see him out of the little space where the trunk and the car don't necessarily meet when you open a trunk. He was crouched down, so I can't say necessarily what he was doing at that time. He stood up, closed the trunk and he approached me with a black rifle in his hand. When he approached me -- when he

approached me, he told me to call my boyfriend and tell him to bring him his stuff. At that point, I told him no. I said, no, I'm not, my phone is about to die. I wouldn't have been able to make the call. So after I told him that, I walked away from him and started to walk back up to my apartment.

Q What was the defendant's demeanor at the time he walked up with a rifle in his hand to ask you tell him to bring me my stuff?

A Kind of hostile, but not necessarily towards me, more towards the situation.

Q Was he pointing the weapon at you?

A No. He had it in his hands talking.

Q This is State's 2. So where are you standing in relation to this photograph when you see Mr. Nelson go to his truck?

A You can't really see it from this picture because it is over more towards that initial driveway that leads to the back building where I was.

Q Try this one, referring to State's 1, which you already initialed. Where you were first standing, how about this time when Mr. Nelson is getting the rifle out of the trunk of the car?

A I would say right around here where this hard black concrete ends to kind of the softer gray, so

right around in that area.

Q I'll have you mark that, too. If you will mark that with your initials and a number "2" to show your second position, okay. Mark the second time where you are -- when Mr. Nelson approaches you with a rifle.

A (Witness complies.)

MR. HIXSON: Here is the location she marked, Your Honor.

THE COURT: Very well, thank you.

Q (MR. HIXSON) So you are further up the walkway so you can see the other side of the house, not the alleyway?

A Correct.

Q Is Michael there at the time?

A No. He was already up in the apartment, as far as I know. I know he left before me, and when -- he -- he would have had time to get up to the apartment while I was speaking with the defendant.

Q So the last time you see Michael -- not the very last time, we'll tread lightly on that -- the last time you see him, he is taking the shotgun and your understanding is he's going back upstairs because he says he's going with you to pick up your child; is that safe to say?

A Yes.

Q After Mr. Nelson asks you to tell your boyfriend to bring his stuff, what happens then?

A I start walking around the front of the first building more so around -- slightly around the corner of it, so I'm walking around the east side of that building headed back towards my apartment, and as I'm walking, I make it to about the breezeway area --

Q I don't think we used that term, "breezeway," what do you mean? This area?

A Yes.

Q Between the buildings is what you are calling a breezeway?

A Yes.

Q Okay.

A So I make it to about to that area. I hear the front door to the apartment -- the building I lived in, that front doorway had a door on it that you had to open to get to the stairway and the other apartments. As I am walking away, I hear that door shut. I see Michael behind -- through the glass of the cars that were parked walk up against the edge of the building and towards that small breezeway area.

Q Does he have a shotgun in his hand then?

A He does.

Q Tell us what happened then?

A I walked around, got through the breezeway and I -- it happened so quick. I didn't have time to say anything. I saw him peek around the corner and duck back. I heard shots in that time frame. I also heard Michael's son, who was standing in that doorway of my building with the door opened, telling me to get over there, to get over there, come over there with him.

MR. BARR: Objection, hearsay.

THE COURT: Excited utterance.

MR. HIXSON: I would offer it for that.

Q (MR. HIXSON) Was this a very stressful experience?

A Yes.

Q Did Jerome's voice seem to be under the stress of the excitement of this situation when he's calling to you?

A Yes.

MR. HIXSON: I ask that --

THE COURT: It is admitted.

Q (MR. HIXSON) Please continue, ma'am.

THE COURT: Under the theory of excited utterance and not offered for the truth of the matter asserted.

MR. HIXSON: That's right. Thank you, Your Honor.

A At that point, Jerome was yelling to me. I

walked into -- I went into the hallway area and stood with Jerome. I didn't feel very long that we were in there, maybe 10, 15 seconds, if that. I heard a few more shots in that time frame. It happened very quickly. So I heard a few more shots and it stopped, and maybe about 10 seconds after I heard it stop, I proceeded to tell Jerome that we needed to go out there, we needed to go out there, he could be laying on the ground bleeding out for all we know, we needed to check on him. I was instructed not to, to stay in the building and he would go out first. He walked outside of the doorway before I did. When he walked out of the doorway, he got to the breezeway area and started yelling and screaming. I ran out over there (witness crying). At that point in time, I ran over there -- ran past Jerome in the breezeway because I could see Michael laying on the ground. I approached Michael, who was on the ground. I went and got beside him, and I got down and kneeled into the dirt next to him. I started applying pressure to his neck, which is where he had been shot. I started applying pressure to his neck. I took off my sweater and I tried putting pressure on him. I was yelling for help. I yelled to a couple of people that was on the scene that I needed a straw, that he can't breathe. I was trying to help

him. (witness crying)

At that time, while I was down on the ground with him, the defendant was approaching me taking apart his rifle and saying, He threatened me first, he threatened me first. I told him that he needed to get away from me, that he was still alive and Michael was on the ground bleeding to death, that he needed to get away from me. He walked away. By the time he made it to the trunk of his car, officers arrived on scene and told him to get down on the ground. I was yelling to the officers, Forget him, forget him, we need help over here, he's bleeding out, dying.

Then, one of the officers came over and tried to help with CPR. I know another woman, I don't know her name or remember what she looks like, but she came from somewhere and tried to help. And very shortly after that, EMS came out and got me out of way to help him. Then they went and sat me in a chair until Crime Scene could come and take pictures of everything.

Q (MR. HIXSON) Let me show you what is State's 4 that is in evidence. Take your time. Do you recognize that?

A I do.

Q What is that vehicle and what is that object laying on the floor?

A Defendant's vehicle and the defendant's weapon.

Q There was a little discussion about the location where Michael fell with the shotgun and all of that. I'll show you a picture and see if you remember this. I'm referring to State's 7. Does this adequately depict the area where you remember Michael being on the ground?

A It is.

Q Did you see anyone disturbing that scene or taking anything out of the scene?

A I didn't. I didn't. They were pretty quick at securing the alleyway.

Q Did you take any fired shotgun shells out of the scene?

A I didn't. I was too busy attending to Michael.

Q Let's talk about what you saw and the gunshots that you heard. Did you see Michael fire that shotgun? Do you believe that Michael fired the shotgun?

A I really don't know. I can't differentiate between sounds. I saw him with the shotgun, but I also saw him peak out and duck back down, so I can't really say whether or not I saw him take a shot or not.

Q In your statement, you tell law enforcement that you believe he shot the shotgun?

A Yeah. And it is kind of one of those things you

hear -- see a person with a gun and you don't see another person, so the person who I saw was Michael and I saw him with a gun and I heard gunshots, so at that time I could say I presumed that looking at it that he did, but I can't say for sure he did or not because there was a lot of commotion, and there was a couple of sounds of gunshots, and he was the only one I saw.

Q Give more detail about that. About how many shots do you believe that you heard?

A About three to four overall.

Q I don't want you to have to mimic too much, but as far as pacing, is it bang and a long time and another bang, or was it pretty quick, bang, bang, bang, bang?

A Pretty quick together.

Q Did they all sound the same? Did one sound differently than the other?

A Honestly, I don't know. I can't say if they did or not.

Q Did you see Michael actually struck and hit, or -- I just want to make sure you understand -- so the jury can understand what you saw, because you mentioned Jerome asked you to get out of the way. Do you believe that you saw Michael be shot or --

A No. It was before.

MR. HIXSON: Beg the Court's indulgence for a moment.

Q (MR. HIXSON) I think you mentioned in your statement before -- let's talk about this for a second. I'll take you back after Antwuan Nelson and the fight and Michael and you are up there and you say you are cleaning up, okay. Were there drugs in the apartment at that time?

A I can't remember.

Q Let me be more direct. Did you assume that law enforcement was coming over and --

A Yes.

MR. BARR: Objection, leading the witness.

Q (MR. HIXSON) Did you put anything in the green truck?

A I did.

Q What did you put in the green truck?

A Drugs. I don't remember exactly what it was or what it looked like, but I put paraphernalia in the truck.

Q Did you put a razor blade in there?

A I can't remember.

Q Scales? Okay. And why did you do that? What was your thought process and why did you do that?

A That if the cops got called because of a physical

altercation, that they would be found in the house and it was something that I didn't allow in my house -- or tried best not to. I was a new mom. I did not partake in those activities, so at the end of the day, I didn't want my child taken from me if officers came and drugs were found in the residence.

Q So do you know on this day if those were the defendant's drugs or Michael Rogers' drugs?

A I don't know.

Q You know you did not see them in there prior to Antwuan Nelson being in the apartment?

A Correct.

Q We talked about a fair amount, so looking back relating to the amount much time that went by, do you believe that from the initial time when Mr. Nelson and Mr. Rogers come through the door, until the time you see your boyfriend laying passed out -- passing on on the ground, about how long do you believe -- how much time you do think transpired, total?

A 30, 45 minutes.

MR. HIXSON: Thank you. I have no further questions.

THE COURT: Mr. Barr.

CROSS-EXAMINATION

BY MR. BARR:

Q Ms. Bloomer, you -- you gave a statement to the officers with the Myrtle Beach Police Department the day this incident occurred; do you have a recollection of giving a statement?

A I remember giving a statement. Of course I had to, I was there. It's been three years, I can't word for word recall what I told them.

Q The second gentleman from the wall, Officer Clothier, do you recognize him?

A From somewhere. I honestly can't say whether it was that night or not.

Q Does he appear to be a person you gave a statement to?

A I, honestly, really don't know. I remember a younger female officer escorting me to the police station, but as far as my statement, I don't -- I was in a numb phase. I don't remember who interviewed me about what.

Q I see. You gave that statement on the 27th of January, five minutes after 7 o'clock in the afternoon, but you have no recollection of what you said in that statement?

A Pretty much what I've said here, as far as what I saw, but it is also three years ago. So can I tell you

word for word what I said in that statement? I cannot.

Q Well, starting to begin with, there are quite a few things that seem to be different. Let me direct your attention to the very first.

Now, do you deny that in that statement you made no mention, whatsoever, about seeing Antwuan Nelson throwing a first punch when he and your husband -- or he and your boyfriend came up to your apartment?

A Not trying to be rude, I can't really deny putting something in a statement that I just said it was three years ago. I don't remember exactly what was in the statement.

THE COURT: Mr. Barr, if you are going to examine her as to her statement, give her a copy of it so she can look at it.

MR. BARR: Um, well, I'm not -- inasmuch as she says she doesn't remember, I can't impeach her, but it will certainly come along again, and I'll make sure she has a copy of it.

THE COURT: Well, you can show it to her and ask her and refer her.

MR. BARR: All right, sir.

Q (MR. BARR) Now, you indicated that your boyfriend told you when you were upstairs to get the gun?

A Correct.
Q And you thought that he was referring to a shotgun?
A Correct.
Q And you said you didn't know where the shotgun was?
A Correct.
Q But you had seen the shotgun before?
A Correct.
Q All right. Now, you saw the shotgun before in your house, correct? Is this the shotgun you saw in your house owned by your boyfriend?
A Yes.
Q Now, I'm showing you what is marked and entered into evidence as State's No. 23. As far as this diagram reflects where your apartment is located, is it fair to say there are steps where my fingers are pointing?
A Incorrect, there are not steps there.
Q The steps up to your apartment are in the middle?
A Correct.
Q I see. And you are in the apartment at the top of the steps on the right?
A Correct.
Q Now, so when Antwuan Nelson ran out of your

apartment the very first time, did he run through the breezeway to get to the front of the apartment, or did he run around to that parking lot?

A Can't speak for his actions because, as I stated earlier, when he ran out, I was still in my apartment, so he could have taken any route other than outside of my back window to get where he was.

Q Ms. Bloomer, isn't it true that your boyfriend shot at Antwuan Nelson directly from his steps as Antwuan Nelson ran around the building going to the front of the billing, didn't he?

A That, again, I cannot say because I was in the apartment. He ran out before me. I was still in my apartment, so you are asking me questions I can't answer about another person's actions.

Q You did come out of the building?

A Yes.

Q And isn't it true that Antwuan -- that your boyfriend blew a hole in the door in the next building over here shooting at Antwuan?

A I'm not trying to be rude, but you're asking me questions that I'm unaware and cannot speak for. If the forensic unit would have found something, I'm sure they would have seen it, or other witnesses or the person that lived in that apartment where there was a

hole shot through would have said something.

Q Did you see Antwuan or your boyfriend take the shotgun from upstairs and carry it and place it --

A I can't say. I don't remember. I remember him grabbing it out of the truck at a later point in time, but I cannot remember.

Q So you don't know how the shotgun got -- so when he told you to grab a gun, it obviously was upstairs when he told you to grab the gun; you would agree with that? It was upstairs then?

A Again, I can't say. I don't know where it was.

Q Now, you don't remember leaving out of his presence at any time during this incident, other than the time when he got shot, do you? You were right there?

A And as I stated, he left the apartment before me the first time. He also went upstairs before me that first time. He went upstairs. So there were some minutes that he was out of my presence.

Q Isn't it true that when you gave that statement, Officer Clothier, you never once mentioned to him anything about getting your boyfriend to take you to pick up your daughter, did you?

A Again, I don't have my statement in front of me. You ask me questions that I'm supposed to remember

after a traumatic experience three years later.

Q In fact, you specifically told -- did you not -- Officer Clothier that your boyfriend was the first person to shoot a weapon in this altercation, didn't you?

A Again, I do not remember.

MR. HIXSON: Your Honor, as it relates to impeachment, she's not denying she didn't make the statement. You can't impeachment someone if they say they can't remember, only if they deny the statement can you impeach.

(A brief pause in the proceedings.)

Q (MR. BARR) Let me do this a different way. Now, there was some point when you indicated, at least earlier, that you saw your boyfriend shoot that shotgun?

A When? When I just spoke today?

Q No, ma'am. Well, you gave the statement to Officer Clothier, you did tell him that you saw him shoot the shotgun?

A Yeah, it is probable, I would say. It was three years ago. Again, I don't have my statement. You clearly have it, I cannot say whether I did or not. It is probably three years ago that I said that, that he took a shoot. Again, motions were high.

Q When Antwuan Nelson left your apartment and ran downstairs, you said you and your boyfriend went downstairs after he did; is that correct?

A Correct.

Q Do you know, or did he tell you, your boyfriend, where Antwuan Nelson had ran?

A I can't speak for Mr. Rogers as far as what was said to him. He is no longer here to say that. As far as me, I was not told anything as to his whereabouts.

Q Didn't your boyfriend at that point take the shotgun, went upstairs and went into someone else's apartment looking for Antwuan?

A I don't recall seeing that at all. From what I remember, from what I recall from three years ago is that when we were downstairs, he did not have a shotgun in his hand. He was at the very bottom of the stairs on the concrete, not even in the building, yelling up the top of the stairs.

Q In fact, didn't you tell your boyfriend, Here he is, when he came downstairs? You pointed him to Antwuan and said, Here he is?

A I don't remember that.

Q You didn't tell your boyfriend at some point that afternoon, after you couldn't find Antwuan when he came downstairs, Here he is?

A I don't remember.

Q Let me show you something.

MR. HIXSON: Once general, can't complete impeachment. She didn't deny making the statement, so he can't use extrinsic evidence to word something she doesn't recall. It is witness creditability, not impeachment, unless she denies.

MR. BARR: I'll show it to her and --

THE COURT: If he has her statement and he wants to show it to her and give her an opportunity to review and then ask her, and she still wants to say that she doesn't recall making that statement, that is fine. I think, in fairness, you need to give her her statement.

MR. BARR: Yes, sir.

A (Witness examines document.) I'm sorry, I'm done reading it, where you underlined.

Q (MR. BARR) Didn't you tell Mr. Rogers, Here he is?

A It is what I said in the statement. I cannot recall if I said it that evening, in that moment, at that time. It is in my statement so, therefore, at some point I did say it for my statement, but I can't tell you in that moment if I said it or not.

Q In fact, did you also not tell Officer Clothier,

I really shouldn't have done that? After you -- because you knew your boyfriend was looking for him to shoot him with the shotgun?

A As I stated, I don't remember saying that, but it is in my statement, which you have let me read.

Q Well, your boyfriend came downstairs and went out in front of the apartment complex, did he not go went (sic) there and waited and waited for Antwuan to come downstairs?

A Which time?

Q The very first time.

A I mean, I wouldn't say waited and waited and waited. It was maybe about five, ten minutes, because then I was speaking with him, and we went back up to the apartment so we could get stuff to get my daughter from daycare. So there was points and times where we left from the front of the building together and was upstairs in my apartment. So it wasn't necessarily what I would say a waiting around for hours on end in the entire time of the length of -- from beginning to end.

Q But you do admit that you told Officer Clothier that he sat out there and waited for him to come down; didn't you tell him that?

A Again, please show me my statement so I can say.

You are asking me questions from three years ago that I don't remember everything I said.

Okay. I see where it says he was out there waiting, which I already stated in my statement earlier, that when Michael went out the first time, he was out at the front of the building. When I went out there, I was out at the front of the building. Clearly, waiting, he was yelling up to him. So if that is what is being called "waiting," then, yes, we were out there for a period of time waiting.

Q You called it waiting, that is what you said you were doing. What were you waiting for?

A Honestly, who knows. For him to come down and duke it out like a man, that is what Michael was saying.

Q Fight like a man, and he told you to get the shotgun?

A Originally up in the apartment, because the defendant was over him punching him and they were in my house having an altercation in my property.

Q Now, isn't it true that you never told Officer Clothier anything, not one word, about Antwuan Nelson being over Michael punching him?

A Again, I cannot say whether that is true or not for what I said three years ago.

(A brief pause in the proceedings.)

Q (MR. BARR) You told this jury that you persuaded your boyfriend that it was time to go pick up your daughter from daycare. Are you telling us that your boyfriend was about to take you to pick up your daughter?

A That we were going to go together, yes.

Q He was going to take you to get his daughter, he got shot in the alley?

A Correct.

Q Now, there is only two accesses to the alley, is through the breezeway and through the front. How did he get in the alley then?

A As I stated before, the first time we were downstairs is when I persuaded him to come with me to pick up my daughter from daycare, so that is when we went up to the apartment the second time, what I'm calling a second time as far as the first time being the altercation. The second time after that period of waiting out in the front of the building, so that second time we went out there, and that was after I persuaded him to come with me. We went up there to the apartment.

Q You went up to the apartment, and then all the sudden he said, well, I guess I'll go back down to the

alley. How did he get back down to the alley?

A I mean, not necessarily. We went back down the stairs the second time.

Q Did you go with him?

A Yes, I did, because we were going to get into the truck to pick up my daughter from daycare, then he changed his mind and proceeded to head back up to the apartment for the third time, with me following him shortly after, which is when the defendant approached me with his rifle in hand.

Q And where was your boyfriend then?

A At that point in time I didn't necessarily notice his whereabouts, seeing as I had a man standing there with a rifle next to me. I didn't necessarily notice exactly where he was at until I walked around the corner and saw him walking out from that front door to my apartment building and walk behind the cars, as I stated earlier, into the alleyway -- into the breezeway.

Q All right. So you didn't know where he was, and when you spoke to Antwuan Nelson, he didn't know where he was either, but he knew he was looking with him for a shotgun, but didn't know where he was coming from; isn't that true?

A I can't say his state of mind and what he was

believing or not. I can't speak for Mr. Nelson.

Q How then did your boyfriend get by you, because you were at the bottom of your stairs? How did he get by you into the alley?

A I was not at the bottom of my stairs. If you want to pull that diagram up, I can show you again and show the jury where I was standing when we crossed paths.

Q Do you know --

A Can I hold this real quick?

Q Yes, ma'am, sure.

A So when we went up -- after he went up that third time and I started following after him, he left before me, walking around this way to the front doorway. I followed him, made it to about here when Mr. Nelson approached me with his rifle and told me to call my boyfriend and tell him to bring his stuff. After I told him, no, I wasn't going to, my phone is about to die, I started to walk around this corner right here -- I started walking around this corner here. As I made it to about here, I heard this door close and saw Michael walking along this way and into the breezeway.

Q Did he have a shotgun?

A As I already stated, yes.

Q When did he get the shotgun out of the truck?

A After the first time -- after the first time we were downstairs. So there was still another time that we came back down from the apartment where he did not have the shotgun until the very last time he came from the apartment. He came down the stairs a total of three different times. The first time, I'm not sure about. The second time, I know he didn't, and then the third time, I know he did.

Q I thought you said you didn't see the shotgun down?

A And I just said that, until the third and final last time, which I stated earlier when the prosecutor was asking me questions.

Q If you didn't see him bring a shotgun down, how do you know when he got it?

A I just told you, the third and last final time, I saw him with the shotgun in his hand. I saw it with my eyes.

Q Well --

A And I stated that earlier when I was giving my testimony.

Q Now, you are saying that you saw him in the alley with the shotgun. What I'm asking you is did you ever see him bring it from downstairs? How did he get the shotgun from downstairs down to the ground floor?

MR. HIXSON: This is asked and answered. She said she watch him come down with the shotgun.

THE COURT: Hasn't she answered that several times?

MR. BARR: I don't think so.

THE COURT: Rephrase your question.

MR. BARR: Here is what I do.

THE COURT: Don't ask the same question over and over. Rephrase, and maybe she can understand it.

MR. BARR: She didn't seem to have a problem with English when she was testifying under direct.

THE COURT: Mr. Barr, the question is posed the same way and she's giving the same answer. Apparently you need to rephrase your question if you are looking for some other information, please do.

Q (MR. BARR) Had your boyfriend and his son, were they using drugs earlier that morning?

A I'm not really sure. I'm not them. I can't say whether they were or not.

Q Didn't hear Jerome tell the police --

MR. HIXSON: Objection, hearsay. What Jerome told someone else, that is classic hearsay.

THE COURT: It certainly is, Mr. Barr. I'll sustain.

(A brief pause in the proceedings.)

KRISTEN BLOOMER - REDIRECT EXAMINATION

Q (MR. BARR) I just have one issue I need revisit, and I think we'll be through. That is the issue of who swung first. Didn't you tell Officer Quinn, when you were being interviewed, that you didn't even see who swung first?

A That is what is in my statement.

Q Thank you, ma'am.

MR. BARR: Nothing further -- Court's indulgence just a second.

(A brief pause in the proceedings.)

MR. BARR: That's it.

THE COURT: Redirect?

MR. HIXSON: Just two.

REDIRECT-EXAMINATION

BY MR. HIXSON:

Q It got confusing with the first trip, second trip, all of this, so let's see if you can straighten me up. Let's talk about the sounds of the gunfire and what you said the first trip. So let's clarify for a second. The first trip is after the fist fight, comes back here; is that right?

A Correct.

Q And then you talk and say, Let it go, I think you testified to that earlier, and then you go back up?

A Correct.

Q At some point in time, you guys, Let's go get the baby, second trip?

A Correct.

Q Michael says, I want to go?

A Correct.

Q Goes back up, but you see Antwuan Nelson here; is that correct?

A Correct.

Q That is where the trunk happens?

A Correct.

Q And that is the time that Mr. Nelson says, Call your boyfriend, and then, obviously, there is a third trip down, and that is when you see Michael with a gun coming down the third trip?

A Correct.

Q Now, you were standing here and Mr. Nelson is holding a weapon and talking right here. Can Michael see you standing there with Mr. Nelson from that location with Mr. Nelson with an AR-15 standing beside you, could he have seen you from there?

A He could have. I don't know if he did, but he could have.

Q Just reference from where your person is, why he noticed something changed, there is a weapon down here with his girlfriend and Mr. Nelson is talking to her,

is that when you say, He's here? I guess you testified you don't remember?

A I don't remember. It is in my statement, but I don't remember saying that.

Q I'll leave that alone. You said that a couple of times.

Now, as it relates to the timing of the shot, first trip, second trip, third trip. When Mr. Nelson first goes down the steps and Michael goes down the step, do you hear any gunshots at that moment?

A I didn't.

Q When is the first time you heard any gunshots?

A After the third trip, when I see him with the shotgun and he's into the breezeway area.

Q So if there is a statement that Mr. Nelson goes down the steps, following by Mr. Rogers, and he fires at Mr. Nelson as he is running away, you didn't hear gunfire at that moment in time?

A I didn't.

Q Now, as it relates to Mr. Barr's last question about who struck first, you testified earlier that Mr. Nelson did strike first, can you describe that scene and that testimony in your statements, if that is what you said in your statement?

A When we were standing in the kitchen?

Q Yes.

A So we -- excuse me, not "we." They were standing in the kitchen. I was on the couch. I heard arguing literally like two, three sentences worth, but you could tell it was more aggravated in nature. That is when I stood up. I saw Mr. Nelson throw a punch at Michael, knocking Michael into the stove and refrigerator area, and they started scuffling more, and that's when -- I can't say that's when the refrigerator door handle got knocked off, but.

MR. HIXSON: Nothing further.

THE COURT: Mr. Barr?

MR. BARR: Nothing, Judge.

THE COURT: You may step down, thank you. Mr. Hixson.

MS. WALTER: The State rests.

THE COURT: Very well. Ladies and gentlemen, as you heard, the State has rested, that means the State concluded its testimony. At this point in the case there is matters I have to take up, so we'll give you a break. Mr. Ropp, take them back into their jury room, please.

(The jury exits at 2:31 p.m., and the following is heard out of the presence of the jury.)

THE COURT: Let's take ten minutes.

(A recess was taken.)

THE COURT: All right. Mr. Barr, I'll hear from you.

MR. BARR: Your Honor, I have several witnesses that have been subpoenaed.

THE COURT: Do you have any motions? The State rests.

MR. BARR: Yes, sir, I guess we need to do that.

THE COURT: Yes, sir, that would be appropriate.

MR. BARR: Pardon me?

THE COURT: I said that would be appropriate.

MR. BARR: Yes, sir. Judge, the first thing we would do is move for a directed verdict concerning the offense of murder. The State alleged by way of an indictment that the defendant did commit an unlawful killing with malice aforethought. It would be the defense's position that the State, with respect to that offense, has failed to present any evidence on the necessary elements of the offense of murder and, therefore --

THE COURT: Specifically, what element do you think they have failed on? There is certainly a killing. Any killing --

MR. BARR: Well, I think they have to show that it's an unlawful killing, and we believe that the

defense has raised the issue of self-defense, and that's --

THE COURT: How about mutual combat which negates self-defense? Have you looked at the case of Douglas -- State versus Graham? It is so similar to this case.

MR. BARR: I think I've looked at that case, but all the cases that deal with the issue of mutual combat requires that there be some agreement between the parties, if not specifically -- or at least by conduct to fight. However, there is an exception made where the defendant in this case would have engaged simply for the purpose of self protection.

THE COURT: Well, let me refresh your memory on Graham. Graham, the defendant and the victim quarreled right here in Horry County, Horry County case, quarreled.

MR. BARR: Yes, sir.

THE COURT: They parted, they met again outside of the barber shop here.

MR. BARR: Is that Judge Floyd's case.

THE COURT: Yes. They quarreled again. The victim had a gun. The defendant went home and got his gun. They came back, met in the street and the defendant killed the victim. Well, in that case

Justice Ness -- or Judge Ness then, he later became of course Chief Justice of the Supreme Court -- said that the defendant quarreled with the deceased -- which we have here -- he knew the deceased was armed, he placed himself in a position in the street where an encounter was to be expected, and both parties -- if we take the evidence in the light most favorable even to you in this matter -- fired at each other. You seem you are suggesting that, they there were both there with guns. That required the submission of mutual conduct. After conviction, it went up on that issue. That case is square on point with this particular case as any I have known. I don't know how it could get closer.

Prior difficulty, both of them going and arming themselves, going into an area where they knew they could see each other and shooting it out. In that case, the judge found it was appropriate to charge mutual conduct as negating self-defense. He did charge it. It went up after conviction, and the Supreme Court affirmed. Now, isn't that case very close to what we have now?

MR. BARR: I think it is close; however, I think in this case where it is clear that -- at least thus far from the evidence -- that the actions of the defendant has only been in the nature of self

protection.

THE COURT: I don't know. I think -- I'll hear from you, Mr. Hixson, and let you tell me about it.

MR. HIXSON: Thank you, Your Honor. I'll start with the initial conversation relating to the offense of murder. Certainly it is an unlawful killing. It wasn't lawfully justified and we can't establish that as a matter of law unless we go to a stand-your-ground situation, and we're not doing that. So there is no question the defendant admitted he shot the victim. The victim died as a result of a gunshot wound, that is clearly in the record. The question is relating to malice aforethought. One of the most interesting parts of the presentation of the evidence from Ms. Bloomer is the fact that after Mr. Rogers and Bloomer went upstairs the second time, when there was no confrontation in the parking lot, no one was there in the parking lot, Mr. Nelson went to his vehicle, walked past the front door of the vehicle, went to the trunk of his vehicle, as the testimony by two police officers says that no one was blocking his vehicle and he could drive away. It was calm, according to the testimony of Bloomer. It wasn't irate. It was tense, but wasn't irate. There wasn't a position of uncontrollable rage. He unlocked his trunk, got his

weapon out of the trunk, walked towards Bloomer in a non-threatening manner and told her, You go tell him to get my stuff, call him. He's capable of cool reflection and establishing what is going to happen next. He is not confronted with a weapon at that time or any force and wants to stay there to consummate the business transaction that he had gotten there to go forward.

Bring me my stuff, so he's asking the defendant to come to the difficulty at that moment in time, according to the testimony of Kristen Bloomer. We believe that not only is that an offense of intent to do harm, because he is not running, he is standing his ground, if you want to call it that way. Not in a legal sense, but it was, I'm not leaving. I'm not scared enough to leave. I'm staying here and finishing what I came here for.

There is no question that Mr. Nelson was aware of the fact that Mr. Rogers was attempting to arm himself, because Michael Rogers yelled, Give me my gun. And most likely, although we're not in the mind of the defendant, when he heard that, he left the apartment, as most smart people would when you hear a weapon may be pulled on you. He ran.

The evidence in the record is relating to him

engaging in an unlawful conduct, being distribution of a felony narcotic, and that brings on the entire fact pattern.

THE COURT: Which would negate or could negate self-defense.

MR. HIXSON: Yes. Certainly I believe it is an appropriate argument for the jury to make. I don't think Your Honor could rule as a matter of law.

THE COURT: No.

MR. HIXSON: But I think that is one of the elements that the State has to disprove beyond a reasonable doubt.

THE COURT: It is a jury question.

MR. HIXSON: Yes sir. As such, we believe -- let's be more concise. We believe we've touched on every element as it relates to murder. I can answer any other questions if Your Honor has them.

As it relates to the elements of possession with intent to distribute cocaine base, SLED testified that there are several cocaine-base drugs in the packet of 11 rocks and methylone. So methylone is not a chargeable drugs, but it does go to intent to distribute. How would he get there? Because of Mr. Nelson's own statement, No, you will buy this. You will buy it. I believe that is expressed intent

to distribute narcotics.

The testimony of Ms. Cantey identified that immediately upon hearing a gunshot being fired, a young African-American male in black clothes with red trim running down the alley --

THE COURT: Either a hoody or --

MR. HIXSON: She indicated a conflicting statement. At one point she said she thought it was a hoody, could have been hair, not sure. That is why we put in a couple of witnesses that mentioned that at the time of the incident Mr. Nelson had a different hair style than he does today. We had that, and that may explain the inconsistency of whether it is a dark hoody, because it is clear from the photographs it is a collared jacket, not a hoody.

But she said based on that, she saw the individual attempt to jump or throw something over and then ran back towards the direction of what is established as Mr. Nelson's vehicle. Also, we know there is a shell casing in the alleyway, a live rifle round, which indicates -- and Ms. Bloomer said Mr. Nelson was in that area walking towards where he was right in that location, which is the same location on the other side of the fence where the narcotics were recovered from.

The drugs, according to Roscoe and Officer Harlow, that article dog detected something that was not supposed to be there, that recently was put there, all circumstantial evidence that Mr. Nelson was the source of the drug. We know he was there for purposes of selling that, and that is what we believe -- it doesn't go to the admissibility, it is the creditability of -- obviously Mr. Barr argued that that was not Mr. Nelson's drugs, and that is fair, but that issue should be in front of the jury.

THE COURT: The standard is whether or not there is any evidence which a jury could reasonably convict.

MR. HIXSON: Yes, sir.

THE COURT: You agree, that is the standard?

MR. HIXSON: That's correct, Your Honor.

And the last little bit, we have direct evidence and circumstantial evidence on murder, as well as possession with intent to distribute.

The final offense, Your Honor, Item 49 is in evidence, and that indicates that murder is a crime of violence in the State of South Carolina. Mr. Nelson admitted to possessing a weapon, and there is substantial direct and circumstantial evidence that Mr. Nelson was holding that black AR style rifle that ultimately killed Mr. Rogers. So we believe that the

motion should be properly denied, Your Honor.

THE COURT: Anything further, Mr. Barr?

MR. BARR: Judge, I think I already addressed the issue of murder. Of course, again, as far as -- it is clear from the evidence that there's no -- in terms of the issue of identity, I mean, it has to be actual or constructive possession. In this case, even from the standpoint of circumstantial evidence, which is what the Prosecution seems to be arguing, in terms of what the witness claims -- first of all, she claims what she believes to be a gun. This is what she claims, that she thought that she saw the person scaling the fence and attempting --

THE COURT: In fairness to the witness, didn't she say she just saw -- first she thought it was a gun, but couldn't tell, but just an object thrown over the fence? Don't we have the photograph which shows the discovery of this packet containing drugs that was on the other side of the fence and in close proximity to the area where the witness said she saw the person fitting the Defendant's description immediately following the shooting?

MR. HIXSON: Yes. Her statement specifically stated she thought what she assumed was a handgun because she had just heard gunshots. It was apparent

that he appeared to be climbing over it or to get rid of something. She said she sees something fall out of his hand, can't tell if it was a gun or not, she just assumed because she just heard shots. I believe that is what the record reflects, but she clearly said she thought it was a gun because she just heard shots.

THE COURT: And isn't her testimony corroborated by the fact that there was an object that turns out to be drugs right across the fence?

MR. HIXSON: Yes, sir, and there was no gun recovered.

MR. BARR: Judge, that is fine. If it actually -- and of course identity is always an element of the offense. The only thing that that -- of course the issue of identity, as it results to PWID is a separate element from the offense of actual or constructive possession. It seems to me that she indicates that it was a black male and the person -- and she described some clothing, and that is the only thing that goes to the issue of identifying.

THE COURT: What about Ms. Bloomer's testimony that they argued over a drug sale in her apartment, that she later -- and correct me if I'm wrong, but I'm recalling the testimony, my recollection is that the defendant also made a statement to her that he wanted

her to go up and get his stuff, drugs, out of the apartment?

MR. HIXSON: Whether it is drugs or money. As you recall, initially it was, You will buy it, meaning I want the money. Stuff could be money or drugs.

THE COURT: And I recall it being "stuff" or, "property" or whatever. I don't remember it being specific. It was an implication. The standard is whether there is any evidence, Mr. Barr --

MR. BARR: Yes, sir.

THE COURT: -- from which a jury could reasonably convict. I find that this is a jury question, and I would deny the motions for a directed verdict as to all three charges, and it will go to the jury.

Now, Mr. Barr, let me ask you this. Do you plan to put up a defense?

MR. BARR: Yes, sir.

THE COURT: In that regard, have you discussed with your client, Mr. Nelson, whether or not he would testify in this matter?

MR. BARR: Yes, sir. Judge, we've discussed that issue. We've not reached a final decision.

THE COURT: I would not pressure him. He can change his mind. He can do whatever he thinks is in his best interest as the trial proceeds, of course,

but since we have the jury out, I would like to explain his rights to him concerning his testimony. If you would, Mr. Nelson, please stand. Put him under oath for his responses to me.

(ANTWUAN NELSON, having been duly sworn, testified as follows:)

EXAMINATION

BY THE COURT:

Q You are Antwuan L. Nelson?

A Yes.

Q At this time I want to explain to you very important rights that you have, and if you don't understand anything I say, please let me know. If you want me to explain it in more detail or in a different fashion, I'll be happy to do so; do you understand?

A Yes.

Q I assume you discussed these matters with your attorney, but I want to make sure that you understand these rights. We've reached the stage in the trial where you may present your defense, and you also have the right to claim protection given to you by the Fifth Amendment to the Constitution of the United States, which, in part, says that no person shall be compelled in any criminal case to be a witness against himself. What that means is that you cannot be

required to testify in this case. You certainly can if you want to. You have the right to testify on your own behalf; however, no one can make you testify. That is a personal right you have, and no one can give it up, not your attorney, not me, not Mr. Hixson, no one can give that right up except you.

Now, if you decide to testify, you should understand you will be subjected to the same rules that govern other witnesses and you may be examined and cross-examined on any relevant issue in this case. In addition, if you have any convictions involving dishonesty or false statements or for crimes punishable by imprisonment more than one year, and I determine that the probative value of admitting the evidence outweighs its prejudicial effect to you, the Solicitor, either Mr. Hixson or Ms. Walter, will be able to introduce your record to attack your creditability, your believability.

I do not know if you have any prior convictions of any type. If you do, I would require the State to tell me before you testify, and I would make a determination of whether or not those particular offenses could be used against you to attack your believability. If you decide to testify -- your decision must be freely, voluntarily and intelligently

made with the knowledge of the protections given to you by the Fifth Amendment, and the consequences of your decision to testify.

If you decide not to testify, I want you to understand that the jurors cannot give that fact any consideration, whatsoever, that being your decision not to testify, and there is to be absolutely no prejudice to you because you did not testify. I will tell the jury in my charge -- if you do not testify -- that they may not use that against you in any way. I will tell them that they may not even discuss it.

Now, it is left entirely up to you whether or not to testify. Of course you can talk with your attorney, family and friends, anyone else that might give you good advice, but the final decision is entirely up to you. Now, do you understand the rights?

A Yes, Your Honor.

Q Do you have any questions for me about what I have explained to you?

A No, Your Honor.

Q Mr. Barr tells me that you have discussed this, but you have not made a decision. I want you to understand you do not have to make a decision unless such time as your attorney closes your defense, that is

that he says he rests; do you understand?

A Yes, your Honor.

Q I'll ask you again for your -- before I close your case or declare it closed, I'll ask if you want to testify. I will explain these rights to you again if you need me to, but do you understand them fully now?

A Yes, sir.

Q Okay. All right.

THE COURT: Thank you. Are we ready to proceed with the defense?

MR. BARR: Judge, I followed up on the issue with the one or two witnesses we have under subpoena, neither which seem to be here.

THE COURT: Who are your witnesses?

MR. BARR: Pardon me?

THE COURT: Who are your witnesses and where are they?

MR. BARR: Ms. Lillian Brockington, she is presently in the hospital in Georgetown. The second witness, Mr. Tom Davies, is here in Myrtle Beach somewhere.

THE COURT: You served with him a subpoena, did you not?

MR. BARR: Yes, sir.

THE COURT: Well, have you complied with

Rule 7 -- I think it is Rule 7 -- by providing me with an affidavit as to what they would testify to?

MR. BARR: We haven't done that. With respect to Mr. Davis, I was anticipating that he would be here.

THE COURT: What do you want me to do? I assume you were going to ask me to do something, but I haven't heard it yet.

MR. BARR: What I would like to do is recess this afternoon and get these people lined up for in the morning.

THE COURT: You don't have any witness you could call today?

MR. BARR: There is one other witness that I intend to call, and that witness is here.

THE COURT: That is where?

MR. BARR: He's here.

THE COURT: Well, can you call that witness?

MR. BARR: Yes, sir.

THE COURT: All right. How about your defendant, can he testify today?

MR. BARR: No, sir, your Honor. I think in terms of presentation of our case --

THE COURT: Let me hear from the State.

MR. HIXSON: In what regard, Your Honor? I'm not sure.

THE COURT: He appears to be moving for an adjournment.

MR. HIXSON: I believe I defer to the Court. It is important for this man to get a defense. I want the jury to decide with all of the information. I'm not interested in -- at the same time, we've waited three years for this, too. The family has been also. I don't know what -- I don't get to know what he is putting up, so I don't know.

THE COURT: Okay. How many witnesses then do you intend to call? If you get them all here, how many do you have? Two, the one here and then the defendant?

MR. BARR: Yes, sir.

THE COURT: Four? Four. Okay. Quite frankly, I prefer to begin the defense in morning rather than do one witness here and perhaps that witness -- I'll give you until the morning, Mr. Barr. It is 3 o'clock now. I will adjourn until in the morning, but be ready to go at 9:30. Mr. Barr, Mr. Hixson, Ms. Walter, I want to see you in chambers as we adjourn. Get the jury in here.

MR. BARR: Before the jury comes in -- that's all right.

(The jury enters at 3:12 p.m., and the following is heard in the presence of the jury.)

THE COURT TO THE JURY

THE COURT: Ladies and gentlemen of the jury, we have procedurally reached a point in the trial where it is necessary for us to adjourn for the afternoon. I think we can finish this up tomorrow, but we have done all we can do with you. My option is to stay in here and do things and leave you sitting back in that room, or let you go home. Do we want to take a vote? I didn't think you wanted to, so I'm going to let you go home and ask you to be back in the morning, and in the morning Bobby will have donuts from the Trestle; won't you, Bobby?

MR. ROPP: I believe so.

THE COURT: Let's see what we can do about that. Thank you. Let me ask you -- don't try to visit the scene, don't Google, don't look up anything about this case, and don't try to find information about the lawyers or staff. Don't look me up on Facebook, it would bore you to death. That would be improper. I look forward to seeing you in the morning. Thank you.

(The jury exits at 3:14 p.m., and the following is heard out of the presence of the jury.)

THE COURT: Okay. I would see Counsel in chambers, okay. We're in recess until tomorrow morning at 9:30.

(Whereupon, the proceedings for June 14, 2017

concluded. The following was had on June 15, 2017 out of the presence of the jury.)

THE COURT: Thank you. All right. Mr. Barr.

MR. BARR: Your Honor, I looked at Rule 7, and I think we've pretty much outlined according to the conditions of Rule 7, and the affidavit is a truthful affidavit.

THE COURT: Why is it that you told me yesterday that you didn't have Ms. Brockington's subpoena.

MR. BARR: No, sir, that was before when we first started.

THE COURT: So you didn't have her subpoenaed when this trial started?

MR. BARR: When the trial started I didn't have her subpoenaed.

THE COURT: Who served her with a subpoena?

MR. BARR: Ms. Washington, her name is in the affidavit -- service of subpoena at the hospital.

THE COURT: Who is Charlotte Washington?

MR. BARR: Charlotte Washington is the lady that served the subpoena.

THE COURT: What?

MR. BARR: Served the subpoena.

THE COURT: It says she is inpatient -- what do you want me to do?

MR. BARR: Pardon me?

THE COURT: What do you want me to do, Mr. Barr? We're three days into a trial and you want me to do what?

MR. BARR: I'm asking to declare a mistrial. I mean, if you look at the substance of her testimony.

THE COURT: What is she going to testify to?

MR. BARR: Pardon me?

THE COURT: I read her --

MR. BARR: Judge, I expect her to testify consistent with the statement she gave police, and if she does that, she'll say that the decedent came up to her apartment, initially with the shotgun, looking for Mr. Nelson, that he went back downstairs, that he shot -- in fact, I think she said he shot twice, Mr. Nelson shot.

THE COURT: Let me hear from you, Mr. Hixson.

MR. HIXSON: There is a lot to say, Your Honor. I noted she wasn't an inpatient until the second day of this trial, so it was the 13th, not Monday. The subpoena wasn't served until after that time period, and the problem is that the statement is entirely inconsistent with Antwuan Nelson's testimony we heard pretrial. The fact is that -- I understand why Mr. Barr would want her here. Her apartment is where

Antwuan Nelson was in and, of course, she has substantial bias because she's married to Mr. Nelson's cousin. And as such as I don't know what remedy we're talking about here, but clearly --

THE COURT: He want to declare a mistrial to start again.

MR. HIXSON: An unavailable witness is not legal grounds for a mistrial. That is a fundamental principle of law. Not putting in a defense that you want to put in is not grounds for a mistrial. We did specifically recess yesterday for purposes to prepare -- to give Mr. Barr an opportunity to prepare for the defense, and we can't admit the testimony --

THE COURT: This is the fourth day. Not only do you have notice of this case going, this is essentially the fourth day of trial of this case.

MR. BARR: Your Honor, I think I approached the Court the first day when I found out that she wasn't here. She was going to be here voluntarily. When I found she wasn't here, because she was going into the hospital -- and of course I didn't know that at that time, that she was going into the hospital, but I did --

THE COURT: You said she was going into the hospital.

MR. BARR: Sir?

THE COURT: You said she was going into the hospital.

MR. BARR: Judge, at that time I don't think they actually took her into the hospital, but I wanted the Court to know her status. So I think the -- this was the very first day of court when I brought the matter to the Court's attention, because she was supposed to be here, but she wasn't. When I became concerned about whether or not she could actually be here -- but, you know, Judge, from the substance of her testimony, Your Honor, particularly considering the status where we are as it relates to what the jury will be charged, the issue with the mutual combatance (sic), the issue of the voluntary manslaughter, taking self-defense off the table, Judge, her testimony is credible.

MR. HIXSON: Perhaps I'll flush out the record. As it relates specifically to her statement, Your Honor, the State's position also is it absolutely supports the charge of mutual combat. There is testimony in the record all day indicating that Mr. -- the victim took a shotgun down the very first trip. Ms. Bloomer said she didn't see it, but saw him pull it out of the pickup truck. So it was down there

during the period of time when he was yelling up the steps. So Mr. Barr could argue that Mr. Rogers armed himself during that. There is no question that Mr. Rogers had shotgun on him and loaded shells.

THE COURT: It is undisputed.

MR. HIXSON: Undisputed. And the only issue as it relates to Ms. Brockington's presentation of the facts is that she claims that the defendant -- or the victim fired first. The problem with that statement is, by her own admission, her window faces towards 37th Avenue North and cannot see the position where the defendant was in the alleyway, cannot see it. There is no possibility for perception. So I can flush that out in addition to the shot count and everything else to mitigate testimony.

What I am trying to say for the record and Court of Appeals is that I do not believe there is a substantial prejudice to his presentation of the facts because he has evidence in the record to argue what Ms. Brockington will be able to offer, and I'll be able to show her testimony through bias. It is nearly impossible and inconsistent -- it's internally inconsistent on its own when she says I didn't see anything, I just heard four shots.

In other words, it is not at an undue necessity

that unfairly prejudices the defendant, even when the witness is not enough --

MR. BARR: With all due respect, Counsel argues issues that goes to the issue of creditability. Of course Ms. Bloomer got on the witness stand, and her testimony was pretty much totally contradictory to what she previously stated in the statement given to officer -- to the officer.

Now, as far as -- I believe in terms of the creditability of Ms. Brockington, she is probably more credible than any of the witnesses that actually appeared in this court. I think the jury -- again, the issue of the creditability is an issue for the jury. There is key issues, such as who shot first, whether or not in fact he had the gun. If I remember, Ms. Bloomer consistently claims that when her boyfriend went upstairs the first time, came out the first time, he didn't have a gun. Well, this witness, which I believe the jury will be able to see her creditability, she said he went upstairs, came up to her apartment looking for Mr. Nelson. He had a shotgun with him.

Judge, you know, I don't know that we can second guess what the jury is going to do with jury issues, but I think that clearly -- the issue as far as the

impact of --

THE COURT: All right. I'll take this under advisement for a few minutes.

MR. BARR: Before you go, Your Honor -- I'll deal with that when you get back.

(Court's Exhibit 2 marked.)

(A recess was taken.)

THE COURT: Mr. Barr, your motion for a continuation is denied. I think it is most likely -- I mean your motion for a mistrial is denied. I will not continue the case. According to this affidavit, she was not served with a subpoena until, when, Tuesday -- or Wednesday?

MR. BARR: I believe it was Tuesday, Judge.

THE COURT: After this case started. I was provided with an affidavit this morning, and attached to that appeared to be a transcript of Ms. Brockington's statement that she gave to Detective Quinn. You've had that statement for quite some time, and you knew this case was scheduled for quite some time, and now we're in the third, fourth day of it. I looked at her statement, and what I can see here are things that have been testified to. We've heard testimony that the victim in this matter did arm himself, did have a gun. We heard -- during your

cross-examination that you have a witness -- in fact, I issued you an order to pick up a witness yesterday, who you say will testify that he actually shot the shotgun. You obviously have that witness available with you.

This case boils down to self-defense and mutual combat. There is nothing I've seen in her statement that cannot be confirmed or has not been confirmed or is not in dispute in this. So I'm going to deny your motion to postpone or continue this case, or to grant a mistrial.

What else do you have?

MR. BARR: We're ready for the jury then.

THE COURT: Bring in the jury.

(The jury enters at 10:04 a.m., and the following is heard in the presence of the jury.)

THE COURT: We have our jurors and alternates. Call your witness.

MR. BARR: Kristen Bloomer.

MS. WALTER: I didn't hear you, Mr. Barr.

MR. BARR: Kristen Bloomer.

(KRISTEN BLOOMER, having been duly sworn, testified as follows:)

THE WITNESS: Kristen Bloomer, B-L-O-O-M-E-R.

DIRECT EXAMINATION

DEFENDANT'S CASE - KRISTEN BLOOMER - DIRECT EXAMINATION

BY MR. BARR:

Q I have a couple of things that concern me, and I want them straightened out. I believe you indicated or did -- when your boyfriend came down the stairs the first time, that is after Mr. Nelson had left your apartment, you said he came -- he came downstairs, and where did he go?

MR. HIXSON: Your Honor, I would object and remind Counsel now this is his witness, which is his direct examination.

THE COURT: You are entitled to cross.

MR. HIXSON: But he cannot lead.

THE COURT: There you go, Mr. Barr. You have called her now. You are bound by the rules of direct examination. Thank you.

MR. BARR: Yes, sir.

Q Where did he go?

A When he left the first time?

Q Yes, ma'am.

A Down to the front building.

Q And your boyfriend also went down there to the front building?

A Correct.

Q And I think -- was your boyfriend down there waiting on him?

A I mean, as stated yesterday, he was down here and yelling up the stairs to him.

Q You said in your statement given --

MR. HIXSON: Once again, he cannot lead his own witness. That is why he got to cross-examine her for an hour or so yesterday. He can only ask questions, non-leading, because this is his witness.

MR. BARR: Your Honor, I'm not leading her. She's my witness, but I can attack her creditability just because she's --

THE COURT: You are going to attack the creditability of your witness?

MR. BARR: Yes, sir. I'm entitled to under the Rules of Evidence.

THE COURT: I don't know about that.

MR. BARR: I can challenge creditability.

THE COURT: Take the jury out.

(The jury exits at 10:07 a.m., and the following is heard out of the presence of the jury.)

THE COURT: You may be able to cross-examine her, but you only can do so if the Court declares her as a hostile witness, which you have not done.

MR. BARR: Judge, Rule 607, the creditability of the witness may be attacked by any party, including the witness' -- including the party calling the

witness. 607.

MR. HIXSON: That is absolutely correct. The difference here is we've had two hours plus of attacking creditability that has exhausted cross-examination and that's -- if the rules don't stand for anything, it is a second bite of the apple after time to reflect. You can call her, but you have to abide by the rules of direct examination, not leading her and not get a second bite of the apple after you've had three hours. That is why it is different.

THE COURT: I understand.

MR. HIXSON: Not to be difficult, Judge.

THE COURT: I'm going to let him examine her. I'm going to give him latitude. Mr. Hemingway, bring the jury back in.

MR. BARR: Thank you, sir.

(The jury enters at 10:10 a.m., and the following is heard in the presence of the jury.)

THE COURT: We have everyone back. Mr. Barr, go ahead.

Q So didn't you indicate in your statement that he was out there waiting for him to come down?

A Correct. That is in my statement, and that is also what I testified to yesterday.

Q So, now, if he was waiting for him to come down, you don't know why he was waiting, do you?

A I can't speak for him.

Q Pardon me?

A I cannot speak for the deceased.

Q Sorry?

A I cannot speak for the deceased as to his intentions. I do know he was down there waiting for him as he was yelling up to him.

Q So Michael was yelling up to Mr. Nelson?

A Correct, and I stated that yesterday.

Q He was yelling up -- so he knew where he was?

A I can't say he definitely knew where he was or not. He may have had an idea, but where he was standing, he was yelling up the stairs to him, whether he was in there or not.

Q What was he yelling for, for him to come down?

A Correct.

Q He did not have a gun then?

A Correct.

Q Now, I believe you caught -- as Michael was coming down the second time you heard a door; is that correct?

A No, that would have been the third time, third and final time.

Q Third time you heard the door?
A Correct.
Q And this time you saw Michael with a gun?
A The third and final time, correct.
Q And up to that point, there had been no shooting?
A Not that I heard.
Q Now, if you would, please, ma'am, I'll let you take a look at this. I think you said that after you heard the door, the next thing you heard was you heard him shoot him. Take a look at that.

MR. HIXSON: He has to ask her a question, and he cannot lead her. So she has to -- she doesn't get to read off of a transcript. She testifies --

THE COURT: Rephrase.

Q Did you hear him shoot him?
A Are you asking about in my statement?
Q Yes. I assume you are testifying truthfully today, and according to your statement, you said you heard Michael shoot at him?
A Correct, according to my statement.
Q Were you telling the truth then?
A I mean, I'm assuming so. It was a few hours afterwards.
Q So then the first shot you heard is when you heard Michael shoot at Mr. Nelson?

A I can't necessarily say that. It's been three years, so according to my statement, that is what I said, but I can't tell you looking back now if that's what happened. It's been three years. Can't say whether....

Q Now, you also -- what position -- you told the officer what position you were in when you heard the first shot. Where were you -- where did you say you were when you shot -- when he shot the first time?

A You are asking when I saw -- when I started hearing shooting?

Q Yes, ma'am.

A I was kind of in the breezeway -- not really in the breezeway, but in view of the breezeway.

Q I see. And is it true you said you heard another shot; is that correct?

A I mean, after the initial I heard three or four shots.

Q But you said you heard Michael shooting again, didn't you?

A I don't believe that I said that.

Q Take a look at your statement.

A I'm not really understanding your question, because in my statement, from what I'm reading, it is saying that -- in my statement it says, The next thing

I know I heard him shoot. I saw him do a duck-back to avoid a shot or something like that back into the alleyway, and that is when Jerome said -- that is when Jerome said, You need to go up here, Kristen.

So I didn't say I saw a second shot. After the first initial shot sound is when Jerome directed me to go into there. So, no, in my statement it doesn't say that. From what I'm reading in my statement it doesn't say that I heard or saw him take a second shot at all.

Q Question was: Where were you when the shots were being exchanged; where were you then?

Your response was: The first time I was right here and I saw one of Michael's shots. The last one I was standing in the doorway of the little hallway there. Everything got quiet, and for a few seconds literally, that is when everything got quiet.

I believe that is what you said.

A Okay. So what was your question again? In here it says, Where were you when the shots were being exchanged. It doesn't say what I saw. It could be what I saw or heard, and I said I initially was standing with the first one, and then I heard the other shots when I was in the doorway, which was not in view of that breezeway, so I could not have seen the

additional shots fired that I heard.

Q Didn't you say in your statement that you heard Michael's second shot and it got quiet; isn't that what you said in your statement?

A In my statement, I do not see that. If you can read it and tell me where that is said, I can answer.

THE COURT: Mr. Barr, show her on the statement and let her read it.

MR. BARR: Judge -- Your Honor, I showed her the statement.

Q Here is your answer. Line 22, what does it say? Would you read it, please?

A It says: The first time I was right here and I saw one of Michael's shots.

Q Continue.

A And the last one I was standing in the doorway of the little hallway here.

But let me say this. The question that I answered was, Where were you when you heard the shots. It doesn't say what I saw. And in my statement, I did not say that I saw his first and saw his final shot. The second part of that is what I heard, which is when I was in the doorway.

MR. BARR: Thank you, ma'am. Thank you.

THE COURT: Mr. Hixson or Ms. Walter.

CROSS-EXAMINATION

BY MR. HIXSON:

Q Let's talk about this. I get to cross-examine you, which is strange.

A Yes.

Q Go back to your initial testimony and explain in your own words what you said. Narrow it back to this shot in the alley. Tell us why -- you just testified that you didn't know for sure whether Michael shot or not, and now three or so years later you say you believe Michael shot or you heard shots. Talk about it.

A So, initially, when I was standing there and heard gunshots, the only person I could see with a gun was Michael. I cannot say for sure whether he shot first or not. I couldn't see the defendant and where he was, and with his weapon that I previously knew that he had, because he approached me with it. I was standing in that breezeway. I saw Michael peek out and duck back against the side of the wall, and that is when Jerome told me to go ahead and get into the doorway, and we heard a few other shots.

Q What did you perceive to make you give a statement to law enforcement that Michael Rogers shot?

A The gunshot sound.

Q The sound?
A The sound, and just seeing him peek out and duck back.
Q Was he bringing it up to his shoulder?
A I honestly can't remember.
Q Did you see him squeeze the trigger and flash come out of the barrel?
A No, not that I recall.
Q Did the shots sound inconsistent, one closer, one further away?
A I don't necessarily know the different sounds between different weapons. I know they were closer together. It happened very quickly, within seconds of each other.
Q Since I'm up here, let's run through the whole thing again. Isn't it true that around 3:30 that afternoon, roughly around that period of time, Michael Rogers and Antwuan Nelson walk in your apartment for the purpose of consummating a drug transaction, true?
A Correct.
Q And during the course of that, there was a dispute between Antwuan Nelson and Michael Rogers. Michael Rogers, is it true, he does not want to buy crack cocaine, and Antwuan Rogers says, Yes, you will buy this crack cocaine; isn't that true?

A Yes.

Q And isn't it true that based on that confrontation it became heated, and Antwuan Nelson began raising his voice in your apartment and an invitee and he subsequently punches Michael Rogers to the face, knocking him to the ground and knocking off the handle to your refrigerator?

A Correct.

Q And during the course of the fight, isn't it true that Michael Rogers is on the ground, Antwuan Nelson is on top of him giving him his business as you are trying to pull him off?

A I wasn't trying to pull him off. I stood there, like froze.

Q And during the course of the scuffle, at some point Michael Rogers says, Get me my gun, get me my gun. Antwuan Nelson hears that and decides to break off the physical altercation and goes downstairs in the apartment?

A Correct, because I opened the front door.

Q And over the course of 45 or so minutes, with you up in your apartment and Antwuan Nelson downstairs beside the Crown Vic backed in a slot that could drive any moment in time, he does not retreat or leave, does he?

A Correct.

Q And so subsequent to that, a man that was assaulted in his own apartment, Michael Rogers, he's animated; isn't that true? And he goes downstairs and he stands in front of where he believes Antwuan Nelson to be?

A Correct.

Q And he stands there and says, Fight like a man, you come down here and fight me like a man now?

A Correct.

MR. BARR: Your Honor -- Your Honor, I think even on cross-examination he can --

THE COURT: Mr. Barr, you were cautioned. He has the right to cross-examine.

MR. BARR: Judge.

MR. HIXSON: Your Honor, I'm specifically referring to testimony she elicited yesterday.

THE COURT: I remember the testimony. I understand.

Q (MR. HIXSON) And isn't it true you come downstairs and you remove a quantity of crack cocaine that you hadn't seen in the apartment, scales and a razor blade, and you put it in the pickup truck because you think the police are coming, and you don't want to get arrested for drugs that are not yours in

your own house, if they come to investigate a fight; isn't that true?

A Correct.

Q And after that, 10, 15 minutes go while we've heard that Michael Rogers is waiting downstairs for Antwuan Nelson to come down and fight like a man, and to this point, no one has seen a gun yet, right?

A Correct.

Q It was at that time that you talked to Michael Rogers and you say, Let it go, let's get our baby, let it go, let it go, it's 4:15. So you already have 45 minutes or so. Has Michael Rogers been cooling off during this period of time, calming down slowly, I think was your testimony?

A Yes.

Q And so after that, you go back up to the steps, and it is at that time you see Michael Rogers, isn't it true, you see a shotgun out of that green truck, that that is the first time you see it, and he takes it back upstairs as you go upstairs?

A Correct.

Q And at that point in time, Michael Rogers is retreating, leaving the situation, deescalating the situation; isn't that true?

A Correct.

Q So now that brings us a little past 4:15, based on your testimony I think. And so after 4:15 comes by, you say, Let's go pick up the baby. You go downstairs, Michael Rogers starts to go downstairs and he says, You know what, I'm not going. I'm staying here. Isn't that your testimony?

A That second time, we both went back downstairs.

Q Thank you for correcting me. At some point in time, when you are at the back corner of the house, corner of the side of the house, isn't it true that Michael Rogers decides he's not going with you, and goes back to the apartment a second time?

A Correct.

Q When he came down the second time and went back up, was he carrying a shotgun? You testified that he was not carrying a shotgun a second time?

A Right. What we're calling a second --

Q Clarify.

A After -- after the initial waiting period when he was yelling up to the defendant, Come fight like a man, come fight like a man. He grabbed the shotgun out of the bed of his truck and went up to the apartment, that is what I call the second time up to the apartment. So then that second time back down, when we were going to get in the truck to get my baby from daycare, he did

not have a shotgun or any weapon in his hands.

Q Okay. Thanks for clarifying that. So as you are preparing to go to the green truck, that is when you see Antwuan Nelson come out of the apartment and go to the back of his red Crown Vic, pop the trunk lid and retrieve what is identified as State's 29, semi-automatic military assault weapon?

A Yeah, when Michael went up the third time.

Q He comes to you. I think your testimony was that he was excited, but not agitated or enraged or heat of passion?

A Correct.

Q And he approaches you, and you testified, Get your cell phone, call your boyfriend and tell him to come down here with my stuff. You testified he was not threatening you with a weapon, not pointing it at you, but he was asking you to go get him down here where he had a weapon; isn't that true?

A Correct.

Q And I think you told him, My battery is out on my cell phone, I can't call him, I'll get him -- or something to that effect?

A Correct.

Q At that point in time, you walk around the side of the building, and where you are standing, you

testified earlier, you could see up the side towards the steps, so if Michael is coming this way, he could have seen Antwuan Nelson standing there talking to you with a weapon in his hand, which is the first time you ever saw the AR on scene that day; isn't that correct?

A Correct.

Q Is it not true that you testified that you walked around and that's the moment you see Michael coming this way with the shotgun the third time?

A Correct.

Q And then in your own words, tell us the last minutes once again.

A We kind of met almost, I say in position wise as far as when he was walking into the breezeway, and I walked up towards the breezeway. It is kind of hard to show without the picture. But by the time --

Q I'll show you State's 1, if that helps you. The jury can see.

A Yeah. Kind of to -- so when me and the defendant was standing here and I walked away, I walked this way, and as I made it to right here, which is where the breezeway starts, is when I saw Michael come out of the door and go behind the cars and into the breezeway. So it was kind of a meeting, but not meeting. So, of course, I looked down that way, and I saw Michael peek

out and duck back.

Q When you say peek out and duck back, which way is he ducking or peeking?

A He's looking out this way and ducking back against this building's wall. While seeing that, I heard a gunshot, and then at that same moment his son was telling me to get into that doorway of where the building where I lived is at, and while going in there and being in there, I heard about three more shots. It was quick. It was over maybe like 10, 15 seconds after the last shot I heard. I told Jerome we needed to go out there that he could be hurt, could be laying on the ground, could be bleeding for all we know. Jerome told me, no, don't go out there. I said, yes, I'm going to go. Jerome said, No, I'll go first. Jerome walked out, made it to the breezeway area and just started yelling.

Q Stop. Before you get there, we know what happens next. You turn the corner and see Michael Rogers on the ground?

A Correct.

Q Let's get away from that. Let me show you State's 17. The jury has seen this before. It reflects the potential bullets striking the wall right there. Is that the area of the wall where you saw

Michael peeking around the corner? In other words, was Michael Rogers standing in this area where the bullet strike is in the wall? I'm sure a bigger picture would help you.

A Yeah, because I don't know which....

Q Very good. I'll show you this, State's 16 already in evidence.

(Published to the jury.)

Q (MR. HIXSON) See if this helps a little bit better. It is a further-out shot. It is easier to see what we're talking about.

A Yes, that's the area.

Q So is it true that Michael Rogers was standing in that area and that is the position you saw him as he was peeking around?

A Correct.

MR. HIXSON: Beg the Court's indulgence.

(A brief pause in the proceedings.)

MR. HIXSON: Thank you. No further questions.

THE COURT: Redirect?

MR. BARR: No, sir.

THE COURT: You may step down. Thank you.

MR. BARR: Tom Davis.

(THOMAS DAVIS, having been duly sworn, testified as follows:)

THE CLERK: Say your full name and spell first and last for the Court.

THE WITNESS: Thomas William Davis, T-H-O-M-A-S, D-A-V-I-S.

DIRECT-EXAMINATION

BY MR. BARR:

Q Thank you. Mr. Davis, if you would tell us about yourself. Where do you live?

A I live in Myrtle Beach, about 62 years. I ran a data processing company, worked with the county and city for the first time back in '71. I bought apartments around town and doing the data processing for Horry County during those years. This is one of the apartments that I bought on 37th Avenue, and my wife owned Seaside Reality for about 45 years. She passed away last year, but her name was Nancy Davis. So my family grew up in Myrtle Beach, and that is about it.

Q All right, sir. You own quite a bit of property in Myrtle Beach?

A Yes, quite a bit.

Q And you have been sitting in the courtroom, and of course you are probably familiar with -- do you own property on 37th Avenue North?

A Yeah. I purchased several apartments there

probably 14 years ago or so at [redacted] 37th Avenue North, apartment building which is on the eastern side of where this took place.

Q On the eastern side?

A Ocean side.

Q All right. Can you take a look at this map for one second? This is State's Exhibit No. 1. Take a look at it for a second and get your bearings.

A That is my building on the right side, bottom part of the picture. There are four apartments going down the side, and three on the end.

Q I see. And tell me, if you would, did you have an occasion to go out to your building during the time this incident took place?

A Oh, yes.

Q Why did you go up there?

A Well, calls from my tenants, police cars all over the place, shooting. So I went out there to see if there was any damages to my apartment house and to talk to one or two of the law enforcement officers, and that is the purpose of me going outside there.

Q Did you talk to any of the law enforcement officers that day?

A I did. I don't know his name, but one of the --

MS. WALTER: Objection. I just want to be sure

that we don't get into hearsay. I don't object to he talking with someone, but not the content.

A I talked to a uniform City of Myrtle Beach Police Officer about the damages to the Apartment No. 2's back door on the windowpane. Let's say five or six of the windowpanes were shot out.

Q No. 2?

A No. 2 in my building, [redacted].

Q I'll show you now what is State's Exhibit No. 23. It is not a scaled diagram, but this is [redacted]. Is it fair to say that your building would be on this side, this is [redacted] here? Is your building next door?

A That's correct, that is [redacted].

Q And your building is on that side?

A On the side you are on.

Q Yes, sir. And the damage to your property, could you describe where --

A I would say it is right in the neighborhood of the -- first apartment would be along here, my second apartment would be somewhere around here.

Q What kind of damage was it?

A About five windowpanes, shot several holes in the wooden door.

Q Can you tell what kind of weapon caused it?

MS. WALTER: Objection. How would he know what

kind of weapon?

THE COURT: Let's have him describe.

Q (MR. BARR) Describe the damage.

A I've had several guns, and I've done a lot with shooting in the ranges and in Conway. I do have a shotgun. I don't know what kind of shotgun shot it.

MS. WALTER: Objection. I would ask that the witness is limited to describing the damage.

THE COURT: I think he established a basis. He's a hunter and did a lot of shooting. He can tell whether it is a shotgun or rifle.

Q (MR. BARR) Tell us what kind of damage was done?

A Well, the damage in the glass panes was just broken panes out. Can't tell what kind of bullets hit the glass panes, but you can on the wood because you have like BBs and rifles and .22s and so forth, holes are much larger. These were like a No. 8 bird shot, something like that. I'm not sure. I can't tell you the exact number because I'm not that knowledgeable on a shotgun shell.

Q You sound pretty good to me. No. 8 bird shot you say?

A Buckshot.

Q You heard discussions with at least one conversation with at least one officer with the Myrtle

Beach Police Department?

A At least one. He made an --

MS. WALTER: Objection.

A He made a statement.

MS. WALTER: Objection.

THE COURT: I don't mind him saying he has a conversation.

MS. WALTER: But he's saying he stated.

THE COURT: Mr. Barr, you know the rule.

Q (MR. BARR) You had a conversation with a Myrtle Beach Police Officer. As a result of that conversation with the Myrtle Beach Police Department, did you get your property damage fixed?

A No, I did not get any damages fixed, and as a result of the conversation, I never filed a complaint against anyone shooting my door, because I was told --

MS. WALTER: Objection.

THE COURT: All right. Don't respond.

A I never filed a complaint.

Q (MR. BARR) You didn't file a formal complaint?

A Just verbal.

Q But did you stand up and talk in person to some officer with the Myrtle Beach Police Department about the damage done to your door by a shotgun blast?

A That's correct. He just said --

MS. WALTER: Objection.

THE COURT: Mr. Davis, you can't say what someone else said.

A All right. Well, I said --

MS. WALTER: No content of the conversation can come in. The fact that there was a conversation is fine. Mr. Barr should be well familiar with the rules of evidence at this point.

MR. BARR: Your Honor, he can tell what he said.

MS. WALTER: No, he cannot. That is still an out-of-court statement being offered for the truth of the matter. That is classic --

THE COURT: I don't know. Send the jury out and I'll find out whether it is proof of the matter.

(The jury exits at 10:40 a.m., and the following is heard out of the presence of the jury.)

THE COURT: Mr. Davis, what were you about to say, as a result of the conversation you said what?

THE WITNESS: As a result of the conversation, I knew that I had no chances of collecting because, I mean, the officer told me that the man that did this was dead.

THE COURT: I understand that.

THE WITNESS: That was the total conversation.

THE COURT: Ms. Walter, is it offered for the

truth of the matter asserted, that is, that the man is dead, or is it to explain why this man did not make a claim?

MS. WALTER: Obviously being offered for the truth of the -- the alleged truth that Mr. Rogers fired the shotgun.

THE COURT: That is not disputed.

MS. WALTER: It is disputed that he fired the shotgun.

THE COURT: He didn't say that Mr. Rogers shot the shotgun.

MS. WALTER: If the witness is trying to say that an officer told him that he wouldn't recover because the person who fired the shotgun at that building was dead, that is absolutely being offered for the truth of the matter asserted, because Mr. Barr is trying to get out something that did not happen, and that is that the victim fired the shotgun. Any testimony regarding --

THE COURT: Do you -- you don't know who fired the shotgun, do you?

THE WITNESS: I have no idea who fired the shotgun. I don't know the names of the people, the victim or the defendant's. I saw the defendant's picture on the paper I got, but I didn't know until

then what his name was.

THE COURT: Let's -- all right. I'm going to exclude it. Just don't talk about any conversations you may have had with anyone about it, just simply say I didn't make a claim, and that is sufficient.

MR. HIXSON: One of the reasons is there is no documentation or photographs, no CAD call-outs, so there is no identification who this police officer is, and that is part of --

MR. BARR: That is the police department's fault.

THE COURT: It is a matter of creditability. Mr. Davis said I went to my apartment and there was damage from what appeared to be a shotgun. I think anyone can see whether it is a shotgun or rifle. He said it is a shotgun, I'm familiar with it. There it is, okay. We have it. Mr. Barr, that is it. What else do you want out of this witness?

(A brief pause in the proceedings.)

THE COURT: Bring the jury in.

(The jury enters at 10:44 a.m., and the following is heard in the presence of the jury.)

THE COURT: Everyone is in now. Mr. Barr, proceed.

Q Mr. Davis, the person that you spoke with that had the Myrtle Beach -- how long did you say you lived

in Myrtle Beach?

A Since '54.

Q I'm sure you are thoroughly familiar with the uniform that Myrtle Beach police officers wear?

A Yes. I did the payroll for them for about 10 years.

Q Oh, you did. I see. And you are familiar with their vehicles, and when you came out of your property, you said you were concerned about the damage with a gun. Do you have a recollection talking to one police officer -- you said you reported the damage to him orally, do you have a recollection of talking to more than one?

A There are -- there were at least two standing with me outside of the back door that was shot up, and I communicated with one of the officers, but I don't remember talking to the other, and I don't remember -- I never did hear the officer's name or didn't look at his badge, because I knew I was at a deadened when he said the guy was dead. I just --

MS. WALTER: Objection.

THE COURT: Strike that.

MR. BARR: Thank you, Mr. Davis. I have nothing further.

CROSS-EXAMINATION

BY MS. WALTER:

Q Mr. Davis, can you tell me the name of either of the police officers?

A The name of the police officer?

Q That you say you spoke to?

A He didn't give me his name. I didn't ask his name, and I didn't read his shield.

Q Because you are familiar with the Myrtle Beach Police Department uniforms, correct?

A Right.

Q You know that they all wear name plates, correct?

A Yeah.

Q So he wouldn't have to tell you his name, you are saying that you never looked at his name plate?

A I think if I saw his name plate three years ago I probably wouldn't remember. I just don't remember.

Q So you don't remember the name of either officer?

A If he told me I was going to get my money, I would have --

Q Listen. Please do not tell us anything that anyone said.

A I don't remember his name. I don't remember if he gave me his name, but I have no recollection of his name.

Q Okay. You did not file a police report?

A No.
Q Do you have pictures?
A No, I don't have any pictures.
Q Did you file an insurance claim?
A No, I didn't file an insurance claim.
Q Do you have any bills from any repairs you had to make?
A If I did, they have gone in the trash now.
Q Did you speak with Mr. Barr prior to testifying today?
A Did I say what?
Q Did you speak with Mr. Barr prior to testifying today?
A No.
Q When you walked into this courtroom, did Mr. Barr say to you let's step outside and talk?
A Right.
Q Did you step outside of the courtroom and speak with Mr. Barr?
A Yes.
Q Did you speak with him about your testimony here today?
A Did I speak about what?
Q Did you discuss your testimony, what you were going to testify to when you spoke with Mr. Barr prior

to court?

A We discussed was I the man that owned the apartment that was next door that had damage, and that is the only thing we discussed. I mean, I was the man. He never met me before.

Q So the entire conference that you had for the approximately five to seven minutes outside with Mr. Barr was, Are you the man that owns the building that had damage? That is the entire conversation?

A Well, I'm sure in five to seven minutes he must have said more than that.

Q Did he say anything about No. 8 buck shot, bird shot?

A We talked about why I didn't show yesterday, and it is because of the hospital and other problems I had. I called the Solicitor's Office to explain, and they said don't worry about it. We talked about why I didn't come yesterday, and we talked about how the judge wanted to send someone to get me.

Q So at some point -- my question is: Did you talk about No. 8 bird shot?

A No. No. I never mentioned any type of bullet shotgun shell or anything at all about what type of ammunition or what type of gun, anything at all about that.

Q Did Mr. Barr?
A Neither one of us did.
Q Never talked about it?
A No.
Q You had indicated that you are familiar with guns and shotguns, right?
A I beg your pardon?
Q You told us that you are familiar with guns and shotguns?
A Yeah. The different types of shotguns, different gauges and the difference engages and pistols.
Q So can you tell us how many different gauges of shotgun shot there could be?
A Well, I'm familiar with No. 8, No. 10, No. 12 and buckshot. My daddy used to take me bird hunting, and I've seen buckshot before. That's about all I know about shotgun shells, you know, 8, 10 and 12, depending what type, if you're going rabbit hunting or bird hunting. I remember my grandfather used to say they had something like salt to put in there to shoot animals, or something like that, to scare them off.
Q There is about 20 different types; is that right?
A Probably are. I'm only familiar with about five.
Q And it just so happened that one of those five is what you are saying caused the holes in your building?

A I didn't know what size shot it was. I couldn't tell you whether it was 8, 10 or 12. I've shot 410s and 10 gauge and 12 gauge and 20 gauge. As far as the number of shots in a shotgun shell, I just know there is bird shot and squirrel shot, deer shot and rabbit shot, you know, like that. That is about it.

Q I want to clarify something you just said. I believe you said I could not tell what size shot that did that damage?

A No. No, I couldn't tell. I could not tell if my life depended on it. I couldn't tell you if it was No. 8, No. 10 or No. 12. I just threw out No. 8 because I knew it was small caliber.

Q But you don't know?

A No, I don't know.

Q When is the last time you had been to the building prior to this date?

A Last time I did what to the building?

Q Prior to the date of the shooting, so before January 27, 2014?

A The last time I went to the building before the shooting?

Q Yes.

A God, I isn't know what day it was. I don't remember. I don't even remember what month the

shooting took place. I go there every month. I have seven tenants there.

Q You don't remember when you had been there prior to this?

A No, I don't remember when I went there prior to it.

Q Okay. Thank you.

MR. BARR: Nothing further.

THE COURT: You may step down. Mr. Hixson.

MS. WALTER: Yes, Your Honor, he can be excused.

THE COURT: You are released from your subpoena.

MR. BARR: Defense rests.

THE COURT: Defense rests?

MR. BARR: Defense rests.

THE COURT: Mr. Ropp, will you take the jury out for a moment?

(The jury exits at 10:52 p.m., and the following is heard out of the presence of the jury.)

THE COURT: Mr. Nelson.

MR. BARR: Maybe we need to go back on the record with the defendant as to the decision he made.

THE COURT: That is what I'm doing. Mr. Nelson, I remind you that you are still under oath. On yesterday, I explained to you your right to remain silent, that it is your right not to testify. I want

to reiterate that you have an absolute right to testify in your case if you wish, and I think I explained to you yesterday that you also had an equally important right to remain silent, and that was left entirely up to you. I explained to you the consequences that might arise from you testifying. Do you need for me to go over that again? Do you remember what I told you, and have you had ample opportunity to discuss this with your attorney?

MR. NELSON: Yes, Your Honor.

THE COURT: Now, your attorney tells me that you have decided that you will not testify in this case; is that correct?

MR. NELSON: That's right, Your Honor.

THE COURT: And that is certainly your right, and you have a right not to testify. As I told you yesterday, because you have exercised that right, I will also -- when I charge the jury, charge them, that they may not consider that in any way, whatsoever, and that there is no prejudice to you because you did not testify, that is your decision not to testify.

MR. NELSON: Yes, Your Honor.

THE COURT: Thank you, sir. Okay. Well, Mr. Barr.

MR. BARR: Judge, we would at this point renew

the motion for a directed verdict on the offense of murder. We set forth our rationale to the motion, that is the absence of evidence or lack of evidence in our initial argument when we moved for directed verdict after prosecution presented their case. I think we did the same thing perhaps with the possession of a weapon during a commission of a violent crime and the possession with intent to distribute cocaine. I don't -- the prosecution, in our estimation, benefited by way of evidence that would help as far as....

THE COURT: The standard is whether there is any evidence.

MR. BARR: Yes, Judge.

THE COURT: Mr. Hixson.

MR. HIXSON: I would stand on our earlier arguments just to refresh basically we have satisfied all of the elements as it relates to murder, as it relates to distributing crack cocaine or cocaine base, and pcssession of a weapon during the commission of a violent crime.

THE COURT: There is significant evidence that if believed by the jury would support a verdict of guilty to the offense of murder, and that it is the standard, whether there is any evidence that was supported. It

would fall that after a stipulation by counsel and the State, that murder, as well as the lesser included offense of voluntary manslaughter, would both be considered violent crimes, and then followed by there was evidence of possession of a firearm during the commission of a violent crime, and of course there is evidence that a person matching his description immediately following a time when all of the evidence would indicate that the defendant was present. I don't think that is even disputed at all. First, a person meeting his description drops something over the fence. Shortly thereafter the K-9 comes and locates what is identified as drugs. There is evidence that, if believed, would identify it as drugs in the immediate area on the other side of the fence. We also had conversation from a witness concerning drugs being in her house. I want to make sure that I understand, those drugs were later recovered from the truck also?

MR. HIXSON: Different drugs, Your Honor.

THE COURT: I understand it is different -- different -- different altogether.

MR. HIXSON: It is crack cocaine base, but that's what --

THE COURT: I want to be clear. Is it the

State's position that those drugs are attributable to the defendant?

MR. HIXSON: That's correct. Ms. Bloomer testified she never saw it before and she wanted it out of her house, but circumstantially --

THE COURT: I want to make sure that I understood you. Okay. At any rate --

MR. BARR: But, Judge, he is saying that drugs found in Mr. Rogers' car?

THE COURT: Truck.

MR. BARR: Rogers' vehicle?

MR. HIXSON: Yes. It was brought out in cross-examination that she recovered crack cocaine, razor and scales in the green truck. Kristen Bloomer testified that she put that in there because she thought the police were coming. It was on the kitchen table and she didn't see it prior to Antwuan Nelson coming into the apartment. You can argue that it was Michael Rogers' or Antwuan Nelsons', but circumstantially --

THE COURT: I mean, it is still evidence, circumstantial evidence is good evidence. Anyway, I deny the motion for directed verdict.

Now, gentlemen, I have a charge pretty much together. I would like to see you in chambers, make

sure we're all on the same page with that. I think Elizabeth has it prepared. I'll go over it with you. Come back and put in any additions, deletions or changes that you request on it, and we'll go forward from there, okay. At least for a few moments, I'll see Counsel in chambers.

MR. BARR: Your Honor, upon the issue of the rule to show was that was issued for Mr. --

THE COURT: Dismissing it.

(A recess was taken.)

THE COURT: I understand both of you have minor objections. I would like to put those on the record so I can essentially firm up my charge. I have gone through my charge conference so you can know how I'll charge the law to assist you in your closing arguments.

THE COURT: Mr. Barr, I believe you had an issue; is that correct?

MR. BARR: Yes, sir.

THE COURT: All right.

MR. BARR: My issue with the charge of mutual combat, I believe that this case is -- or the facts are clearly distinguishable from what we probably would otherwise be, especially from the vicinity of the Graham case. If I recall, I mentioned the Graham

case in our initial conference because of Mr. Dewitt, I believe, and Judge Floyd. In the --

THE COURT: Attorney Floyd at that time.

MR. BARR: Pardon me?

THE COURT: I believe it was Attorney Floyd at that time.

MR. BARR: He was Attorney Floyd at that time.

THE COURT: Judge Ness.

MR. BARR: Judge, I think the situation here took place -- and of course the parties got in an argument, and after they got in the argument, then they resorted several days later to obtain --

THE COURT: Wasn't it several days later, and they just met just before?

MR. BARR: The shooting didn't take place until.....

THE COURT: My understanding is that they had a dispute, and I thought it was the same day, but that really doesn't -- they had bad blood, some sort of issue between them. They meet, and on that day, one has a gun, the other doesn't. He goes and gets his gun, comes back to where they are, and then the shootout.

MR. BARR: Yeah. Well, see, Judge, in this case the parties weren't -- I don't know it if we can

show -- the evidence shows they were friends. They apparently had some sort of relationship because they were upstairs trying to accomplish a drug transaction and had a misunderstanding. They were not enemies.

In the Graham case, there was actually bad blood between the two individuals. But in this case, you don't -- you don't have any of that. You have what suddenly developed as an impasse in terms of the transaction, and as a result of that sudden development, they both resorted to -- out of a reaction to taking possession of firearms and shooting it out.

THE COURT: This is what Graham says: There was ill will between the parties. They had threatened each other, and it is inferable that they had armed themselves to settle this disagreement at gun point under these circumstances. The apparent willingness of each to engage in an armed encounter with the other sustained an inference that they were engaged in mutual conduct at the time of the killing and required that the issue be submitted to the jury for determination.

MR. BARR: Of course in this case, Judge, there was no ill will and of course --

THE COURT: What? Mr. Barr, they shot each

other.

MR. BARR: Judge, see, that is the sudden development. In Graham there was ill will that was festering, brewing between them, but in this case there was no ill will. They got into an issue, and of course at that point then -- now as far as -- at some point they didn't even know whether or not they both were armed. I mean, in Graham they just, you know, took to the weapons and they -- and as the case says -- intend to fight, and that intention to fight was manifested by the actions that they carried out. Well, these parties did not intend to fight. I mean, that is not what they intended to do. The fight came along after they ran into an impasse, and then all of a sudden they resorted to guns. But of course they didn't -- at some point they didn't even know that firearms had been entered into the whole picture.

THE COURT: Why did your client not retreat his firearm?

MR. BARR: To protect himself, Judge.

THE COURT: From? From? From?

MR. BARR: Pardon me?

THE COURT: Protect himself from?

MR. BARR: From -- from the decedent. I mean clearly the case says where he engages in resorting to

this type of activity only to protect himself, then mutual combat --

THE COURT: Do you not agree that there is certainly evidence that these two men armed themselves and placed themselves in a position to encounter each other, and that is exactly what happened, and a shooting followed?

MR. BARR: Well, Judge, we just for the record.

THE COURT: I got you.

MR. BARR: We oppose.

THE COURT: And I appreciate your efforts.

Mr. Hixson.

MR. HIXSON: I want to spend a little time on this, and that is specifically to distinguish Graham versus Taylor. In State versus Taylor, Taylor -- the supreme court -- or our court, appellant courts, were in support of the Graham, so Graham is still good law.

THE COURT: That is a 2013 case, wasn't it?

MR. HIXSON: Exactly right, Your Honor. In Taylor, the Court tried to distinguish what a preexisting difficulty is. So the facts that we have in this case, there is no evidence of a preexisting difficulty at the moment that Antwuan Nelson and Michael Rogers walk into the apartment.

THE COURT: As was in Taylor. I mean, Murphy

and, who was the victim -- I think Murphy was the victim, wasn't he?

MR. HIXSON: I believe that is correct.

THE COURT: And Taylor -- other parties were cutting down trees and Taylor goes over to Murphy's house and takes exception to the way Murphy is treating a female, and there was no evidence of any prior difficulty between them.

MR. HIXSON: Exactly right. In Taylor -- and if that happened in this case, mutual combat may not be appropriate, but in Taylor a fist fight ensues based on insults, start punching each other. During the course of that same scuffle, that same thing, is where the difficulty started. One grabs a knife, one arms himself. They stab a person who loses his life. But that disagreement was encapsulated in that moment of time. There was no cooling off period. 45 minutes didn't go by, and the State asserts why mutual combat is appropriate. And Taylor is distinguished from -- I mean this case is distinguished from Taylor is that at that moment after the fight broke up, Antwuan Nelson knew that Michael Rogers was getting his gun, Get my gun, get my gun. Circumstantial evidence shows that that is why he left the apartment. That is the beginning of the difficulty at that moment in time, a

willingness to engage in a fist fight.

THE COURT: And rather than leave the area, he arms himself.

MR. HIXSON: Over 45 minutes of time while Michael Rogers, based on the cross-examination, was taking a shotgun around in a public place while Antwuan Nelson has ample opportunity to leave. It is important that this happens in a public location where the armed encounter is likely to occur, that is in Graham. If the shootout had occurred in that apartment, in other words, if Nelson had grabbed his gun while they are fighting each other and shooting, we would say that that is that a Taylor case, but the fact that he left because he knew he was arming himself, that that is how this case is distinguished, I believe, from Taylor. I think it sound reasoning as it relates to mutual combat, Your Honor.

THE COURT: And, of course, I know that the State had some question about charging self-defense. If we look at Taylor, which you rely on, I think Taylor cites -- I think gives support to my decision to charge Burkhart, to charge self-defense in this matter.

Anything further, gentlemen?

MR. HIXSON: Nothing from the State.

MR. BARR: No, sir.

THE COURT: I would then reiterate that I will charge the law of murder. I'll charge the law of voluntarily manslaughter. I'll charge the law of self-defense, and I'll charge the law of mutual combat as it relates to self-defense, okay. Of course, I don't think there is any questionable charge for possession with intent to distribute crack cocaine and not the marijuana, and we will not charge any inference as to weight. I will charge possession of a weapon during the commission of a violent crime, and I will charge that the parties, by stipulation and agreement, do not contest the fact that both murder and voluntary manslaughter are crimes of violence, okay.

All right. Mr. Palmer, can you bring the jury in for me? State waiving opening?

MR. HIXSON: Glad you brought it up. In the old days, we got last close. I'm not sure.

THE COURT: He put up witnesses.

MR. BARR: Unless they intend to do it altogether, I think now under the law --

THE COURT: They can open as to the law alone, but then they have final closing argument; isn't that right, Mr. Barr?

MR. BARR: Pardon me?

THE COURT: They may open on the law, you argue and then they have closing argument.

MR. HIXSON: Would you like us to open on the law, or just have one argument?

MR. BARR: One argument.

THE COURT: Then you would argue first, Mr. Barr.

MR. BARR: Judge, may we approach the bench?

THE COURT: Yeah.

(Whereupon, a bench conference was had.)

(Whereupon, the jury enters at 11:51 a.m., and the following is had in the presence of the jury.)

THE COURT: Ladies and gentlemen, as you heard, we concluded all of the evidence in this case. I took a moment and discussed with these attorneys what I will charge on the law, and I do that so that they will know my view of the law, and of course I'm the sole and exclusive judge of the law that you will apply, but I always try to let the attorneys know in advance what I will charge on the law so they know.

They have an opportunity now to present their position in the case to you. The defense will go first and will be followed by the State. Both the defense and the State have an opportunity during their closing remarks to comment on the evidence in the case

as well as the law. But I caution you, that nothing they say in their closing remarks can be considered as evidence. Of course they can comment on the evidence, but they cannot add anything to the evidence. The only evidence -- and I'm sure these lawyers would not do that, but the only evidence you may consider is the evidence that you've heard from the witness stand, and I will charge you fully on that at the end of the case when I charge you on the law.

Also, their remarks concerning the law that I will be charging is nothing more than their opinion. You will be guided only on the law as I give it to you at the end of the case during your deliberations.

Now, with that said, Mr. Barr, are you prepared?

MR. BARR: Yes, sir.

THE COURT: You may.

MR. BARR: Thank you, Judge. Your Honor, if it please the Court, Solicitor, ladies and gentlemen.

You now have heard all of the evidence, and you have been presented with all of the evidence that you will be presented with in this case. After the arguments of myself and -- I'm not sure who will be going for the State of South Carolina, the prosecution, but His Honor will charge you on what the law is in this case, that is the law that is to be

applied.

Now, initially when I spoke to you, I did an introduction and I talked about something that didn't seem to catch on too well, or at least grow roots, but I spoke about the rules of the road. We've come to that point now with respect to what His Honor will tell you, he is going to give you a little bit of the rules of the road, that is the law that you have to apply to the facts of this case.

Now, of course one of the things he'll tell you is when you go to your jury room and start your deliberation, you will have to come back with a verdict whereby you all agree, with the exception of the alternates, they won't be deliberating, but all 12 primary jurors will all have to agree with respect to a verdict. Of course once you reach that agreement, then you'll come back with a verdict, which we like to say speaks the truth based on the law and based on the evidence.

Now, if you remember, I indicated to you that one of my primary concerns -- and it is always a concern -- when jurors are being selected as to whether or not jurors are willing to be totally objective; that is, whether you are willing to leave all your subjectivity behind you and take your oath to

be fair and impartial jurors and sit and listen to the evidence and apply it to the law as His Honor gives it to you, even if there is things about the law that you may or may not disagree with.

Let me give you an example of what I'm talking about. When we talk about, say, for instance, distribution of drugs or possession with intent to distribute, which in this case that is one of the offenses that Mr. Nelson is charged with. Well, the law in South Carolina as it relates to possession, there is two kinds of possession, possession can be either actual possession, which is to physically have your hands on something, or constructive possession, and of course constructive possession means when you control the disposition of it, it is under your spirit of influence. You may not be in actual possession of it, but it is in your spirit of influence. It may be right in front of you. But if you exercise dominion and control over it. Now, some people may say, well, that shouldn't be, but that is what the law says. That is what the law says.

As you look at these cases, please remember if you look at this case, each and every offense -- and Mr. Nelson is charged with three -- each and every offense legally has elements, and the elements of the

component parts that make up the offense, if any one of the elements that His Honor instructs you that applies to a particular defense, if the prosecution doesn't prove any one of the elements beyond a reasonable doubt; that is, if you are not all convinced that the prosecution has proven each element -- not one or two -- say in the case of self-defense that the prosecution has disproved -- disproved because, now, Antwuan Nelson does not have to prove that he shot Mr. Rogers himself. He doesn't have to prove that.

The law presumes -- even right now, the law presumes he's innocent. The prosecution has to disprove each and every of the four elements, and we'll talk about the four elements a little bit later on, but His Honor will charge you on what the elements of self-defense are, and you'll have to decide whether or not, based on the evidence or lack of evidence -- or lack of evidence, and in this case lack of evidence can be important. Just as an issue, say, for instance, creditability of witnesses. I'll get this out of the way, because I may forget about it, and I'm getting older. I may forget about it, and my mind might leave me, and I might not get back to it, but talk briefly about creditability of witnesses.

In legal jargon, or legal arena, we refer to creditability of witnesses. Your Honor will instruct you as to your responsibilities as to what to believe on the witness stand. Everyone on this witness stand, either though they swear or affirm to tell the truth -- let me tell you something, Holy Bible gets a rough time sometimes because people swear and affirm sometimes, and they don't always tell the truth.

Now, what do I mean? For whatever reason, it is your prerogative, absolutely yours, totally yours to decide who to believe that testified from this witness stand in this case, how much or what they said they believe, if any at all, or whatever -- whatever. The creditability of witnesses is totally within the providence of jurors because His Honor can't even comment. That is up to you. The believability of the witnesses.

What causes people to lie? Well, lots of things cause people to lie. They may have a political interest, economic interest, social or personal interest. In this case, I think His Honor may give you a charge on something we call "inconsistent statements," that is when people make statements at one point, and for whatever reason, later on they have a different perspective on the same issue and even

testify in court that, well, I don't remember like that or -- or either, I don't remember at all. And of course this is -- I'm not picking on anyone. Our job is hard sometimes as defense lawyers, because sometimes I'm looking at the 12 of you now and I don't know how far I can go. I don't know you personally. I don't want to offend anybody, but I have a client to represent.

The defendant is charged with -- he's charged with some very serious crimes. He's charged with -- first of all -- unlawfully killing a man with murder, with malice aforethought. His Honor will instruct you on the details of what the elements of this offense of murder is, and then perhaps even more illuminate on what each one of those elements are.

Back to the issue of creditability of witnesses and what makes them change, what makes their memory go bad. In this case, the girlfriend of the decedent, Ms. Bloomer, got on the witness stand yesterday and swore to tell the truth. Everything was going well as long as she was under direct examination, but then comes the defense lawyer, and her memory started getting bad. It's been three years ago, it is a long time.

Ladies and gentlemen, I'm not going to stand up

here and patronize you. Ms. Bloomer had a problem with memory because she wasn't telling the truth, simple as that. What compels me to say that she wasn't telling you the truth is my duty and responsibility to my client to make sure that he gets a fair and equitable, impartial representation in this courtroom.

Now, I can sympathize with her for what has happened to her boyfriend. I don't mind saying it was something they shouldn't be doing in the first place. That is hard to deal with. It is hard to accept. Nobody wants to see anyone dead. But if in everyone's life -- depending on what you do and how you carry yourself, it becomes harvest time. It becomes harvest time. And even for Mr. Nelson right now, it is harvest time. I wouldn't want to be in his shoes. Lord knows, but it is harvest time. You have to pay the piper. When you do bad things, bad things happen to you, but we want to make sure that punishment is according to and equitable and based on what someone has done. In other words, we don't want you to -- and I don't want you to think that Mr. Nelson is guilty of murder because he is guilty of drug dealing. Look, those are different things. Punishment is even different. Murder is one thing, drug dealing is

another.

Now, as it relates to this issue of creditability, notice we thought -- I called one witness, and I'll tell you, I thank the gentleman for coming in here. Ms. Walter gave him a little hard time. She didn't want him to say too much, but quite frankly, that man -- my goodness, he owned half of Myrtle Beach. I mean, he doesn't care about the nickels and dimes, but usually rich people, that is how they get what they want. But he came in here and told you the truth. See, prior to the time that he came in here, this table right here, which is going to come here and stand up here, I want you to listen to them, want to show them the respect they deserve, but I want you to remember what it is that you heard in this courtroom on that witness stand and what you heard from His Honor, and what these exhibits will say, and I don't know they have a whole lot of significance, quite frankly.

If you listen to the facts of this case, you have a pretty good idea now of exactly what took place, pretty good idea of what took place. As I said, this table will have you believe that somehow -- where is that shotgun? I'm not going to get the shotgun out, because I'm not going to do what the Solicitor did at

the beginning of the case and get you in some kind of dramatic mood by taking the gun and flashing it in front of you.

You've seen the shotgun enough, but notice this shotgun didn't go to SLED. Well, there is nothing -- no evidentiary value in -- the shotgun had no evidentiary value, so we didn't send it to SLED for -- the young lady that testified said, well, we couldn't tell when the shotgun was fired last. It may be fired a year ago, two years ago, one minute ago or whatever. The Solicitor says, well, Mr. Nelson, the only one doing the shooting. He murdered Mr. Rogers. He shot him with an AK-47 (sic) -- well whatever assault rifle.

Well, these guns, along with all of the shells and ammunition, irrespective of how much he piled on the counter or whatever -- I mean you can buy it from Walmart, but now we're not concerned with how much ammunition he had. I mean they may have a concern, make some suggestion about something having to do -- but a whole bunch of people got shells now and carry enough to be able to shoot, for whatever reason.

The law says, believe it or not, whether we like it or not, the pendulum is swinging that way. I mean, you have guns, walking around with guns in college. I

don't know. I mean, it is an issue with both sides, and there is usually two sides to every issue. But usually it is not until something happens, something dramatic of whether or not we're going too far this way or too far this way. Same thing we do with drugs, going too far this way, marijuana or smoking it, or cocaine using it, whatever.

Mr. Rogers wasn't doing no shooting. He never used a shotgun. He was a victim of a bad drug deal, and Mr. Rogers -- Mr. Nelson (sic) wanted to shoot him and get money or get drugs or -- everything that you saw and you've heard based on what Antwuan Nelson has done is what you heard when they got in an argument. Antwuan Nelson -- when Mr. Rogers started to talk about getting his gun, Rogers (sic) took off running -- Antwuan Nelson. He ran to get his own gun.

Well, now, here is the kicker. I'm going to come back to this in a second. Remember, the prosecution would have had you believe -- if I didn't have Mr. -- thank the lord for Mr. Davis, who ain't got an axe to grind, and like I said, he probably has more houses and apartments then all of us together. He sat over there and said, look, you know, you are dealing with nickels and dimes, but somebody took a shotgun and blew up the door on my apartment.

You remember I asked Ms. Bloomer right here, I asked her, When Antwuan Nelson ran out of the door and your boyfriend ran down the stairs -- I even asked -- where is my glasses -- I asked Mr. -- he didn't hesitate a second in finding this property on this map. He probably knows where half the property is in Myrtle Beach. I mean, that is how rich people are, that is what they concentrate on. He is in the business of buying houses and buying apartments and making money. But you remember, I asked him where was the damage to his building, and you remember it is over here. It is over here. See, when Rogers came down the stairs down here in this apartment, right here -- now I'm going to -- I'm going -- I'm going to do like Mr. Hixson. I thought I saw -- they make sure -- they walk the line -- walking the line, ain't that something, but I like it. Jurors are supposed to see. But, now, right here, Ms. Bloomer told you her apartment is up here on the second floor.

See, when Rogers came down here and when Antwuan did turn this curve, boom. That is how he blew a hole in the door over here. Here is the interesting thing. These same people over here came up and asked you to believe what they will tell you or what they are going to argue to you or tried to persuade you to adopt

their view of the evidence. Not only did you not see a gun, but you didn't see one police officer who came here and told you anything about any evidence regarding that man's door. You would have thought that maybe that is a different case. Well, it is not a different case, it is the same. Why is it that, as I said, Ms. Walter was very concerned that he wanted to talk too much about who he talked to, any of the police officers.

Because as I said -- where is Mr. Clothier? He is the chief. He testified. I don't believe he testified. But, notice, I don't have anything related to the -- through the process of discovery. We have what we call "discovery" where people present evidence regarding evidence in the case. We have to exchange certain things. There's not one shred, not one iota dealing with anything with this door. That's interesting, isn't it? You come to a crime scene and, in fact, if you go back and look at what the officers talked about, this is not even in the crime scene. It is not even in the crime scene.

Now, is Mr. -- was Mr. Davis' testimony believable? Ladies and gentlemen, you all have been determining who and what to believe all your life. You remember in my opening statement I asked only that

you use your good commonsense to arrive at a verdict in this case. You know when someone is giving you the whole deal, or you know when someone is not telling you the truth. I submit to you that Mr. Davis was telling you the truth.

Now, notwithstanding the fact that Myrtle Beach's finest, for whatever reason, chose not to include one police report -- Mr. Davis' statement was oral, and he didn't give us anything away. My God, you are investigators. You are police officers. You ought to have a report. Somebody ought to. Now, Ms. Walter says, Do you know who you are -- you know, I like the way he handled that, because I'll tell you something else about rich people. That is how they accumulate wealth, they know what they are doing.

Well, did you talk to Mr. Barr back in the room? Ain't nothing I can tell that man. What kind of -- he sat right there and said, listen, I've never seen the man, never spoke about. What we talked about was we talked about my door getting fixed, that is what he is worried about. The thing about it is that nobody mentioned anything about how that door got shot. How the shotgun -- wasn't that gun, the same gun that everyone had a hard time seeing that Mr. Rogers had shooting at Antwuan Nelson.

Now, Mr. Nelson, he got to his car, but he sneaked around the car. If you notice, even Ms. Bloomer admits, you know, he was stooping behind -- what do you think he was stooping down for? He was stooping down because when you look at where his car is, here is where he is parked, and here is the man's truck, and here is the alley where -- this is where Mr. Rogers was, roaming around out here looking for Mr. Nelson. I asked Ms. Bloomer, even this morning, what was he downstairs for waiting? See, that man had the gun. If he couldn't handle Antwuan Nelson physically upstairs and asking for the gun then, he wasn't down here waiting on him to come downstairs without a gun. He had the gun then and he went upstairs looking for him. He had the gun then.

Antwuan Nelson had no -- if he had came out here and exposed himself -- even Ms. Bloomer testified that he was looking around -- what do you think he's looking for? He was trying to figure out where in the world Mr. Rogers is. If he walked over here and got into his car and exposed himself, it would be probably a different scenario today. It would be a different scenario.

Mr. Rogers was not playing with that shotgun. Ms. Bloomer had to admit this morning -- she had in a

statement when he shot a second time -- when he shot a second time. See, when he shot a second time, that is when we was shooting at Antwuan Nelson, because he was looking at him down here in the alley trying to kill him, and Antwuan Nelson defended himself and shot back.

Now, ladies and gentlemen, Your Honor will instruct you, and as I said in my opening remarks, Antwuan Nelson shouldn't prove his innocence. He is presumed to be innocent, and that presumption of innocence remains with him even now at this point in this trial. That presumption of innocence is only removed when you decide that you have been convinced by the evidence and weight of the evidence that the prosecution has otherwise proved them guilty each and every one of these offenses beyond a reasonable doubt.

Now, there is a couple of things that I want to make sure that I mention to you before I sit down, because I'm not going to stand up here a long time. I think, and I know, and I've watched you all, you have been very attentive to this case and you paid attention. No one is going to sell you a bill of goods about what transpired. I don't care what the prosecution might say, they cannot change what transpired in this courtroom. As I said, I certainly

want you to pay attention and listen and be courteous, but don't take a bill of goods. Don't take a bill of goods.

Mr. Davis was the last person that came in here and testified and probably told you more about this case than anybody, because he was the one that primarily -- up to this point, everybody is trying to say, well, we ain't find no shell casings. Shell casings, now you have 40 some people going around, and guess what, if you remember, when Antwuan Nelson left with Officer Garrett -- when he left with Officer Garrett, the crowd was so hostile towards him and -- that he had to get him away, put handcuffs on him and put him in a squad car and take him away. Several officers said they were kind of getting rough, kind of rowdy there. So they were all scattered around, all around the apartment complex. I don't know where the shotgun shell went to, I mean the one that was shot. But, now, as I said, if Mr. Davis didn't come around, the prosecution would have you believe Mr. Rogers didn't do any shooting first, he had an empty gun. He had shells in his pocket, and when he got shot, the shells, some of them got -- shells jumped, went over here, some of them went over there.

Well, I don't know what happened. I don't know

how many gun shells he had in the chamber. I don't know how they got scattered around, where they plan -- and I'll tell you what, while I'm thinking about it, let me share something with you about professional people, and I better be careful because some people might say, well, as a lawyer I have to claim myself in that category but professional people hate to admit we're wrong. Common people admit they are wrong a whole lot quicker than people. I can't remember the lady's name, she's from SLED. Was she firearms or -- I can't remember, but, anyhow, what I tried to get her to do is admit there is a poor investigation going on when they didn't even take a sample of what they thought was blood. You remember she tried to justify it? Well, it looked like blood, and then she gave me the long litany of why it wasn't important. Anyone knows better than that. How are you going to have blood at a crime scene and you can't even come to court and say scientifically that is blood? It doesn't work like that. But instead of saying, We just missed that. No, we're trying to justify it. Even when you are wrong, you are still right. Well, you can't do that.

The truth of it is -- and I know you could see that. You know better. You know better. But rather

than saying I'm wrong and we don't have it and we don't know whether it is Mr. Rogers' blood or not, it is just not important that we know whether or not, first of all, that that was blood. Yes, it is important. You are a forensic experts. That is part of the crime scene. You are supposed to get it. Someone is supposed to collect it, take it to custody, send it to be analyzed. That is the purpose of doing it the right way, so that the results you get is based on some true and not something that is perhaps not true.

I'll tell you what -- and I know it shocked me when Mr. Davis correctly called the No. 8 bird shots. He said I didn't discuss that with him, but based on what he saw, the damage done to his door, he knew exactly what Mr. Rogers was shooting. He knew exactly what -- and guess what -- where are those shells at? They are somewhere over here. No. 8s. No. 8s. No. 8. Prosecution would have you believe that, well, I guess No. 8s -- but that is what he shoots, and that is why they tore up that man's door, because he was shooting at this man over here.

As I said, there is a couple of things I don't want to forget that I mentioned to you that I know His Honor will tell you about. We already talked about

that presumption of innocence. That presumption of innocence is a strong presumption. It is a very strong presumption. Let me tell you how strong it is. Legally, if something were to happen in this courtroom right now, Antwuan Nelson would be not guilty because that presumption of innocence applies until such time as you, the jury, armed with the law as His Honor gives it to you, says he's guilty. The presumption of innocence is a substantial right, but it's in our law. It is one of the things that protects us, one of the things that distinguishes us from some of these societies where justice is so swift, Lord have mercy, if you want to call it justice. Or in some cases where people only taking certain positions that are beneficial to them, they call it "just us," and you know what I'm talking about now. I'm going back to the credibility of Ms. Bloomer, who when I asked her about her statement she said my memory was better back then today. She hardly would admit that Antwuan Nelson -- or that Mr. Rogers even did any shooting. She didn't remember where she was.

Now, from her statement she had to admit that that is what she said. If you remember, I asked Ms. Bloomer, I said, Listen, in your statement you don't deny that nowhere in your statement did you ever

mentiocn you and your boyfriend were getting ready to go to the daycare center to take the child. No where in your statement did you ever mention Antwuan Nelson punching Mr. Rogers. No where in the statement did she mention it, but yet today somehow Mr. Rogers was down on him punching. Oh, Lord have mercy. Mr. Rogers was getting -- Mr. Rogers wasn't going to go to any daycare center with her, he was instead going around that apartment complex with that shotgun trying to find Antwuan Nelson, that is what he was doing. He wasn't going to go to any -- and the reason she didn't say it is because it didn't happen. Didn't happen.

Now, even you can understand why even today she would come into this courtroom and tell you something and it was not true. That is just the short and long of it, as simple as that.

Reasonable doubt, the kind of doubt that would cause a person to hesitate to act. That is not very difficult to understand. He's going to explain it to you in more detail, but a reasonable doubt is the kind of doubt that would cause a person to hesitate. In layman's terms we can understand that. That is the kind of doubt -- in other words, when His Honor gives you the law, even as to murder and as to manslaughter, voluntary manslaughter or possession of a weapon

during a violent crime, even drug distribution, and I'll talk about drug distribution last, because quite frankly, as I said, you are grown people, I'm not going to spin -- you -- you -- you could see things.

I just simply ask you, is it fair to convict someone for murder where all they have done is distribute drugs? I'm not saying that that is right, but let the punishment be to what the person has done. It is unfortunate that this thing got out of hand, but sometimes that is what happens when you do the wrong thing and you engage in the wrong thing. Sometimes it spills over.

Reasonable doubt, the kind of doubt that would cause a person to hesitate to act. In other words, if you get to your jury room and you have a discussion if Antwuan Nelson murdered Mr. Rogers, shot and killed Mr. Rogers with malice aforethought. Premeditation. Premeditation. Not in the sense of ill will, but premeditation. Guess what, I'm here to tell you -- irrespective of what Mr. Hixson may say -- this thing happened in less than a hour, wasn't a whole lot of chance for premeditation from the time they came upstairs. I think Ms. Bloomer said 30 to 45 minutes. Half of which Antwuan Nelson was hiding in the woman's apartment. So this is not -- this was a spur of the

moment thing where, really, it happened so fast, even according to Ms. Bloomer, she was so excited -- it came and went just like that. I mean, that is what happened with her. This was no kind of thing where someone had a period to do all kinds of cooling off. What kind of cooling off do you do in less than an hour? You can't do any cooling off. If you do a lot of cooling off, cool off -- it must not have been anything to cause you to be too upset to begin with.

Let me go on. The kind of doubt to cause a person to hesitate to act. If you are indifferent -- and His Honor will tell you, if you are not firmly convinced; in other words, if you think there is a real possibility -- a real possibility that the defendant could be innocent based on what has not been proven, then His Honor will tell you you have to find him not guilty. He'll tell you, and I'll leave it at that. I won't go into more details about what is in these boxes.

Go on the next thing. Circumstantial evidence, I hate talking about circumstantial evidence because so much of the prosecution case in this instance is based on circumstantial evidence. Do you remember the lady that testified when shots were fired at her house and scared, shooting at her. Imagine sitting in your

house and hear shots fired in your neighborhood and shots are coming in your house, Lord have mercy. You have to run from your own house.

Anyhow, she said I saw someone scaling the wall, and they were either scaling the wall or attempting to jump up and they dropped something over the wall, so I told the police about it. She said the person I saw had something dark on, same thing as Antwuan Nelson had on, red trim, dreadlocks -- no, she didn't say dreadlocks, somebody else talked about dreadlocks. He had something on his head and ran back towards the car. That, taken along with some other things, such as running back towards the car, wasn't no one else back there, she didn't get to see his face, if you believe that all of that taken together -- and His Honor will tell you it leaves to only one conclusion, if you conclude that Antwuan Nelson -- if you believe that. Simple as that. That is based on evidence. I won't argue with that. You are not children, and I'm not going to treat you that way.

Already talked about believability of witnesses. Statement of defendant, you only have one statement from the defendant in this case that I can think of, very first statement he made to the officer. It was a voluntary statement. I shot in self-defense. I shot

him in self-defense. I shot him in self-defense. Shot him in self-defense. Shooting at me.

Expert witnesses, Dr. Proctor. I had to let Dr. Proctor know that he still looks good and remind him of a case we were involved in years ago, a child that drowned near Myrtle Beach, and no one knew what happened. Dr. Proctor said -- testified to quite a few things in terms of the evidentiary significance of what he testified to -- to tell you the truth, I don't even remember. I remember what I wanted to hear from him, and that was Mr. Rogers based on the pathologic report finding regarding drugs. Now, Scott said, Well, doesn't that mean that the drugs were in the system for awhile and broken themselves down and not like he was using them that day, and I think Dr. Proctor's response was something to the extent of they had been metabolized.

Now, Ms. Bloomer said I keep drugs out of my house. I know my husband liked to deal with them and mess with them, I keep them out of my house. That is why I took all the drugs out of the house and put them -- put them in my husband's truck, because I didn't want it to be found in my house, so I put them in my husband's truck. Didn't give them to the police, and certainly didn't give them to Antwuan

Nelson. Prosecution said all the drugs, wherever they are, in the man's truck, on the fence, all of the drugs were Antwuan Nelson's drugs. Expert witness-problem. A good man. Good man.

Defendant who testifies, His Honor will charge you about a person's legal right not to testify, so I won't talk about that.

Prior inconsistent statements, I won't talk about that anymore because I think that you all have seen how that works and understand how people can be impeached when they say one thing, and said something different yesterday, and the two things are reconcilable, and you want to know -- well, you can be impeached, and we saw that in the case of Mr. Bloomer and, quite frankly, in terms of the testimony -- but, ladies and gentlemen, you decide about creditability as it relates to the prosecution of this case.

Murder: The unlawful killing of a person with malice aforethought. Unlawful killing, as opposed to manslaughter, which is a killing without malice aforethought. Often said to be -- of course with murder you have unlawful killing, which can't be a lawful killing, can't be where you find, for instance, say, you find self-defense, but we talked about it earlier with malice aforethought, just total

difference in the sense of ill will, no regard for human life. I mean, you know, you formulate in your mind I want him dead. I want him dead and you concentrate on I want him dead.

Had a lady one time drive all the way from Columbia with a butcher knife and came back 200 miles for her husband, caught him cheating. She just wanted him dead. Premeditation, murder. I intended it. That didn't happen in this case. The one thing I know for sure, that that did not happen in this case. Antwuan Nelson may be involved in drugs, but not murder. Not murder.

Sometimes you may have to do something that you probably shouldn't do to get yourself out of a bad situation, but Lord knows he's not a murderer.

Possession of a weapon during a violent crime, I don't need to talk about that. His Honor, he'll talk to you about all of these things, but I think that the instructions that he gave you is so clear for me to sit here and keep you from your lunch talking about something extraordinary. I'm not going to do that, because I don't think it is -- quite frankly, I don't think it is fair to you, to any of us.

Voluntary manslaughter. Let me say this much. If you find -- if you find in this case that Antwuan

Nelson shot Mr. Rogers in the heat of the moment with sufficient legal provocation, then His Honor will say that the killing will constitute manslaughter. I don't know that if someone shoots a shotgun or trying to kill you with a shotgun, I do know that will probably provoke most people to fire a fatal shot as opposed to receiving the other end of a shotgun, and I'll leave it right there.

Self-defense. His Honor will go over each one of those. It is a defense that places murder on the prosecution to prove the absence of self-defense. With respect to each element of the offense, the prosecution has to prove the absence -- say, for instance, well, we do have stand-your-ground in a situation where you invoke self-defense and you say I didn't have any choice but to shoot him. In the context of general self-defense, usually you're required to retreat. You are required to run or stand down or go somewhere or wherever as a part of your defense, if it is reasonable for you to do so. If you can do so without jeopardizing -- getting seriously injured. If Antwuan stuck his head from behind the car, stood up, stand up wherever Mr. Rogers was, he probably was going to -- in terms of that question -- and as I said, His Honor will tell you, and of course

Mr. Hixson will have a whole lot to say about it, because having orchestrated the situation where the shotgun blast in a man's house that the police doesn't even acknowledge is evidence other than -- doesn't even acknowledge it as part of a crime scene. No physical evidence anywhere on the chart or anything else showing a picture where the man's door -- where it was shot. Why? Not even one. I take the same position with respect to law enforcement. It should have been here. It should have been here. Should have been here from the very beginning along with all of the other stuff, but they were just having you believe that Antwuan Nelson was a drug dealer just out there trying to extract money or drugs out of Mr. Rogers, and after he couldn't do it, he killed him. It wasn't that simple. No, it wasn't that simple.

Right to appearance, there is a simple one. His Honor will instruct you on what that means, act or appearance if -- listen, if Michael Rogers pointed that shotgun at Mr. Rogers (sic) and reasonably believed -- even if it had no shell in it, even if he done shot all of it, and he believed he still had some and he fired to keep from firing -- His Honor will tell you that part.

I know you don't want to listen to me all day

long. You just want to sit through and go all the way through and feast on the words of a lawyer. You don't want to hurt my feelings. Well, I know better, so I'm going to sit down now. My time is over, and I know you will come back with a verdict based on the law and evidence as you found it to be, come back with an appropriate verdict which speaks the truth. Thank you.

MS. WALTER: The first statement the defendant made, No, you are going to buy these, and those words were the beginning of the end of Mr. Rogers' life. When Mike Rogers refused to buy the drugs that that defendant brought into his apartment, the defendant used the first weapon at his disposal, his fists. He suckered punched Mr. Rogers and caused him to fall back into the refrigerator and stove. He fell to the ground, and the defendant got on top of him and continued punching him, continued punching Mr. Rogers in his own home. So being attacked in his home, Mr. Rogers screams out, Honey, get the gun. But she didn't get the gun. Michael Rogers didn't get the gun. They tried to end this confrontation in a non-violent manner. Open the front door, get the defendant out of our home.

So the defendant runs down the stairs. Michael

Rogers waits a minute, and he and Ms. Bloomer wait for a minute or two trying to calm down, and then Michael Rogers follows after him, empty handed. The defendant -- if he at this point is scared of Mr. Rogers -- had the perfect opportunity to run right to his car, which was not blocked in any way, parked in front of the building and just take off right then and there. Instead, he runs up into that front building. He is there for a half an hour, 45 minutes. Kicking back, chilling, not worrying about a thing apparently.

Mr. Rogers is incensed, and rightfully so. He's been beat in his own home. He stands at the foot of the stairs again empty handed, Come down and fight like a man. Come down and fight like a man with your fists. And, yet, the defendant still hid in the apartment. Ms. Bloomer is able to talk to Mr. Rogers and calm him down. At that point, Michael Rogers walks away. That is important for two reasons.

Number one, because Michael Rogers left. He was no longer in front of that building. There was nothing stopping the defendant from getting in his car and driving away. Had he taken that simple act, that simple step, we wouldn't be here today. Do you know who would be here today? Michael Rogers. Instead, having Michael Rogers and -- the other important thing

is Michael Rogers walked away. He didn't run so he could get his gun and come back and hunt the defendant down. He walked away, because at that point, he and Ms. Bloomer had decided, okay, I'm calming down, it is time to focus and go and pick my daughter up from daycare.

So Michael Rogers walks away and around the building. So instead of getting in his car, what did the defendant do? Come downstairs again, walks past the driver's door, goes to the trunk of his car and takes the AR assault rifle out of a case that is in his trunk, walks past his driver's door again and walks up to Ms. Bloomer, who is standing there with her phone that doesn't work, stands there while holding an assault rifle saying, You tell your guy to get down here and give me my stuff. Does that sound like someone who is afraid for their life?

If he at that point is so convinced that Michael Rogers is trying to kill him, is he going to stand there and demand that Kristen Bloomer call him down? It doesn't make sense. You heard Ms. Bloomer say that based on where they were positioned, kind of at the corner of the building, that it is very possible that Michael Rogers, as he walked away, could look back and see the defendant holding an assault rifle while

talking to his girlfriend.

Kristen Bloomer walks away, and again the defendant has an opportunity to leave, and he doesn't leave. Instead, he goes to the end of his car and he looks down the alley and he fires three or four times. Not a warning shot in the air like, okay, let's call this off. Shoots three, four times. We know of three shots because you have the strike mark on the wall in that little breezeway where Michael Rogers was protecting himself. You have the bullet that went into Ms. Cantey's apartment, and then you have the bullet that tore into Michael Rogers' neck causing catastrophic damage.

Defense counsel said I don't know how the shotgun shells got there, but you heard both from Dr. Proctor about the damage that was done by that bullet, but also from Officer Owens that when you take a round like that to the neck, do you think you are going to stand there and go, nope, can't let go of the shotgun? He is shot in the neck, falls and everything he has in his hands scatters.

Now, defense wants you to believe that that gave others the opportunity to go around and pick up the evidence that Michael Rogers had ever fired that shotgun. You heard testimony that in order to eject

the spent shotgun shell from that shotgun, you have to actually pump the shotgun. Do you think that that was Michael Rogers' last action? He got shot in the neck falling to the ground, Oop, hold on, better eject this spent shell? That didn't happen. Do you think that someone had time to scour the alley and find the wadding that would have been there, however many pellets. You heard Michelle McSpadden testify, there would have been so many pellets, dozens of pellets that it would be impossible for everyone to pick up every last piece of evidence that would show that that shotgun ever had been fired. There was no evidence that it had been fired, because it was never fired. There was no strike marks on the wall. No one can take that away.

Let's engage in the defendant's fantasy world for a minute and believe that little minions ran through the alley picking up all the wadding and all the little pellets, but there would have been strike marks in the wall. Just as the defendant's bullet left a strike mark in the wall where Michael Rogers' head had been, had Michael Rogers fired that shotgun, there would be strike marks and they would have been seen.

Mr. Davis, nice enough man, but let's remember one thing, when he told you that there was damage to

his building, he didn't know when it occurred. That certainly wasn't part of the questioning. I showed up, there were police there, I had a conversation. When did that damage occur? He hasn't been there for a month prior. What evidence do we have that there was damage? Yes, I did, and pardon me if you saw me chuckle when he came up with No. 8 bird shot, but how unusual is that, especially since he just finished his testimony saying I have no idea what kind of ammunition did that, no idea what kind of shotgun caused that damage? If you remember, I said did you talk to Mr. Barr prior to testifying? No. No, I didn't. What about when you and Mr. Barr walked out of the courtroom for about five to seven minutes? Oh, yes. Yep. Yep, I did talk to him, but magically did not talk about this No. 8 bird shell.

There simply is no evidence that you have seen that that shotgun again was ever fired. It wasn't loaded when they recovered it. There was not a single spent shotgun shell on the ground. There was no gunshot residue on the victim's hands. You know where the gunshot residue was? On the defendant's hands, because he's the only one that was firing a gun that day. He is the one that fired a gun, and those actions are what caused Michael Rogers' death.

Now, as you've heard, the defendant is charged with three different crimes: Murder, possession of a weapon during a violent crime and possession with intent to deliver crack cocaine base or crack cocaine. Let's start with that. There is no dispute -- sorry Your Honor --

THE COURT: You need a break? I don't doubt that one minute. I'm sorry.

MS. WALTER: No. No, I'm fine.

THE COURT: I would rather they be in a position to pay attention. Let's let them go out and I'll let you continue.

MS. WALTER: No problem.

THE COURT: I hate to break it, but.

(The jury exits at 12:59 p.m., and a recess is taken.)

(Whereupon, the jury enters at 1:06 p.m., and the following is had in the presence of the jury.)

THE COURT: Ms. Walter.

MS. WALTER: The defendant is charged with three offenses: Murder, possession of a weapon during a violent crime and possession with intent to distribute crack cocaine or cocaine base. I'll start with that one. One of the elements is established right off the bat, the defendant intended to distribute drugs.

There is no dispute that he went up into the victim's apartment and tried to sell drugs. For whatever reason, Michael Rogers wasn't satisfied with the drugs or price, but the defendant tried to sell him drugs, that is the intent. It is cocaine base. You heard Doug Robinson from SLED testify as to it was cocaine base.

So all we're left with is this idea of possession. State has to prove to you that at that point during this situation, the defendant possessed crack cocaine. Well, there is plenty of evidence that the defendant possessed crack cocaine. First of all, we have the drugs that Ms. Bloomer removed from her apartment and placed into Michael Rogers' truck so the police wouldn't find it. Even more telling is Michelle Cantey's testimony. She is sitting on her sofa, feet up relaxing after a long day of work checking her E-mail when she called it a reverberation, a bullet comes tearing into the wall of her home. She gets up right away, looks down the alley and she sees a black male wearing black clothes with red trim trying to jump over the fence or scale the fence. When he's not able to make it, he throws something. Black clothes, red trim. She tells the police, hey, I saw someone throw something over the

fence. Officer Harlow and Roscoe come and go out and, lo and behold, right where she said it was thrown Roscoe finds a balled up plastic wrap of drugs. So that shows that the defendant was down that far in the alley to throw the drugs.

We also know that he advanced down the alley, because after he killed Michael Rogers, as Kristen Bloomer was kneeling on the ground trying desperately trying to stop the bleeding, the defendant advanced on her with the rifle, and don't forget, Michelle McSpadden found an unfired cartridge in the alley very near where Mr. Rogers laid.

This reminded me of something else, Mr. Barr wants to make some big issue about the fact that they didn't test the blood on the ground. I hope I made my point when I questioned Michelle McSpadden. Does that make even a little bit of sense to you that you have a guy shot in the neck, as Dr. Proctor said, severing all sorts of veins and arteries. He said every time the heart pumped, the blood would spew out. You have Kristen Bloomer saying I was trying everything I could to stop the blood. Officer Owens worked on Michael Rogers right where there pool of red liquid was. What do you think it is? Why would they have to test it? That is a red herring. Don't follow the red herrings.

Keep your eyes on the ball and on the rules of the law and the offenses charged here.

So we know that the defendant went down the alley. We know that Ms. Cantey saw someone dressed shockingly like the defendant trying to climb a wall and throw something over the fence, and we know that Roscoe found drugs right where that was. That is called circumstantial evidence that the defendant possessed those drugs, and we know for sure that he intended to distribute them. So at this point you should be firmly convinced that he is guilty of that charge.

The second indictment is possession of a weapon during a violent crime. Again, one of the elements we can get rid of right away. There is no dispute that the defendant had a weapon. An assault weapon absolutely qualifies as a weapon. So it comes down to whether this was during the commission of a violent crime. So as long as you convict him of voluntary manslaughter or murder, he is guilty of a weapon during the commission of a violent crime.

Let's turn to murder and talk about voluntary manslaughter first, because sometimes things strike me as rather absurd, such as the fact that half an hour to 45 minutes wouldn't be an adequate cooling off

period. There was no interaction between Michael Rogers and the defendant for that half an hour to 45 minutes. You can have a cooling off period that is far shorter than that, and certainly Michael Rogers cooled down from the initial fight when the defendant sucker punched him. So the defendant had an adequate cooling-off period. So that is one way that voluntary manslaughter is out the door.

You also have to look at if there was sufficient provocation. There is no testimony from anyone that Michael Rogers ever had a gun anywhere in sight of the defendant. None. None, whatsoever. So how could he have been sufficiently provoked to take an assault rifle and fire it at a vital part of Michael Rogers' body? So I submit that voluntary manslaughter should be off the table.

Let's focus on murder. Murder is unlawful killing of another with malice aforethought. Unlike what Mr. Barr would have you believe, there is no magic number, no magic amount of time in the law. Okay, let's go, let's see how long it takes to get malice aforethought. It can be formed in an instant, formed in an amount of time it takes you to pull the trigger. It can be either expressed, I want to kill you, which we don't have here, or implied. It can be

implied by the fact that the defendant showed complete and utter disregard for the value of life. He showed that complete and utter disregard for life when he took an assault rifle, which he fired four shots. There was 16 more in a magazine. So he takes an assault rifle loaded with 20 bullets and fires three times down the alley striking Michael Rogers in the throat. Think of the power of the bullets that make a dent in the brick wall and travels the length of that alley and through the wall of a building. Using a weapon of that force on the vital part of Michael Rogers' body, that shows malice.

You can also imply malice by the fact that the defendant used a deadly weapon in the commission of this crime. That shows malice. If he had constrained himself to a fist fight and maybe got in a lucky blow, probably would have malice aforethought. But the defendant brought a gun to a fist fight. He escalated it, and by using a deadly weapon, that shows malice.

Now, the defense would have you believe that this was self-defense, there is one problem with that right away, and the Judge will tell you the defendant can't be at fault -- we use these legal terms -- in bringing about the difficulty. What that means is when the defendant sucker punched Mr. Rogers, when the

defendant continued to fight Mr. Rogers in his building, the fact that Mr. Rogers had not been seen at that point with a gun, he was at fault. He brought about the difficulty, and when you bring about the difficulty, you do not get the benefit of self-defense.

The Judge will also instruct you about mutual combat, and that means when two people agree, and it doesn't have to be a formal written agreement, but when two people agree by words or action to involve themselves in combat with deadly weapons, you don't get the benefit of self-defense. Clearly, the defendant, by bringing the gun into this fight, was engaging in mutual combat, and because of that, he does not get the benefit of self-defense. Plain and simple, the defendant is guilty of the murder of Michael Rogers, and there is no defense for that.

Mr. Barr talks about the rules of the road. I'll give you a rule: Thou shalt not kill. He violated that rule. He violated the rules of the road, and when you violate a rule -- and I'll go back to something else Mr. Barr said -- as a man sows, so shall he reap. What did the defendant sow in this case? He went into the victim's apartment, tried to sell him drugs, became angry when the victim wouldn't

buy the drugs, assaults the victim in his own home, and rather than leaving well enough alone, he hides and waits until he has an opportunity to go down to his trunk, pull out an assault rifle and kill Michael Rogers in this half hour, 45 minutes.

Think back on the testimony. Think back on how many different times, at least two or three different times that the defendant had the ability to drive away and prevent this from happening. He could have driven away when he first ran out of the victim's apartment. He could have driven away when he came down prior to getting the gun and approaching Kristen Bloomer. He could have driven away as he walked past his driver's door and had to advance to the alley where he then took aim at Michael Rogers and fired. There were so many opportunities for the defendant to escape, don't let this be one of them. Find him guilty of the crimes he committed. Find him guilty of all of the charges. Thank you.

THE COURT: Thank you.

(A brief pause in the proceedings.)

THE COURT: Do you know if the jury's lunch is here yet.

DEPUTY ROY HEMINGWAY: Yeah, it is here.

THE COURT: I'm going to let them have lunch

before I charge them. Thank you. We're at ease.

(The jury exits at 1:19 p.m., and the following is heard out of the presence of the jury.)

THE COURT: Mr. Johnson, this parade of people in and out of my court will not take place in my charge. If you have to leave, you be out of here before my charge starts. If anyone tries to bother to leave this courtroom during my charge, immediately arrest them. We have a holding cell downstairs, I'll deal with them later. Thank you.

MS. WALTER: May I ask what time you'll have us back?

THE COURT: I'm going to give the jury about a half hour.

(A lunch recess was taken.)

(Court's Exhibit 1 marked.)

THE COURT: Mr. Johnson, no one leaves or enters.

(The jury enters at 1:55 p.m., and the following is heard in the presence of the jury.)

THE COURT: Ladies and gentlemen, I'm about to charge you on the a law. I may have mentioned to you earlier that I do something that I'm not aware of any other judge in the state that does this, but it is appropriate, and the supreme court approved what I do. I give you a transcript, a written copy, of my charge.

In that regard, I have to read from it because I have to give you a verbatim transcript of my charge, and I do that because we bring you here from your daily routines and jobs and expect you to understand everything and just hear me shout off the law at the end of the trial and then expect you to absorb some rather complexed concepts in that charge. It is not fair to you without giving you something to take with you to refresh your memory, so that is why I do this; however, I ask you to keep in mind that the charge is given as a whole. You should not take one little part of the charge and concentrate on that without giving thought to other parts, because many of the parts of this charge relate to and have a bearing on how you will look at some of the other parts, so keep that in mind through your deliberation process.

During this trial, you and I have certain duties to perform. As a trial judge, it is my duty and responsibility to reside over the trial of the case, and I also have the duty to rule on admissibility of evidence offered during the trial. You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record in this case during this trial, you must disregard that testimony. You are to consider only

the testimony which has been presented from this witness stand, any exhibits which have been made a part of the record of this case and any stipulations, agreements of counsel.

I have the additional duty to charge you the law applicable to the case. As presiding judge, I am the sole judge of the law in this case, and it is your duty as jurors to accept and apply the law as I now state it to you. If you already have any idea as to what the law is or what the law ought to be, and it does not agree with what I now tell you the law is, you must abandon this idea, because you are sworn to accept the law and apply the law exactly as I state it to you. In every case tried in this court before a jury, the jury becomes the soul and exclusive judge of the facts in a case. A trial judge cannot intimate, state, comment on or make any statement to a trial jury about the facts in the case. Since you, the jury, are the sole judges of the facts in this case, you are not to infer from what I have said during the progress of this trial in ruling on the admissibility of evidence, or otherwise, or anything that I say to you now during the course of this instruction to you that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the

facts in this case. This is a matter solely for you, the jury, to determine as jurors. It is your duty to determine the effect, value, weight and truth of the evidence presented during the evidence of this trial.

The indictments in this case charge the Defendant with murder, possession of a weapon during the commission of a violent crime and possession with intent to distribute cocaine base or crack cocaine. I remind you that the fact that the Defendant was arrested, charged and indicted in this case is not evidence in the case and can't be considered by you as evidence of guilt in this case, nor does it create any presumption or inference of guilt. This document, being the indictment, are simply the formal written instruments which contain the charges made against the Defendant. They are the formal documents which the case is brought into the court. The indictments in this case allege three different offenses against the Defendant. The charges are: Indictment No. one, murder. Indictment No. 2, possession of a weapon during the commission of a violent crime. Indictment 3, possession with intent to distribute cocaine base or crack cocaine.

Each indictment charges a separate and distinct offense. You must decide each indictment separately

on the evidence and the law applicable to it unaffected by your decision as to any other indictment. The Defendant may be convicted 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, the Defendant has pled not guilty to these indictments, and that plea puts the burden on the State to prove 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 an important rule of the law that the Defendant in a criminal case, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which the indictment issued unless guilt has been proved by evidence satisfying you of that guilt beyond a reasonable doubt. This presumption of innocence does not end when you begin your deliberation, but it accompanies the Defendant throughout the trial until you reach a verdict of guilt based on the evidence satisfying you of that guilt beyond a reasonable doubt.

Now, the presumption of innocence is like a robe of righteousness placed about the shoulders of the

Defendant which remains with the Defendant until he has been stripped -- until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory. It is not just a legal phrase. It is a substantial right to which every Defendant is entitled unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt.

The State has the burden of proving the Defendant, as I have said, guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or a preponderance of the evidence. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few 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 that the Defendant

is guilty 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. What is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

Now, 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 proved by circumstantial evidence. The law makes no distinction between the weight or value to be given either direct or circumstantial evidence. However, to the extent the State relies on circumstantial evidence, all of 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 reasonable doubt. This burden rests with the State regardless whether the State relies on direct evidence, circumstantial evidence or some combination of the two.

Necessarily, you must determine the creditability of witnesses who have testified in this case. Creditability simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and to determine which evidence convinces you of its truth. In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses, or several witnesses over one witness. You may believe a part of the testimony of a witness and reject of the remaining part of that same witness. You may believe the testimony of a witness in its entirety, or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any bias, prejudice or other motive in the case. You may also consider the appearance and manner of a witness while on the witness stand.

Now, a statement alleged to have been made by the Defendant has been admitted into evidence in this case. While the Court, I, have determined that the

statement is admissible, I instruct you that you make the ultimate decision whether or not the Defendant made the statement. If the Defendant did make the statement, you must determine whether the statement was made by the Defendant voluntarily and of his own free will. This means that the statement was not caused by pressure, force, fear, threats, coercion or intimidation or by hope or a promise of leniency or reward of any kind. In determining whether a statement was voluntary, you should consider both the characteristics of the Defendant and the details of the question. Some of the factors that you must consider are the age of the Defendant, Defendant's education or lack of education, Defendant's mental ability or capacity, Defendant's IQ or intelligence, Defendant's background and environment, place and length of detention, nature of the questioning and the advice or lack thereof to the Defendant of his Constitutional rights including, but not limited to, his right to remain silent, that any statement could be used against him in a court of law, right to have an attorney present, that he could -- that if he could not afford a lawyer, one would be appointed to represent him without any cost and he could stop making a statement at any time.

You must carefully consider all of the surrounding circumstances before you can give any weight to any alleged statement. The State has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary. If you determine it was, you may give the statement further consideration that you deem proper. You must decide what weight, if any, should be given to the alleged statement.

If you determine the statement was not the free and voluntary statement of the defendant, you should not consider the statement at all. The Rules of Evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call "expert witnesses." A witness who by education and experience has become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert, and may also state the reasons for the opinion. You should consider any expert opinion received in evidence in this case, and like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience, or if you conclude that the reasons given in support of the

opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted. 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 of the question of guilt or the 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 to draw no conclusion, whatsoever, from the fact that the defendant in this case did not testify. The fact that this defendant did not testify should not even be discussed in the jury room.

The burden of proof, as I stated to you, is on the State. The defendant is not required to prove his innocence and the burden of proof remains on the State to prove guilt beyond a reasonable doubt. There has

been evidence presented that witnesses have made prior statements, which are not consistent with the witness' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statement to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial. If a witness is shown to have knowingly testified untruthfully concerning any material matter, you may consider this in determining whether to trust the witness' testimony as to other matters. You may reject all of the testimony of that witness, or give all or part of the testimony the weight you think it deserves.

Now, the defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought. 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 the intent to inflict an injury or under circumstances the law will -- from which the law will infer an evil intent. Malice aforethought does not require that malice exists 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 expressed or inferred. These terms "expressed" 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. Expressed malice is shown when a person speaks words which express hatred, ill will for another or when a person prepared beforehand to do the act which was later accomplished; for example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice. Malice may be inferred from conduct showing a total disregard for human life. If you find that the State failed to prove beyond a reasonable doubt that the defendant committed murder, you may consider whether the State has proved beyond a reasonable doubt that the defendant committed voluntary manslaughter.

To prove voluntary manslaughter, the State must prove beyond a reasonable doubt that the defendant took the life of another in a sudden heat of passion

based on sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter. Sudden heat of passion may, for a time, affect a person's self control and temporarily disturb a person's reason. The sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his action and would produce an uncontrollable impulse to do violence.

Sufficient legal provocation must be the type that would make a person of ordinary reason and caution to become enraged and to lose control temporarily. The provocation needed for voluntary manslaughter must come from some act of or related to the victim. Words alone, however vulgar or insulting, are not enough to be legal provocation.

Where death is caused by the use of a deadly weapon, the words must be accompanied by some overt, threatening act which would have produced the heat of passion. The exercise of a legal right, no matter how offensive it is to another is never sufficient provocation for volunteer manslaughter. If the heat of passion had cooled, or if there was enough time between the provocation, if any, and the killing for

the passion of a reasonable person to cool, the killing would not be voluntary manslaughter.

In deciding whether a reasonable person would have had enough time to cool off, you should consider the circumstances surrounding the killing. You may consider the nature of the provocation, if any, the Defendant's mental and physical state and the circumstances and relationships between the parties.

The defendant has raised the defense of self-defense. Self-defense is a complete defense, and it is establish you must find the defendant not guilty. The State has the burden of disproving self-defense. If you have a reasonable doubt of the Defendant's guilt after considering all of the evidence, including the evidence of self-defense, then you must find the defendant not guilty. On the other hand, if you have no reasonable doubt of the Defendant's guilt after considering all of the evidence, including evidence of self-defense, then you must find the defendant guilty.

The following elements are required to establish self-defense. First, the defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the

defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense. If the defendant voluntarily participated in mutual combat for purposes other than protection, such as a preexisting dispute or difficulty, the injury of the victim would not be self-defense. This is true even if during the combat the defendant feared death or serious bodily injury. However, if before the injury is committed, the defendant withdrawals and tried to, in good faith, to avoid further conflict either by words or acts makes that fact known to the victim, mutual conduct would not bar self-defense.

For mutual combat, there must be a mutual intent and willingness to fight, this intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat.

The second element of self-defense is that the defendant was actually in imminent danger of death or serious bodily injury or that the defendant actually believed he was in imminent danger of death or serious bodily injury. If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow

to prevent death or serious injury.

If the defendant believed he was in imminent danger of death or serious bodily danger, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the defendant actually was or believed he was in imminent danger of death or serious bodily injury, you should consider all of the facts and circumstances surrounding the crime, including the physical condition and characteristics of the defendant and the victim.

The defendant does not have to show that he was actually in danger. It was enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The defendant has the right to act on appearances even though the Defendant's beliefs have been mistaken. It is for you to decide whether the Defendant's fear of imminent danger of death or serious bodily danger was reasonable and would have been felt by an ordinary person in same situation. The final element of self-defense is that the Defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the Defendant did in this particular instance.

The Defendant is charged with possession of a weapon during a violent crime. The State must prove beyond a reasonable doubt that the Defendant was in possession of a firearm, or visibly displayed what appeared to be a firearm, during the commission of a violent crime. A firearm means any machinegun, automatic rifle, revolver, pistol or any weapon which will or is designed to or make readily to be converted to expel a projectile.

In order to find the Defendant guilty of possession of a weapon during the commission of a violent crime, you must first find the Defendant guilty of either committing a violent crime or attempting to commit a violent crime. The State must prove beyond a reasonable doubt that a weapon further advanced or helped in the commission of the crime. The State and the defense stipulate or agree that both the murder and the offense of voluntary manslaughter are violent crimes.

The Defendant is also charged with possession with intent to distribute cocaine base or crack cocaine. The State must prove beyond a reasonable doubt that the Defendant posed cocaine base, crack cocaine, with the intent to distribute. To prove possession, the State must prove beyond a reasonable

doubt that the Defendant had both the power and intent to control the disposition or use of the cocaine base or crack cocaine. Possession may be either actual or constructive. Actual possession means that the cocaine base or crack cocaine was at sometime in the actual physical custody of the Defendant.

Constructive possession means that the Defendant had dominion and control or the right to exercise dominion or control over either the cocaine base itself or the property which the cocaine base was found. Mere presence at the scene where the drugs are found is not enough to prove possession. Actual knowledge of the presence of the cocaine base is strong evidence of the Defendant's intent to control his disposition or use. The Defendant's knowledge and possession may be inferred when the substance is found on the property in which the Defendant's -- on the property under the Defendant's control; however, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have. Two or more persons may have joint possession of a drug. The State must also prove beyond a reasonable doubt that the Defendant intended to distribute the cocaine base. "Distribute" means to

deliver other than by administering or dispensing a drug.

Intent may be shown by acts and conduct of the Defendant and other circumstances from which you may naturally and reasonably infer intent. In determining whether the Defendant had the intent to distribute the cocaine base, you may consider the circumstances surrounding the Defendant's alleged possession. You may consider the amount of the substance alleged to have been possessed, the manner in which it was allegedly possessed, the place where it was allegedly possessed and other factors which you consider to be important. You must find that the Defendant did not intend to have the cocaine base solely for its use.

There is two possible verdicts which you may find on each indictment in this case, guilty or not guilty. There is no significance, whatsoever, to the order in which I stated these possible verdicts, just simply one has to be stated before the other. Ladies and gentlemen, your verdict must be an unanimous one. Madam forelady, I want you to go into your jury room in a moment, and when the jury has reached the verdict, write the verdict on the verdict form, which I'll provide to you, and then you knock on the door and inform the bailiff you've reached a verdict, and

at that time I'll bring you back in into courtroom.

Now, before I send you in, let me remind you that I'll take this charge here. I have it already marked as my exhibit. We will send that in with you, but before we leave the courtroom, let me talk to you a little bit about the verdict form. Of course you can approach your deliberations in any fashion you feel appropriate. It is entirely up to you, the jury. I prepared a verdict form which, at least my view, will logically lead you through these charges and make it easier for you to reach a verdict.

It starts with a statement that says, As to the charge of murder, we, the jury, unanimously find the Defendant -- and I say circle one, and it is "guilty" or "not guilty." Again, it makes no difference which one I put. I'm not suggesting any verdict. Under that, there is a sentence, and it says if you found the Defendant guilty of murder, do not consider the lesser included offense of voluntary manslaughter and go directly to the charge of possession of a firearm during a violent crime.

If you found the Defendant not guilty of murder, you may consider the charge of voluntary manslaughter. Remember a moment ago I said that was a lesser included, if the State didn't prove murder, you could

consider the lesser included. And then I have as to the charge of voluntary manslaughter, we the jury unanimously find the Defendant -- and, again, you could circle "guilty" or "not guilty." But as I said in the earlier statement, if you find him guilty of murder, you do not even consider manslaughter, because you don't find -- can't find him guilty of both. If you find him not guilty of murder, then you may consider manslaughter. And as to manslaughter, you may find him guilty or not guilty if you get to that point.

Again, I'm not suggesting any verdict. I'm just trying to help you by giving you a skeleton to go through with this verdict form.

The next charge of possession of a firearm during the commission of a violent crime, we, the jury, unanimously find the Defendant -- and you circle one, "guilty" or "not guilty." And then has to the possession with intent to distribute cocaine base or crack cocaine, we, the jury, unanimously find the Defendant -- and there you circle "guilty" or "not guilty." I just didn't -- I hope it will help you understand he is charged with murder, you can find him guilty or not guilty, either one.

If you find him guilty of murder, don't even

consider manslaughter. You go straight to the next charge, which is possession of a firearm during the commission of a violent crime. If you find him not guilty of murder, then you may consider voluntary manslaughter, and may find him guilty or not guilty on that charge. You must have found him guilty of either murder or voluntary manslaughter in order to support a finding that he would be guilty of possession of a firearm during the commission of a violent crime. The State and Mr. Barr have agreed that those are the two charges that are violent crimes and would support that finding.

Again, I am not suggesting any verdict, I'm just trying to set out something that would maybe help you logically follow through with your deliberations. I'm going to send you in your jury room, and one of two things will happen. I'll bring you back -- I don't think I will because I've gone over the charges with the attorneys. If I bring you back, I'll give you a further charge. If I do not bring you back, I'll send in all of the exhibits and the charge and the verdict form. If I do that, if I have a bailiff deliver that to you, that is your signal to begin your deliberations.

All right, Mr. Ropp, if you will take this jury

back in the jury room. Segregate the two alternates for right now.

MR. ROPP: Yes, sir.

(Whereupon, the jury exits at 2:31 p.m., and the following is had out of the presence of the jury.)

THE COURT: Anything other than what you placed on the record, Mr. Hixson or Mr. Barr?

MR. HIXSON: No, sir.

MR. BARR: No, sir. No, sir.

THE COURT: Nothing further than what we discussed? Let's get together and make sure we got all of the exhibits.

MS. WALTER: And we have that done, Your Honor.

COURT REPORTER: Yes.

THE COURT: Ms. Dahl, here is my jury charge. I think there is live ammunition, please leave that here, don't send that into the jury. Mr. Hemingway, look for any live ammunition.

MS. WALTER: That should be all of that.

THE COURT: If it is live, the jury can ask for it. All right. We'll be at ease.

(A recess is taken and the jury starts deliberations at 2:34 p.m.)

THE COURT: Ms. Smithson and Ms. Lewis, I'll separate you from the jury right now because only 12

can deliberate. Mr. Palmer, make sure they are in another jury room where they are comfortable and plenty of refreshments. If you need anything, if there is not a sheriff's deputy right there, walk in the hallway and let us know. I'll ask you to stay with us for an hour or so, or at least for the first hour, and you may be released at that time. Thank you. We're at ease.

(Whereupon, the jury starts deliberations.)

THE COURT: The jury has reached a verdict and, of course, I don't know what the verdict is. I know there is much interest in this case from both sides. I will tell you all, this jury is going to come in and it is going to be a verdict read. I will tolerate no outbursts from anyone in front of this jury. If you do not think you can contain yourselves, you need to leave, because if you do so, Mr. Johnson, make sure some of your staff arrest and remove anyone who makes any outbursts or display of displeasure or joy or anything else when this jury comes in. I'm not going to tolerate it, all right. Anyone that needs to leave, needs to leave now. I didn't see anyone getting up. Okay. Mr. Palmer, bring in the jury.

(The jury enters at 5:16 p.m., and the following is heard in the presence of the jury.)

VERDICT

THE COURT: All right. We have all of our jury in. Madam forelady, have you reached a verdict?

FOREPERSON: Yes, Your Honor

THE COURT: Was it an unanimous verdict?

MR. FOREPERSON: Yes, Your Honor.

THE COURT: Give it to Mr. Ropp and, Mr. Ropp, if you would deliver it to the clerk. May I see it, madam clerk?

(A brief pause in the proceedings.)

THE COURT: Very well. Madam clerk, publish the verdict, please.

THE CLERK: Indictment No. 2015-GS-26-00011, the State of South Carolina versus Antwuan Levon Nelson. As to the charge of murder, we, the jury, unanimously find the Defendant not guilty.

As to the charge of voluntary manslaughter, we, the jury, unanimously find the Defendant guilty.

As to the charge of possession of a firearm during the commission of a violent crime, we the jury unanimously find the defendant guilty.

As to the charge of possession with intent to distribute cocaine base or crack cocaine, we the jury unanimously find the defendant not guilty.

Signed by foreperson, Miranda Ray. Dated June 15, 2017.

Ladies and gentlemen of the jury, if this is your verdict, so signify by saying "I."

THE COURT: Was there any juror who did not affirm that this was his verdict; please stand?

And there was no response to that. Mr. Barr, do you have any request for polling?

MR. BARR: No, sir. No, sir.

THE COURT: Motions, Mr. Barr.

MR. BARR: If it please the Court. We directly -- I move with respect to the manslaughter conviction for a judgment verdict --

THE COURT: I think --

MR. BARR: And of course that would include the corresponding possession --

THE COURT: Yes, I understand. Mr. Barr, there is ample evidence to support this jury's verdict, but I'll hear from you, Mr. Hixson or Ms. Walters, either one of you.

MR. HIXSON: Apologize. As it relates to Mr. Barr's motion?

THE COURT: Yes.

MR. HIXSON: There is substantial evidence in the record that supports the conviction for murder and voluntarily manslaughter. And the malice aforethought, I assume, it makes voluntary

manslaughter appropriate.

THE COURT: Very well.

MR. HIXSON: Obviously, during the commission of a violent crime commiserates, flows, from that.

THE COURT: Any reason we should not proceed with sentencing?

MR. HIXSON: We're prepared to go forward.

THE COURT: I'll hear from you.

MR. HIXSON: Thank you. As it relates to Mr. Nelson's criminal record, he does not have much to speak of, as Your Honor is well aware of. He has misdemeanor drug convictions, several drug arrests, but nothing of a violent nature. I think Your Honor is well aware of a federal indictment to distribution of drugs out of Williamsburg County. Those are not convictions. He is currently in the U.S. Marshals' custody pending a trial on those drug charges in the federal system. Make sure that I'm clear, those are not convictions, I'm giving the nature of Mr. Nelson's criminal history.

I have not had a chance to talk to the family who would like to address the Court at the appropriate time.

THE COURT: This is the appropriate time, if anyone would like to.

MR. HIXSON: Beg the Court's indulgence for a moment, Your Honor.

MS. WALTER: We do have a family member that would like to speak.

THE COURT: I'll hear from him.

MS. WALTER: State your name and spell your first and last.

VICTIM: Jordan Benson, J-O-R-D-A-N. This is hard time for our family. I thank you guys spending these days. In these three years without my uncle, he has a daughter who will never know who her daddy was because of senseless things, and I don't feel it is fair to us or my grandmother. It was her last blood son that died some years back, but I'm her grandson. She has another grandson through the deceased, and my aunt. Like I said, just want -- I don't think it is fair. You should take no life. You should take no life for that. I just don't see -- it is senseless, and I don't feel that justice has been served, but.

THE COURT: Thank you.

MS. WALTER: State your full name and spell your first and last.

VICTIM: Earline Bess, E-A-R-L-I-N-E, B-E-S-S, Michael Rogers' mother. That was my baby son. I had two sons. That is my last son. It is a hurtful

thing, but things happen, I understand that. It just hurts so bad, but I'm thankful that it is over with. I forgive him, you know. It is in God's hand. I just -- I'm sorry (witness crying) -- it just hurts so bad. I had two sons and two daughters. My two daughters are back there, and my two sons are gone. I just love my kids so much, and just to be gone in an instant, it just hurts so bad. I thank you. I just thank you.

THE COURT: Yes, ma'am. Anything further from the State?

MR. HIXSON: We believe voluntary manslaughter, as you are well aware, sentencing is zero to 30, and 30 to life for murder. As it relates to the conduct of Mr. Nelson, whether there was substantial heat of passion or not, there was ample opportunity for Mr. Nelson to get himself out of the situation. The method and weapon that was used is absolutely senseless, and we ask for the upper end of the sentencing range. As your Honor knows, there is consecutive sentencing as it relates to the possession of a weapon after whatever sentence.

THE COURT: And I'll state for the record I'm aware of the fact it could be concurrent or consecutive, five years, and 30 on the....

MR. HIXSON: Correct, Your Honor.

THE COURT: I'll hear from the defense.

MR. BARR: Judge, I do intend to ask -- his family, he has quite a few family members here. I'm surveying to see who wants to say something, but I'll get my piece out of the way. First of all, I thank the Court and the jury for their consideration in this case. I think the Court has been fair and the jury's verdict is certainly a verdict that has been based on the facts of the case as the law applies. Let me say by way of mitigation that -- Scott Hixson mentioned a criminal record, and I'm not aware of any criminal record that he has, so this is the first time coming to court.

I'm -- I'm -- and if it was not talking to a judge, I would be concerned because prosecutors always start talking about what someone has been arrested for, and of course the simple fact that someone was arrested for something and may have charges pending, that is not a conviction. Of course I'm quite aware of the federal charges that are now pending against Mr. Nelson, and of course you know, Your Honor, you are well aware that should Mr. Nelson find himself in trouble with the feds, they'll require if he gets and active sentence here, they will require that he does that sentence before he even starts on any time. I'm

not suggesting there is time, but that will take care of it. In terms of what we're here for today --

THE COURT: Let me ask before you go further, Mr. Barr.

MR. BARR: Yes, sir.

THE COURT: The jury did not see the lengthy statement that was given by your client. Of course I did in the Jackson v. Denno hearing, determined the voluntariness, but from my understanding, and from remarks that you made during opening and closing, your client doesn't dispute the fact that he was at Mr. Rogers' residence for the purpose of consummating a drug deal?

MR. BARR: Well, Judge, what actually happened, he was in the parking lot when he was confronted by Mr. Rogers and wanted Mr. Nelson's assistance in helping him find some drugs.

THE COURT: So you are saying I did not hear him say that he took drugs up there to sell and they got in a fight over those drugs?

MR. BARR: You may have heard him say that because he did take drugs upstairs at Mr. Rogers' request.

THE COURT: Okay. All right. Anyway, go on.

MR. BARR: Of course, Judge, there is no question

that they got into an argument about the -- about drugs, and I don't think there is any question -- and certainly the jury saw fit to give him the benefit of the doubt when it came to manslaughter as opposed to murder, because had Mr. Rogers not interjected guns into this situation, then the guns would not have been involved. He followed -- ran Mr. Nelson out of there. Mr. Nelson went upstairs and hid up there for over 30 minutes.

THE COURT: Mr. Barr, is there anything more frank than a young drug dealer driving around the community with an assault weapon?

MR. BARR: In his trunk.

THE COURT: Doesn't matter where it is. You show no concern for the community or people that you may be distributing these drugs to, showed no concern for them, and you show a readiness to take a life. Why else was he riding around with that assault weapon?

MR. BARR: Judge, I guess it is the same reason that 99 million people in this country buy weapons. It seems like they like to shoot. As far as what he did, I don't think that he should be punished. I hope he's not punished -- I hope he's punished consistent with what the blame worthiness he's got for what he did. And, Judge, needless to say, we've talked about

this -- and let's put all the cards on the table. The State said 25 years of murder and walk out of here, and we didn't take it because we did not --

THE COURT: 25 years for murder because that is a sentence on murder.

MR. BARR: 25 years on manslaughter. It says 25 years on manslaughter, and we didn't take it and went to trial. We did that because, in terms of what he had done, he didn't -- granted, he had his gun in his trunk, but now he was driving an automobile that he had to crank with a screwdriver. Mr. Rogers was going around the parking lot looking for him, and his wife helped find him. There he is. There he is. Otherwise, they would have never -- they would have never known. Mr. Rogers would not even know that he came downstairs, but they pointed him out to him, and he ran. Judge, the rest is history.

But be that as it may, Your Honor, I think -- Judge, quite frankly, I think 15 years is enough. I'm asking the Court in the case that -- Graham case we dealt with regarding the appeal, that was 12 years in that case. Judge, this young man -- now we're sympathetic towards -- a death is a terrible thing in any situation, whether it is drugs or whatever, but unfortunately, Judge, we have a situation in this

country -- we have a lot of young people, for whatever reason, and a lot has to do with education, but, Your Honor, I practice law all over the Lowcountry, and I'm at least familiar with sentencing, and most familiar with some of the sentencing by particular judges, but, Your Honor, I don't think that what we're asking for is out of line with what most judges would sentence, and I'm not telling you that that is what you have to do, but for a manslaughter conviction that is a first criminal offense. Certainly I don't condone selling drugs. I don't condone that. And I don't condone buying them. And I don't -- when it comes to apportioning the blame between selling and buying, this is not a situation where it deals -- limited situation with just selling drugs. It deals with someone that was ready to grab a weapon and introduce a weapon into a situation, and it escalated. They have been buying -- they smoked drugs, marijuana, over there all the time, that is what they do when they go over to that apartment. They do that all the time, and these fellows usually get along, but it just happened on this occasion that they had a fallout and got in an argument.

But, Your Honor, I would implore the Court to consider this young man still has some of his life in

front of him, and either way you go with a sentence or conviction for something most serious, he'll do 85 percent before he even looks for parole. 85 percent of 15, Judge, that is over 12 years, Your Honor. I would certainly ask the Court to consider a sentence of no more than 15 years.

Your Honor, if any of his family members -- he has his mother here. Do you want to say something? Tell the Judge.

MS. GASKINS: I'm Brittany Gaskins. This is my son, Antwuan Nelson. We're sorry what happened, but please, please do not give him much time. I'm sorry what happened. God knows I am sorry. But, please, he's a good son and he always hang out over there. He always hang out over there.

THE COURT: Why was he carrying an assault weapon around for? If he wanted to visit his friends, what was he doing -- what in the world would possess a young man to take out an assault weapon and shoot someone over, under the worse case scenario, an insignificant amount? Does it say something about the value he puts on human life?

MR. BARR: Judge, he was being shot at.

THE COURT: The other man was wrong, too. That makes no difference. If he would have shot your

client, we would be here prosecuting him. Yes, ma'am. Thank you.

MR. HIXSON: I wanted to address one thing. I don't want to relitigate the fact pattern here, but as Your Honor is well aware, in the pretrial rulings concerning the admissibility of his statement, he repeatedly -- over an hour statement -- indicated he never saw the victim with a gun, never saw the victim with a gun.

THE COURT: That is what is in the statement.

MR. HIXSON: And maintained that to the end.

MR. BARR: He never saw him because he didn't know where he was. He saw him when he came up the alley, but prior to that time -- that is why he was hiding out by the back of the car, because he didn't know where he was.

THE COURT: Why did he get the gun out if he didn't know where he was? He didn't know he had a gun?

MR. BARR: Judge, Mr. Rogers went upstairs. The witness that didn't testify today, who is in the hospital, that would have come to court, she would have testified when he came upstairs for the first time -- when he came out of the apartment the first time, he went straight to the apartment, went upstairs

looking for Mr. Rogers with the gun -- Mr. -- I mean Mr. Nelson. Mr. Nelson happened by chance to have gone in the apartment across the hall, as opposed to the one he thought he was in. But he went up there with the gun to shoot him, but it happened that he was in another apartment.

THE COURT: That was some time earlier in the day, wasn't it?

MR. BARR: That was immediately after the scuffle in the apartment. Mr. Nelson stayed up there approximately 30 minutes before he came back down. When he came down, the girlfriend said, Oh, there he is, he had to take off running again.

THE COURT: All right.

MR. BARR: Yes, sir.

THE COURT: Does your client want to say anything?

MR. NELSON: Yes, Your Honor. First and foremost, I'm very apologetic to what happened to your family member. Mike was a cool guy, and I didn't want that to happen. Yes, I tried to leave the scenario. The real story is Kristen Bloomer was standing in front of my car. The picture that they showed that didn't have anything in front of it, that was after the scene, two cars right there. When I first came

down, Kristen was standing directly in front of my car, and Mike was standing right there as well. Another car pulled up. As soon as I come down the steps, if I come down the steps, you could see my first feet. Kristen Bloomer yelled out, There he goes. There he goes. Mike ran past --

MR. HIXSON: I want you to keep going, but look at the Court.

THE COURT: If you have something to tell me.

MR. NELSON: Your Honor, I'm not that bad guy that this wording is trying to put out. Me riding around with a rifle, for one, we're in a country town. I had a friend of mine, who was in the military, me and him went in the woods and did target practicing, and couple target practicing. I liked the gun, and I was always saying when I get an extra money, I'm going to get me a gun. So I got the gun. The reason in that time frame I had it in my trunk was I was staying with my child's mother at the time, and at that time we had a four-year-old son and one-year-old son. I did not want to keep that gun in the house, because the oldest boy plays with toy guns, and I didn't want to provoke anything at the apartment complex that we were staying at. That is why I kept it in my trunk, because I didn't have another safekeeping than to keep

it in my trunk. That is why I went -- I knew it was there. If I was stopped by officers, I told them I have a rifle and gave the paperwork, but that is the only reason why I ever rode with that gun. I didn't want to leave it in the house and the little young man find it and thought it was a water gun or something, that is my whole purpose riding. I didn't ride just to be some sort of bad boy or anything of that nature, Your Honor. I got the likes of the gun from a friend, because I never owned a gun before. We went somewhere in the woods, shot it, he told me about it and I said I want to get me one. He told me a rifle association to join, and I was trying to be my gun collector type of thing. But, you know, that situation led to this. I would never, ever try to hunt nobody down, Oh, I got me a gun, no. A lot of people didn't even know I had that gun. It was always in my trunk, because it was the only safekeepings for it.

MR. BARR: Judge, I don't want to beat a dead horse, but I'm going to strike the last word. I think it is significant that the gun had to be -- he had to even put it together. The gun was dismantled in the trunk.

THE COURT: I heard no testimony, just that he had to put the clip in.

MR. BARR: Where is Officer Clothier?

THE COURT: Mr. Barr, this is sentencing. This is sentencing.

MR. BARR: Yes, sir.

MR. NELSON: Yes, sir, Your Honor. The way the gun was in the case, it was all clips. Every time I go to a gun shop and I bought bullets or clip, I always asked can I ride with this legally this way or that way. If they said no, I would have discard that. So they said you can ride with this, but don't have it loaded, so I had it in the case and the case closed. For it to be in my car, around that time, me staying with my child's mother, she was my only closest family member around Conway, so I have no other safekeeping of keeping the gun. Plus, the apartment house, I didn't want any problem happening with the kids, so I kept it in my trunk.

THE COURT: Anything else?

MR. NELSON: I'm very apologetic for this whole scenario. Mike was a good man. I never meant for this to happen, and I honestly tried to leave the situation, but I felt --

THE COURT: You had every opportunity to do that.

MR. NELSON: Your Honor, when I tried to leave, Kristen was standing in front of my car. That is the

first time I left. That is when I ran upstairs to avoid everything. Whoever was downstairs told Mike I was up there, because someone was saying, Yeah, he's up there. Yeah, he'll come down. You'll show where he is at. When I came down the second time, that is when Kristen Bloomer was standing directly in front of my car. That is when I ran to my car door, she said -- no. When I came down, she said, There he goes. There he goes. When he ran and that car pulled off --

THE COURT: The jury said you are guilty.

MR. NELSON: Yes, sir.

THE COURT: And I will not change it. Mr. Nelson, do you want to tell me anything about you?

MR. NELSON: I'm a dad as well. Around that time I had a one-year-old child, about to turn two, still in diapers. I was going to school for welding. I was trying to get my life on the right track, and I was. I was going to do that so I could try to get a truck and do a welding business. I was never, ever in trouble. Last time I got into an altercation or fight was like in seventh grade or sixth grade.

THE COURT: Why were you involved in the drug business?

MR. NELSON: Your Honor, at that time I did it because I didn't have no money and I wanted to get

extra gas money or diapers for my son. I was going to school out of pocket, but working part time with my step-father. I don't have a history of selling drugs. It was just that day, Your Honor. I'm just not that bad guy.

THE COURT: Ms. Walter, you have something?

MS. WALTER: State wanted to note that -- as the defendant admitted in his initial statement -- he did have to -- even at the very least -- put the magazine into the AR.

THE COURT: I'm very familiar with the AR-15 type rifle. They are not disassemble. You pull the pin and pop it open, at the most, it snaps back.

MS. WALTER: But the defendant had to insert the magazine into the gun and cock it back to make it ready, so that shows, in the State's mind, premeditation, that that was not just a spur of the moment, heat of passion accident.

THE COURT: All right. Mr. Barr, ready for sentencing?

MR. BARR: Yes, sir.

THE COURT: Mr. Antwuan Nelson, on the charge of voluntary manslaughter this Court sentences you to 25 years at the state penitentiary, State Department of Corrections followed by a consecutive five-year term

for possession of a firearm during the commission of a violent crime. Thank you very much.

Ladies and gentlemen of the jury, I want to thank you for your service in this case. It's been a long case, been a lot of testimony you heard. I can tell by the verdict that you gave this defendant the benefit of every doubt in this matter, and the conviction that you make is the conviction that I believe you don't have any alternative to do. When we started, I told you that I would hope you would leave this experience with a better understanding of our legal system and how important it is to have our right to be tried by a jury. I could not say this young man was guilty, neither could Mr. Hixson, none of us could. It came to you to do it. It is a hard decision. It is always hard to judge other people, but you have fulfilled your oath. You have done your duty, and no one can criticize you for that. I thank you for that.

I can't remember all of my jurors, but I'm all over the county. You might find me at Lowe's or a hardware store or somewhere, and if you do and recognize me, please do stop and talk to me. Tell me about your experience. I'm always glad to hear from jurors. I'm very easy to approach. A lot of my judge

friends are scared to be approached by folks, but I'm not. I welcome anyone who would like to speak to me. Thank you for your service. You are released and your service for this week has ended.

I would say this, you are not required to speak to anyone about this case, you don't have to. If you want to, you can. Now, you can tell your wives and husbands and significant others all about it, everything you thought about this case. You can discuss it with anyone, or no one. If anyone approaches you and you tell them you don't want to talk about it and they persist, get their names and bring it to my attention, and it will not happen again, I promise you. Thank you.

Mr. Ropp, take them to gather their things and make sure they are on their way.

(The jury exits at 5:45 p.m., and the case of State vs. Antwuan Nelson concluded.)

VERDICT

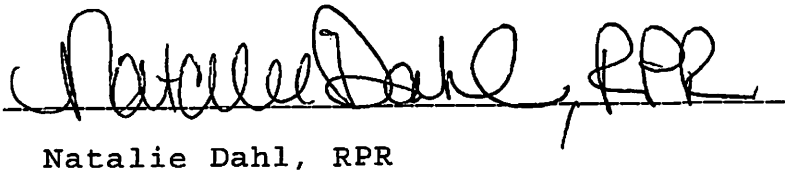
CERTIFICATE OF REPORTER

State of South Carolina)
County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina, on the 12th through the 15th days of June, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 20, 2017



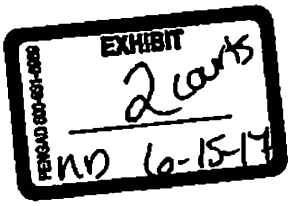
Natalie Dahl, RPR
Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	**INDICTMENT NOS.**: 2015GS2600011
	)	2015GS2600012 & 2015GS2600013
	)	
THE STATE,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	**AFFIDAVIT**
	)	
ANTWAUN L. NELSON,	)	
	)	
Defendant.	)	
	)	

PERSONALLY APPEARED BEFORE ME UPON BEING DULY SWORN, the affiant herein, attorney for this Defendant, South Carolina Bar No.: 543, states as follows:

1. That the testimony at trial of Lillian Brockington cannot be attained though she is a material and indispensable witness. The Deponent is not intentionally delaying the proceedings, but do not believe he can safely try this case without the testimony of Ms. Brockington.

2. Ms. Brockington was duly served with a Subpoena to appear in these Court proceedings on June 12th, 2017. The original Subpoena was delivered to Ms. Brockington at Georgetown Memorial Hospital where she is now an impatient by Ms. Charlotte Washington. A copy of the Subpoena is attached, the original of which was delivered to Ms. Brockington. The Deponent has misplaced the Proof of Service, which he had in Court to deliver to the Trial Judge, but now cannot find it.



3. The Deponent believes that if the witness could attend a trial, she would testify consistent with her Pre-Trial Statement taken by Officers of the Myrtle Beach Police Department, a copy of which is attached.

4. Also attached is a copy of the Hospital's comments regarding the patient's status.

5. The Deponent is informed and believes that Ms. Brockington suffers sickle cell anemia, and is awaiting blood transfusion.

6. That this affidavit is not for purposes of delay

SWORN to me before this 15th day of June, 2017

Notary Public for the State of S.C.
My Commission Expires: 07/16/2017

Charles David Barr, Esquire

Detective Quinn: The time now is 6:34 p.m. on Monday, January 27, 2014, and we're on 37th Avenue North. I'm Detective Quinn with the Myrtle Beach Police Department. I'm speaking with Lillian Brockington.

Lillian Brockington: Yes.

(From this point forward questions will be posed by Detective Quinn, and answers will be given by Lillian Brockington, unless otherwise noted)

Q: B-r-o-c-k-i-n-g-t-o-n.

A: I-n-g-t-o-n, yes.

Q: And you're in apartment [redacted]?

A: Un, huh.

Q: Okay what's your date of birth?

A: [redacted].

Q: And a phone number is [redacted]?

A: Yes.

Q: And how long have you lived there?

A: About a couple of months.

Q: Obviously we're here about this shooting incident that happened earlier today. I understand you witnessed some of it or you had some involvement with it?

A: Yes, but not involved.

Q: Not involvement. I apologize, bad choice of

words. You were a witness to some of it?

A Yes, what I heard is when his cousin came down I heard the guy that got shot go here we go babe, here we go babe, and he got his gun and shot at him.

Q Who got his gun. Start from the beginning. I'm a little confused here. Who said what?

A The guy's girlfriend that got shot, here we go babe, here we go babe, and the guy that got shot got his gun and shot at the other guy that is in jail, first.

Q So the guy who got shot you are saying shot first?

A Yes. Then he shot back and then he shot again and then he shot back and that's when he got hit.

Q That's when he got hit. So how many shots do you think you heard total?

A Four.

Q Four, four total, okay. Did I heard this right you said that the guy who didn't get shot, went upstairs and came back in or something like that?

A I don't know what happened earlier part of the day but the guy that got shot ran upstairs to my apartment and he was in my apartment with his shotgun.

Q Oh, so the guy who got shot went looking for this

dude?

A Yes.

Q And that's apartment [redacted], are they lettered or numbered?

A They are lettered, I mean numbers.

Q Numbers. I've got someone who was in [redacted]

A No, numbers. They are all numbers.

Q Okay.

A I was like what are you looking for, why are you running up in my house with a shotgun, and he was like where's Scrilla, where's Scrilla, and I was like he ain't in here.

Q What did he call him?

A Scrilla.

Q Scrilla?

A Yes, and he came back downstairs and whenever Scrilla came out where he was at, his girlfriend, the guy that got shot, hollered here you go babe, here you go babe, and the next thing I heard was a shot fired at Scrilla and then Scrilla shot back at him, and he must have missed and then shot again that got shot, shot again, and then he shot again.

Q You saw this happen?

A I was in my window.

Q Okay.

A I was in my window.

Q So we're looking at the - - -

A Apartment [redacted].

Q And the one facing the street, right?

A Yes.

Q The one where the red car and the green truck are parked, you remember [redacted] is that building?

A Yes.

Q Where is your window?

A The last window on the corner.

Q The one closest to us or furthest away?

A Furthest away.

Q So you were up on the second floor in that corner looking right down at it.

A Yes.

Q When you saw him shoot, let's call him the victim because he got hit, where did you see him standing?

A He was in the back and that alley way.

Q All right.

A He was in the alley way shooting at him because he was going to his car.

Q You were looking out the window that looks towards the street?

A Yes.

Q Or the one - - -

A No, towards the street.

Q How could you see him?

A I didn't see him, I heard him. I didn't see him, I heard him.

Q Got you. So you heard a shot in the alley way first.

A Un-huh.

Q Before this guy shot.

A Un-huh.

Q What did you see him do, the guy at the red car.

A When the shot went off.

Q Yes.

A He ducked.

Q Did he have a gun in his hand?

A Yes, he did.

Q He already had the long gun in his hand?

A No, he was at his trunk when the dude was shooting at him, he was getting his gun I guess to shoot back. Once he got it together he shot back and missed and then the other dude shot again, and then he shot again.

Q Okay, so you are looking out and you never see him going to his trunk or anything, he had the gun in his hand when you looked down?

A Yes.
Q That's when you heard the first shot?
A Yes.
Q You heard one shot.
A Un-huh.
Q And she was yelling there he goes, here we go --
-
A No, before the shot went off she must have seen the one that's locked up so she hollered here we go babe, here we go babe. Then I heard the shot. Then I looked and I see him shoot back and then I heard another shot.
Q You are certain that the first shot came from the alley way or could it have come from the ---
A It came from the alley way because I was sitting at the window all day.
Q And then what did you see the male at the red car do after all the shots were fired. Where did he go, which way did he go?
A I guess once the dude got hit, he wen to see was he okay or something.
Q So you saw him go up the alley?
A Yes but there was no more shots because after that I heard her hollering oh, my God, oh, my God, and I came down and said is he breathing

and that was it. By the time I said was he breathing, the cops were coming and made the other dude get down and stuff.

Q Are you familiar with the neighbor who was shot, do you know him? Have you ever talked to him or hung out with him or anything at all?

A Just hi and bye.

Q All right. Did you ever see the other shooter before, the other male?

A Yes because that's my husband's cousin.

Q That's your husband's cousin. I didn't realize that, okay. We have his ID and we know who he is. When you said the girlfriend was yelling, and what did you say.

A There you go babe, there you go babe.

Q So meaning?

A She was telling him - - -

Q She was tracking him?

A Yes.

Q Where he was?

A Yes.

Q Okay, where did you hear her voice did it go from inside the building or was it from outside ?

A Outside.

Q It was definitely outside?

A Yes.

Q Okay. Then how long did you stay at the window after this all happened? You saw it all the way to the cops pulled up?

A After I saw the Plaintiff go to the back I came downstairs to see what happened to see if he got hit or whatever and saw this man on the ground and his girlfriend over him so I asked her is he breathing because I'm a nurse.

Q Yes.

A I went and asked her was he breathing and she said no, he wasn't breathing at that time. I don't know if they revived him before he left or whatever. I don't know.

Q I don't know what his status is right now. I think they brought him back and hopefully it's still the case. I don't know for sure.

A By that time I was coming back and the cops were coming up and had the Plaintiff on the ground.

Q Okay. Anything I'm missing that maybe I should have asked you that I didn't. Is there something you still want to tell me that I need to know.

A No, that was it. That was all I heard and saw.

Q Okay. Did you hear anybody of the two males yell or say anything. Did you hear any words out of

their mouths?

A No, I didn't hear no words. I just heard the shots, I didn't hear no words from neither one of them. After she hollered here we go, I just heard the shot, and I heard another shot and I then I heard another shot, and then I heard another shot, and that was all the shots I heard.

Q Okay.

A That's when I found out he was on the ground because I went to my back door to look and I was like h, my God, he's on the ground.

Q Did you see where he was hit?

A In the neck.

Q In the neck, and I think that's when I saw my husband's cousin over him saying come on, come on, man like he was trying to help him up. He really didn't want to shoot at him or whatever. He was trying to get in his car to leave.

Q I think that's all the questions I have for you. Do you have any questions for me that I can answer for you?

A No. That's all I can say.

Q I appreciate your time.

A Thank you.

Q The end of the interview time is 6:44.

TIDELANDS HEALTH

WORK / SCHOOL EXCUSE

DATE: 6-14-17

PATIENT: Lillian Denise Bromfield

was seen at:

Tidelands Waccamaw Community Hospital ____
4070 Highway 17 Bypass
Murrells Inlet, SC 29576

Tidelands Georgetown Memorial Hospital ✓
P.O. Box 421718
606 Black River Road
Georgetown, SC 29442

and may return to work / school on: ____

COMMENTS: Above listed person was admitted on 6/13/17 and will remain in hospital till MD release.

Provider's signature: [signature]

Patient Copy

MC-EXCU 7834
EXCU

(8/15)

497

WITNESSES

Jarrod Mackin Myrtle Beach Police Department

ARREST WARRANT NUMBER

2014A2620600155
CDR: 0116 16-03-0010, 0020
DOA: 1/29/2014

ACTION OF GRAND JURY

TRUE BILL

Bob Harris
Foreperson of Grand Jury
Date: JAN 22 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015-GS-26-00011

The State of South Carolina

County of Horry

J. Scott Hucks 14H00478

COURT OF GENERAL SESSIONS

January, 2015 TERM

THE STATE

vs.

Antwuan L Nelson
B/M
[redacted]
DOB:
SSN: [redacted]

ATTORNEY: Charles D. Barr

Indictment for

Murder

ORIGINAL

Jimmy A. Richardson, II, Solicitor

FILED
HORRY COUNTY
2015 JAN 27 AM 8:39
MELANIE HUGGINS-WARD
CLERK OF COURT

DATE RECEIVED FROM
GRAND JURY

App. 501

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on January 22, 2015, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010, 0020

That Antwuan L Nelson did in Horry County, on or about January 27, 2014, willfully, feloniously, and intentionally kill the victim, Michael Rogers, with malice aforethought, either express or implied, by means of Shooting him with a rifle, and the victim did die as a proximate result thereof on or about January 27, 2014 in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

499

WITNESSES

Jarrod Mackin Myrtle Beach Police Department

ARREST WARRANT NUMBER

2014A2620600156
CDR: 0549 16-23-0490
DOA: 1/29/2014

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JAN 28 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015-GS-26- 00012

The State of South Carolina

County of Horry

J. Scott Hucks 14H00478

COURT OF GENERAL SESSIONS

January, 2015 TERM

THE STATE

vs.

Antwuan L Nelson
B/ M
[redacted]
DOB: [redacted]
SSN: [redacted]

ATTORNEY: Charles D. Barr

Indictment for
POSSESSION OF A WEAPON DURING THE COMMISSIONOF A VIOLENT CRIME

ORIGINAL

Jimmy A. Richardson, II, Solicitor

FILED
HORRY COUNTY
2015 JAN 27 AM 8:39
MELANIE HUGGINS-WARD
CLERK OF COURT
DATE RECEIVED FROM
GRAND JURY

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on January 22, 2015, the Grand Jurors of Horry County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

CDR: 0549 16-23-0490

That Antwuan L Nelson did in Horry County, on or about January 27, 2014, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

501

WITNESSES

Jarrod Mackin Myrtle Beach Police Department

ARREST WARRANT NUMBER

2014A2620600159
CDR: 3014 44-53-0375 (B) (1)
DOA: 1/29/2014

ACTION OF GRAND JURY

~~TRUE BILL~~

Bob Harris
Foreperson of Grand Jury
Date: JAN 29 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015-GS-26-00013

The State of South Carolina

County of Horry

J. Scott Hucks 14H00478

COURT OF GENERAL SESSIONS

January, 2015 TERM

THE STATE

vs.

Antwuan L Nelson
B/M
[redacted]
DOB:
SSN:

ATTORNEY: Charles D. Barr

Indictment for
POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE

ORIGINAL

Jimmy A. Richardson, II, Solicitor

FILED
HORRY COUNTY
2015 JAN 27 AM 8:39
MELANIE HUGGINS-WARD
CLERK OF COURT
DATE RECEIVED FROM
GRAND JURY

Trial Not Guilty
Lamy B. Hyman
Natalie Dahl
6/15/17

App. 505

502

STATE OF SOUTH CAROLINA)
) INDICTMENT
COUNTY OF HORRY)

At a Court of General Sessions, convened on January 22, 2015, the Grand Jurors of Horry County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE

CDR: 3014 44-53-0375(B) (1)

That Antwuan L Nelson did in Horry County on or about January 27, 2014, possess with intent to distribute, dispense or deliver, or did aid, abet, attempt,or conspire to distribute, dispense or deliver a quantity of Cocaine Base, a controlled substance under the provisions of Section 44-53-110, et.seq., Code of Laws of South Carolina, 1976, as amended, such distribution not having been authorized by law, and being in violation of Section 44-53-375(B), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the 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."

Respectfully Submitted,

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 20th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTWUAN LEVON NELSON,

APPELLANT

APPELLATE CASE NO. 2017-001406

CERTIFICATE OF SERVICE

I certify that a copy of the Record on Appeal in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of August, 2018.

Tyler Cheney
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 20th day of August, 2018.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTWUAN LEVON NELSON,

APPELLANT

APPELLATE CASE NO. 2017-001406

FINAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE 2

ARGUMENT

In this self-defense case, the trial judge erred in refusing to grant a continuance or declare a mistrial when the defense's key witness, who would have testified that the decedent came to her apartment looking for the defendant with a shotgun and shot first at appellant, was in the hospital 3

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STATEMENT OF ISSUE ON APPEAL

In this self-defense case, whether the trial judge erred in refusing to grant a continuance or declare a mistrial when the defense's key witness, who would have testified that the decedent came to her apartment looking for the defendant with a shotgun and shot first at appellant, was in the hospital?

STATEMENT OF THE CASE

An Horry County grand jury indicted appellant for murder, a weapons charge, and possession with intent to distribute crack cocaine. R. 497 – 502. On June 12, 2017, appellant was tried before the Honorable Larry B. Hyman and a jury. R. 1. Mary Ellen Walter and Scott Hixson represented the State. R. 1. Charles Barr represented appellant. R. 1. The jury acquitted appellant of murder and the drug charge, but convicted him of voluntary manslaughter and the weapons charge. R. 463, ll. 12 – 23. Judge Hyman sentenced appellant to twenty-five years for manslaughter and a consecutive five years on the weapons charge. R. 480, l. 22 – 481, l. 2. This appeal follows.

ARGUMENT

In this self-defense case, the trial judge erred in refusing to grant a continuance or declare a mistrial when the defense's key witness, who would have testified that the decedent came to her apartment looking for the defendant with a shotgun and shot first at appellant, was in the hospital.

Factual Background

This case is the rare "hen's tooth" where a trial court's abuse of discretion in denying a continuance substantially prejudiced a defendant. See Morris v. State, 371 S.C. 278, 282-83, 639 S.E.2d 53, 56 (2006) (acknowledging State's argument that reversals for denial of a continuance are rare as hen's teeth, but reversing because of the prejudice to defendant). The trial court charged self-defense and mutual combat based on the facts of this shooting and the jury acquitted appellant of murder and a drug charge, but convicted him of the lesser-included offense of voluntary manslaughter. R. 452, l. 9 – 454, l. 25. R. 463, l. 1 – 25. Had the trial judge not refused to delay the case so that a material defense witness, who was in the hospital, could testify that the decedent, carrying a shotgun, had been looking for appellant and shot first, appellant likely would have been acquitted. R. 484 – 496.

The police officers who responded to this shooting at an apartment complex described a chaotic scene with an angry group of forty people. R. 24, l. 2 – 26, l. 6. The people were "yelling, threatening the defendant." R. 26, ll. 1 – 6. Appellant Antwuan Nelson ("Nelson") was standing by his car and peacefully complied with the officers' commands. R. 25, ll. 19 – 23. After putting Nelson in handcuffs, an officer stayed with him because of the angry crowd. R. 25, l. 19 – 26, l. 6. Another officer put Nelson in the car and took him to the station "for his safety

and to calm things down." R. 87, ll. 4 – 24. On the way to the station, Nelson told the officer that he shot the decedent because the decedent was going to shoot him. R. 87, l. 25 – 88, l. 8.

Despite the presence of forty people at the scene, the State only called two non-police officer fact witnesses. One was the resident of a nearby apartment complex who had a stray bullet lodge in her end table and then saw a man throw something over a fence. R. 92, l. 23 – 93, l. 2. R. 96, l. 24 – 98, l. 12. The other was the decedent's girlfriend, Kristen Bloomer ("Bloomer"). R. 274, ll. 12 – 25. It was apparent from Bloomer's testimony that the decedent's son, Jerome, was a material witness to the shooting, but the State did not call him to testify. R. 287, ll. 7 – 16. R. 291, l. 15 – 300, l. 12.

Bloomer's credibility was thoroughly impeached by the inconsistency of her trial testimony with her statement and because she moved evidence after the shooting. R. 356, l. 11 – 357, l. 23. R. 303, l. 14 – 304, l. 12. Bloomer and the decedent, Michael Rogers ("Rogers"), lived together in an apartment in Myrtle Beach. R. 274, l. 22 – 276, l. 14. On the afternoon of the shooting, Bloomer was home and saw Rogers and Nelson come into the apartment. R. 279, l. 9 – 280, l. 20. Rogers and Nelson went into the kitchen to talk and were "pretty calm and collected." R. 279, l. 9 – 280, l. 20.

Rogers sold and used drugs. R. 281, l. 24 – 282, l. 24. Bloomer could tell he was discussing a drug sale with Nelson. R. 281, l. 24 – 282, l. 24. She heard their voices "getting hostile." R. 281, ll. 15 – 23. Nelson threw a punch at Rogers and they began scuffling. R. 281, l. 15 – 285, l. 4. Rogers was on the ground with Nelson on top punching and kicking.[1] R. 284, l. 16 – 285, l. 12. Rogers told Bloomer "to get his gun." R. 285, ll. 12 – 14. Bloomer knew

[1] A police officer testified she "spent probably 10 minutes looking at" Nelson's hands and saw no injuries. R. 194, ll. 5 – 14.

Rogers had a shotgun, but claimed not to know where the shotgun was at that moment, so she instead opened the front door and Nelson ran away. R. 285, l. 12 – 286, l. 14.

Bloomer tried to get Rogers to calm down and not leave the apartment, but "[t]hat did not happen." R. 286, ll. 19 – 25. Rogers was "furious." R. 287, ll. 1 – 6. Rogers and Bloomer went down the stairs from their apartment to the front of the building, passing Rogers' son, Jerome, on their way. R. 287, l. 7 – 288, l. 22. Curiously, Bloomer could not remember whether Rogers was holding his shotgun when he went down the stairs even though Rogers told her to get it a few minutes earlier. R. 287, l. 17 – 288, l. 15. Rogers, "outraged," stood in the driveway yelling "to where he believed the defendant was" challenging appellant to come out and "fight like a man." R. 289, l. 21 – 290, l. 18.

Rogers was standing near his truck while he was yelling at appellant. R. 289, ll. 3 – 8. Even though Bloomer could not remember whether Rogers had his shotgun when he went downstairs, she testified that Rogers did not have his shotgun while yelling at appellant. R. 290, ll. 14 – 18. Even more curious, Bloomer claimed that she convinced Rogers to return to their apartment, but Rogers stopped and "grabbed a shotgun **out of the bed**" of his truck, which was parked outside of an apartment complex where Rogers dealt and bought drugs. R. 291, l. 19 – 292, l. 20 (emphasis added). Rogers, holding the shotgun in his hand, "casually" walked back up to their apartment. R. 292, ll. 16 – 20.

Twenty minutes passed in their apartment while Bloomer convinced Rogers to drive her to pick up their daughter from daycare. R. 292, l. 16 – 294, l. 9. However, Rogers ultimately decided not to go and walked back up to the apartment. R. 294, ll. 10 – 23. Bloomer could not remember why Rogers decided not to go to the daycare. R. 294, ll. 11 – 16.

Bloomer saw Nelson come down the stairs. R. 294, ll. 10 – 19. Nelson went to the trunk of his car and then approached Bloomer with a rifle in his hand. R. 294, ll. 16 – 25. Nelson did not point the rifle at Bloomer. R. 295, ll. 7 – 13. He told Bloomer to call Rogers and "tell him to bring his stuff." R. 295, ll. 1 – 6. Bloomer told Nelson her phone's battery was dying and then started to walk back to her apartment. R. 295, ll. 2 – 6.

Bloomer then heard the door to her apartment shut and saw Rogers in the building's breezeway holding his shotgun. R. 297, ll. 1 – 24. Rogers peeked around a corner, ducked, then Bloomer heard shots. R. 297, l. 25 – 298, l. 7. Rogers' son yelled for her. R. 298, ll. 1 – 7. She heard more shots, then "ran past Jerome in the breezeway" to Rogers, who was lying on the ground, bleeding. R. 299, ll. 1 – 23. Rogers died of a gunshot wound to the neck. R. 199, l. 11 – 200, l. 22.

Bloomer denied taking away any spent shotgun shells from the scene. R. 301, ll. 13 – 15. She admitted taking drugs and drug paraphernalia from her apartment and putting them in Rogers' truck because she was afraid the police would take her child. R. 303, l. 3 – 304, l. 9. On direct-examination, she testified that she did not know whether Rogers ever fired the shotgun, but admitted that in her statement she "believe[d]" Rogers fired. R. 301, l. 16 – 302, l. 19. Appellant called Bloomer as a witness during his case. R. 349, ll. 19 – 24. Confronting Bloomer with her statement, she admitted that she initially said she "saw one of [Rogers'] shots. R. 356, l. 11 – 358, l. 22.

The police recovered Nelson's rifle when they arrested him at the scene and Nelson had already taken out the magazine. R. 31, ll. 10 – 20. They also recovered Rogers' shotgun in the alley close to his body. R. 56, ll. 5 – 16. Two unspent shotgun shells were found by the police.

R. 56, ll. 17 – 23. An additional two unfired shotgun shells were found on Rogers' body at the autopsy. R. 208, ll. 3 – 14.

The solicitor emphasized with the police witnesses that were at the scene that no spent shotgun shells were found and that the police had no evidence that any of the crowd tampered with the evidence. R. 56, ll. 17 – 23. R. 128, l. 15 – 129, l. 7. R. 143, l. 19 – 156, l. 15. The crime scene investigator testified about her extensive search and that no spent shotgun shells were found. R. 143, l. 19 – 156, l. 15. The shotgun was empty. R. 156, ll. 14 – 15. The crime scene investigator specifically testified that she found no evidence of birdshot or wadding at the scene. R. 172, ll. 12 – 15.

This testimony from the police was called into great question by a defense witness, Tom Davis ("Davis"). R. 368, l. 6 – 376, l. 20. Davis had lived in Myrtle Beach for sixty-two years and had acquired "quite a bit of property," including the apartment building where the shooting took place. R. 368, l. 6 – 376, l. 20. Davis went to the scene that day because of calls from his tenants. R. 368, l. 6 – 376, l. 20. Davis was familiar with firearms and shotguns and found windowpanes shot out and holes in the door consistent with the same shells Rogers had. R. 368, l. 6 – 376, l. 20. Despite multiple objections from the solicitor, Davis was able to testify that he had a conversation with the Myrtle Beach police at the scene about the damage to his property from the shotgun blast. R. 371, l. 3 – 376, l. 22. R. 377, ll. 2 – 24.

The Missing Witness and the Trial Judge's Ruling

After ruling on the defense motions at the close of the State's case, trial counsel told the judge that he had two witnesses under subpoena who were not present. R. 338, ll. 9 – 24. One of the witnesses was Davis, who testified the next day about the shotgun damage that the police did not find. R. 338, ll. 18 – 21. The other witness was Lillian Brockington ("Brockington"),

who trial counsel told the court was "in the hospital in Georgetown." R. 338, ll. 18 – 21. Judge Hyman asked whether trial counsel complied with Rule 7 of the Rules of Criminal Procedure regarding the missing witnesses' testimony and trial counsel replied that he had not. See S.C.R.Crim. P. 7(b). R. 338, l. 22 – 339, l. 10. Trial counsel then asked the court to recess for the day (at 3:00) and resume in the morning so the defense could "get these people lined up." R. 339, ll. 5 – 10. The State did not oppose adjourning court for the day and the trial judge excused the jury. R. 340, ll. 1 – 21.

The next morning, the court again took up the problem of Brockington's attendance at trial. R. 342, l. 3 – 349, l. 11. Pursuant to the continuance rule, Rule 7(b), trial counsel provided the court with an affidavit stating the necessity of Brockington's testimony, a transcript of her statement to police, and a note from Tidelands Georgetown Memorial Hospital stating that Brockington had been admitted on June 13, 2017 (the day before) and would "remain in the hospital until MD release." R. 342, ll. 4 – 7. R. 484 – 496.

Trial counsel confirmed for the court that Brockington had been served with a subpoena, but admitted that she had not been served before the start of the trial. R. 342, ll. 3 – 23. Judge Hyman asked trial counsel "what do you want me to do" and trial counsel asked the court to declare a mistrial. R. 342, l. 24 – 343, l. 16. Trial counsel summarized Brockington's testimony:

> Judge, I expect her to testify consistent with the statement she gave police, and if she does that, she'll say that the decedent came up to her apartment, initially with the shotgun, looking for Mr. Nelson, that he went back downstairs, that he shot—in fact, I think she said he shot twice, Mr. Nelson shot.

R. 343, ll. 9 – 16. When questioned why this issue was not addressed until the fourth day of the trial, trial counsel stated he thought Brockington planned to appear voluntarily and he did not know she would be going into the hospital. R. 344, l. 14 – 345, l. 17.

The solicitor opposed any delay or mistrial and said the issues about which Brockington would testify were "Undisputed" because Bloomer said she saw Rogers with a shotgun and that Rogers had loaded shells. R. 344, l. 7 – 347, l. 2. The solicitor said "for the record and Court of Appeals" that appellant would not be prejudiced because evidence already existed in the record about Rogers' shotgun and that he would be able to impeach Brockington for bias. R. 346, l. 6 – 347, l. 2. He said "the only issue" regarding Brockington's potential testimony would be that she claimed Rogers fired first. R. 346, ll. 6 – 15.

Trial counsel argued all of this was for the jury's consideration and the solicitor's argument related to Brockington's credibility, not the necessity of the testimony for the defense. R. 347, l. 3 – 348, l. 1. He argued that who shot first was a "key issue" and the jury was entitled to judge Brockington's credibility against Bloomer's credibility. R. 347, l. 3 – 348, l. 1.

After a brief recess, Judge Hyman ruled, "Mr. Barr, your motion for a continuation is denied. I think it is most likely—I mean your motion for a mistrial is denied. I will not continue the case." R. 348, ll. 8 – 13. The court criticized trial counsel for not subpoenaing Brockington until the Tuesday of the trial. R. 348, l. 8 – 349, l. 11. The court then reasoned that after looking at Brockington's statement, "what I can see here are things that have been testified to. We've heard testimony that the victim in this matter did arm himself, did have a gun." R. 348, ll. 19 – 25. He further ruled:

> This case boils down to self-defense and mutual combat. There is nothing I've seen in her statement that cannot be confirmed or has not been confirmed or is not in dispute in this. So I'm going to deny your motion to postpone or continue this case, or to grant a mistrial.

R. 349, ll. 6 – 11.

Trial counsel attached Brockington's statement given the day of the shooting to his Rule 7(b) affidavit. R. 484 – 496.In her statement, Brockington said she heard Bloomer tell Rogers,

"here we go babe, here we go babe," Rogers got his gun, and shot first at Nelson. R. 484 – 496. She unequivocally stated that Rogers shot first. R. 484 – 496. Rogers earlier was in her apartment with his shotgun asking for Nelson by his nickname. R. 484 – 496. Rogers left when he heard Bloomer yell "here we go babe." R. 484 – 496. Brockington explained that Bloomer was "tracking" appellant. R. 484 – 496. She heard Rogers fire and could see Nelson at his car. R. 484 – 496. Nelson then got his gun together and returned fire. R. 484 – 496.

The Trial Court Erred in Refusing to Continue the Case or Declare a Mistrial

Brockington's testimony was essential for the jury's consideration in this self-defense case and the court erred in not delaying the trial so that she could testify. Appellate courts have traditionally frowned upon reviewing trial judge's decisions on motions for a continuance. State v. McMillan, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). "A trial judge's denial of a motion for a continuance will not be disturbed absent a clear abuse of discretion." Id. "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." Id.

Nelson's case is a hen's tooth. The trial court recognized this case "boils down to self-defense and mutual combat," yet inexplicably usurped the jury's function to judge Brockington's credibility on the key issue in the trial. Had the jury chosen to believe Brockington, it would have shown that Nelson acted in self-defense and did not arm himself until after Rogers fired at him. The jury also could have believed that because Rogers and Bloomer were actively looking for Nelson, he had no ability to retreat and no choice but to arm himself. Brockington's testimony about Bloomer "tracking" Nelson would have further undermined her credibility because it would have shown that she was complicit in Rogers' attempt to shoot Nelson and had an incentive to testify in a manner reducing her own culpability in Rogers' death.

Our appellate courts have reversed refusals to continue cases where far less was at stake than the importance of Brockington's testimony in this case. In McMillan, the Court reversed because the defense did not have time to order a transcript to impeach a key witness at the second trial of a case. McMillan at 22-23, 561 S.E.2d at 604-05. Holding that the verdict "hinged" upon the witness's credibility and the defendant was hampered in his ability to impeach her, the Court reversed the trial judge's refusal to grant a continuance to obtain the transcript. Id.

The lawyers in McMillan at least were able to cross-examine the witness. Here, the jury never heard Brockington's testimony. If being hampered in the ability to cross-examine the key witness is enough to warrant reversal, then refusal to allow time to secure the key witness's presence should amount to reversible abuse of discretion. "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001). The trial court's conclusion that Brockington's testimony was unnecessary in this close case is without evidentiary support.

Appellant's case is factually similar to State v. Williamson, 115 S.C. 315, 315, 105 S.E. 697, 698 (1921). In Williamson, the Court reversed for refusing to grant a continuance where the defendant's wife, who was a crucial witness in the case, was unable to attend court due to her advanced stage of pregnancy. Id. The wife's doctor submitted an affidavit, stating it would be dangerous for her to testify at the trial. Id. at 315, 105 S.E. at 697. However, it was undisputed, she was "a most important witness for her husband; the killing of [the decedent] having occurred on account of alleged opprobrious language used to her by him a few days before the killing, ... and she was present and witnessed the homicide." Id. The Court held the trial judge "was manifestly in error in not continuing the case, on showing made and under all of the facts and circumstances of the case." Id. at 315, 105 S.E. at 698. Just like Williamson, the trial judge here

erred in not continuing the case because of appellant's proffer showing the need for Brockington's testimony. See also State v. Burns, 294 S.C. 338, 364 S.E.2d 465 (1988) (reversing for refusing to grant continuance so defense could locate a police informant); Logan v. Gatti, 289 S.C. 546, 347 S.E.2d 506 (Ct. App. 1986) (reversing failure to grant a continuance when plaintiff's expert witness was called up to duty by the Navy); Graham v. Greenville City Coach Lines, 233 S.C. 175, 104 S.E.2d 72 (1958) (reversing because trial court refused to continue case when key witness suffered complications from operation); State v. Waring, 109 S.C. 52, 95 S.E. 143 (1918) (holding trial judge erred in refusing to continue case because of illness of crucial witness in self-defense case).

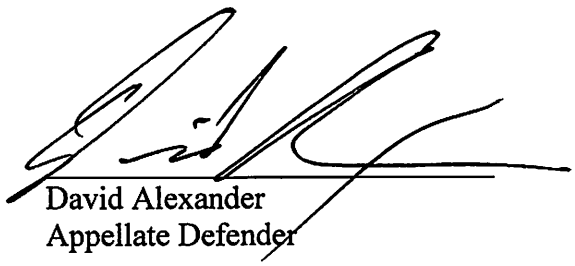
While the trial judge criticized appellant for not subpoenaing Brockington until after the trial began, appellant made the proper showing under Rule 7(b) for a continuance. Rule 7(b), S.C.R.Crim. P. Trial counsel provided an affidavit explaining that Brockington had been subpoenaed, that her testimony was necessary, the substance of her testimony, and the hospital's explanation of Brockington's absence. R. 484 – 496.

Even if appellant had subpoenaed Brockington a month before trial, it would have made no difference because of her hospitalization. The above-cited cases show that continuances for a missing, material witness are hen's teeth compared to cases where the defense bore some fault or simply needed more time to prepare. The court's refusal to continue the case or, in the alternative, grant a mistrial, was error and prevented Nelson from having his case fairly heard by a jury. See State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000) (holding that double jeopardy barred the State from retrying the defendant after the State asked for a mistrial because of a missing witness, but noting that double jeopardy does not apply when the mistrial is with the defendant's consent). Brockington's testimony was a manifest necessity. See State v.

Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (applying "manifest necessity" standard for mistrial). Even without hearing Brockington, the jury acquitted appellant of murder. Had they heard Brockington's testimony, they likely would have found that the State failed to disprove self-defense and would have acquitted Nelson. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and remand for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTWUAN LEVON NELSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Blitch, Esquire, at the Rembert Dennis Building, P.O. Box 11549, Columbia, SC 29211, this 5th day of September, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case Tracking No. 2017-001406

The State, Respondent,

vs.

Antwuan Levon Nelson, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in denying Appellant's motion for a continuance or a mistrial when his counsel did not act with any diligence in seeking to ensure his witness would be available for trial.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Michael Rogers, the victim, was shot and killed by Appellant at Broadway Station, a condo or apartment complex in Myrtle Beach. Kristen Bloomer, who lived with the victim and had a child with the victim, was in the apartment when all the difficulty between the victim and Appellant began. (T.368; 372; R.275; 279). The victim arrived home with Appellant and the two seemed fine. Shortly thereafter, their voices became hostile with Appellant demanding the victim buy drugs from him. (T.374-375; R.281-282). Appellant then punched the victim and the two started scuffling throughout the kitchen. (T.376; R.283). After fighting for some time, the victim told Bloomer to get his gun. Instead, she opened the front door and Appellant took off. (T.378; R.285). Bloomer and the victim stayed in their apartment while Bloomer tried to calm him down. (T.380; R.287).

The victim and Bloomer leave the apartment and head downstairs. When they get downstairs, the victim is still upset and is yelling for Appellant to come out and fight like a man. (T.382-383; R.289-290). Bloomer realized it was time to pick up their daughter so she got the victim to go with her back to their apartment so they could then go and pick up their daughter. Before heading back, the victim took his shotgun out of the bed of his truck. Bloomer was unsure if he had it when he headed down or not. (T.380; 385; R.287; 292). After several minutes Bloomer and the victim head to the parking lot. The victim decided not to go pick up their daughter, so he headed back to their apartment. (T.387; R.294).

When the victim headed back to their apartment, Bloomer saw Appellant emerge from one of the buildings. He crouched down, looked around, and headed for the trunk of his car. Appellant closed the trunk and stood up with a black rifle in his hand. (T.387; R.294). He

approached Bloomer and told her to call the victim and tell him to bring Appellant's stuff. She walked off and back toward her apartment. (T.388; R.295).

As she was walking off, she saw the victim emerge behind a doorway. The victim had his shotgun in his hands. Bloomer heard shots as she made it through a breezeway that lead around the apartments. She heard several shots, three to four overall, and when it stopped rushed to the victim's side. (T.391-392; 395; R.298-299; 302). She did not know whether the victim had ever fired his shotgun, but she did not remove any shells or see anyone disturbing the scene around the victim. (T.394-395; R.301-302). Appellant approached while taking apart his rifle and Bloomer told him to get away. Appellant then headed toward the trunk of his car. (T.393; R.300).

Officer Mackin arrived at Broadway Station around four in the afternoon to find numerous people telling him someone had been shot and Appellant was the shooter. (T.116; R.23). Appellant, wearing a black jacket, was leaning up against a red older car, possibly a Crown Victoria, with an AR-15 rifle beside him. (T.117-118; 122-124; R.24-25; 29-31). Officer Mackin and his partner were told there was a man shot down the alley leading to the back of the complex, so his partner went to tend to the victim. Officer Mackin testified 40 people[1] were around making threats, yelling, and threatening Appellant. (T.119; 124; R.26; 31).

Officer Owens testified he approached Appellant with Officer Mackin. Appellant was wearing black with red trim, with a black jacket. (T.146; 147; R.53; 54). After Appellant was in custody, Officer Owens left to assist the victim. He found the victim middle ways in the alley.

[1] Appellant seems to make a point of saying the State failed to call the 40 witnesses, but there is nothing in the record to indicate what any of the witnesses knew or that their testimony would be any different from that presented by others at trial. See State v. Richardson, 253 S.C. 468, 473–74, 171 S.E.2d 717, 719 (1969) (noting "the State is not required to place upon the stand every witness who has knowledge of material facts connected with the crime charged or whose name is endorsed upon the indictment"); see also, State v. Charping, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) ("[A]n adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses.").

(T.147; R.54). He arrived at the victim and immediately realized it was bad because the victim was shot in the neck and Officer Owens knew from his time in combat that it was a fatal blow. He tried to press a towel to the wound and perform CPR until EMS arrived. (T.145; R.52). In the area around the victim, Officer Owens testified he saw two shotgun shells, but both were unfired. (T.149-150; R.56-57). He saw no spent shotgun shells. The two unfired shells were 12 gauge, No. 8 birdshot. (T.154; R.61).

James Garrett, a former supervisor with the Myrtle Beach Police Department, arrived at the scene after Appellant was already in handcuffs. He told Officer Mackin to place Appellant in his vehicle and he would take him to the station. Mr. Garrett did not ask Appellant any questions, but Appellant volunteered: "I shot him because he was going to shoot me." (T.180-182; R.87-89).

Michelle Cantey lived in the same condo complex as the victim and near where the victim was shot. (T.184; R.91). She heard several gunshots and then a reverberation like a mini earthquake. (T.190; R.97). She testified the day of the shooting a bullet entered her condo and embedded in the drawer of her end table. (T.185-186; 192; R.92-93; 99). She indicated she saw an individual wearing black with red trim trying to scale a fence after she heard several gunshots. He appeared to throw something and then run toward the red Crown Victoria. (190-192; R.97-99).

Officer Harlow, along with his K-9 officer Roscoe, searched the area along the fence. They located a ball of saran wrap with a green leafy substance as well as a white powder that looked like cocaine. (T.206; R.113). He also found several spent shells near the area where Appellant was located.

Michelle McSpadden, was a former crime scene officer with the Myrtle Beach Police Department. She indicated three fired shells were located that came from the AR-15 rifle fired by Appellant. She indicated the rifle had 16 unfired rounds in the magazine located beside the rifle on the ground. (T.242-245; R.149-152). She also stated there were two unfired shotgun shells found near where the victim had been shot. She explained the shotgun itself had no shells, fired or unfired, in it when it was collected. (T.248-249; R.155-156). Ms. McSpadden also performed gunshot residue tests on Appellant. (T.259; R.166). A similar test was performed by another officer on the victim. (T.299; R.206). She indicated officers found no evidence of birdshot or other shotgun pellets. She also testified they found no spent shells or the wadding that would have been ejected when the shell was spent. (T.264-265; R.171-172). According to McSpadden: "We spent quite a bit of time at that scene there, and I feel confident we would have seen evidence of a shotgun blast had it been there." (T.277; R.184).

Jennifer Nates, an agent with SLED's Trace Evidence Section, explained gunshot residue tests and the results of the tests performed on Appellant and the victim. (T.357-358; R.264-265). She located gunshot residue on the hands of Appellant. (T.360-361; R.267-268). However, she found no gunshot residue on the hands of the victim. (T.361; R.268).

According to Dr. Proctor, the pathologist, the bullet that killed the victim entered the neck. It caused extensive damage to the carotid artery and the jugular vein. (T.290-292; R.197-199). The jacket of the bullet and the projectile separated in the victim's body, with the projectile exiting and the jacket remaining lodged in the body. (T.290; R.197). The victim died from a gunshot from at least two feet away which struck the victim's neck and caused extensive visceral damage and hemorrhage. (T.293; R.200). With every beat of the victim's heart, "blood would just spew" until he was dead. (T.293; R.200).

STANDARD OF REVIEW

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

"[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). Whether a mistrial is manifestly necessary is a fact specific inquiry. "It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (citations omitted). This Court "favors the exercise of a **wise discretion of the circuit judge** in determining the merits of such motion in each individual case." State v. Craig, 267 S.C. 262, 269, 227 S.E.2d 306, 309 (1976) (emphasis added) (quoting State v. Singleton, 167 S.C. 543, 166 S.E. 725 (1932)). "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

ARGUMENT

I. The trial court did not err in denying Appellant's motion for a continuance or a mistrial when his counsel did not act with any diligence in seeking to ensure his witness would be available for trial.

Appellant contends the trial court erred in denying his motions for a continuance or mistrial when Ms. Brockington, one of Appellant's witnesses, was not available at trial. Appellant knew Ms. Brockington's testimony prior to trial beginning and took no steps to secure that testimony at trial. Appellant did not subpoena the witness until after trial began and after she was already in Georgetown Memorial Hospital. As a result, Appellant did not utilize due diligence to obtain her testimony and cannot now complain regarding her failure to be present at trial.

In the instant case, Appellant was arrested in January 2014. Ms. Brockington, who is married to Appellant's cousin, gave a statement on January 27, 2014. Appellant's case was called to trial on May 30, 2017, for the week of June 12, 2017. See Records for Antwuan L. Nelson, Horry County Fifteenth Judicial Circuit Public Index, https://www.horrycounty.org/Online-Services/Public-Index (last visited July 18, 2018). Appellant's counsel admitted not having his witness under subpoena prior to trial because she was going to be present voluntarily. (T.435; 437; R.342; 344). He also acknowledged knowing she was not present on Monday, June 12, and it was not until Tuesday, June 13 that he had her subpoenaed.[2] (T.437; 441; R. 342; 348). At the time Appellant finally subpoenaed Ms. Brockington, she was already in the hospital. (Court's Exhibit 2, Affidavit; R.484).

[2] Interestingly, the affidavit provided to the Court indicates the subpoena was served on Ms. Brockington June 12, 2018, at the hospital even though, according to the Work/School Excuse provided by Tidelands Georgetown Memorial Hospital, Ms. Brockington was not admitted until June 13. Counsel's statement that she was served on Tuesday would correspond with June 13. (Court's Exhibit 2, Affidavit and Work/School Excuse; R.484).

On June 14, 2017, the State rested and Appellant acknowledged two of his witnesses were not present, one of which was Ms. Brockington. Appellant admitted he had not complied with Rule 7, because he had not prepared an affidavit for the court. (T.431-432; R.338-339). Appellant then asked the trial court to recess early for the day, at approximately 3:15 pm, which the court granted. (T.432; 434; R.339; 341).

On June 15, 2017, the fourth day of trial, Appellant provided an Affidavit, Ms. Brockington's statement, and a Work/School Excuse from Georgetown Memorial Hospital, then asked the trial court to declare a mistrial. The Affidavit indicates Ms. Brockington was served with the subpoena while already in the hospital, though counsel misplaced the proof of service so he did not attach either the subpoena or the proof of service. The Affidavit indicates Ms. Brockington was expected testify consistent with her statement given to police, which was provided to the trial court. The statement, by the wife of Appellant's cousin, merely indicates the victim approached her door looking for Appellant while holding a shotgun. She then heard shots fired and indicated the victim fired first and Appellant returned fire. She admitted she could not see the victim from where she was located in her apartment, but could only hear the shots fired. She indicated she heard four total shots. Finally, the attached Work/School Excuse indicated Ms. Brockington was admitted on June 13, 2017—the second day of trial—and would not be released until cleared by a doctor. (Court's Exhibit 2; R.496).

The trial court noted: "This is the fourth day. Not only do you have notice of this case going, this is essentially the fourth day of trial of this case." (T.437; R.344). The trial court denied the motion for a mistrial and indicated he would not continue the case. He found the subpoena was not issued until after trial started even though counsel had notice of both Ms. Brockington's statement and the fact trial was going forward. (T.441; R.348). The court also

found the majority of the testimony Ms. Brockington would provide was already in the record, and so the continuance or mistrial was not necessary to add cumulative testimony. (T.441-442; R.348-349).

Rule 7 of the Criminal Rules of Procedure states:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and **has made use of due diligence to procure the testimony of the witness** or of such other circumstances as will satisfy the court that his motion is not intended for delay.
>
> (1) When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.
>
> (2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief.

Rule 7(b), SCRCrimP (emphasis added). A continuance is not automatically given because a witness is unavailable. The court has discretion to determine whether due diligence was used to try and secure the witness's testimony. In the instant case, the trial court clearly found due diligence was not used by Appellant's counsel because he did not seek the continuance prior to trial and, instead, waited until the fourth day of trial.

This Court has made it abundantly clear: "It is paramount that the party asking for the continuance **show 'due diligence' was used** in trying to procure the absent witness." State v. Colden, 372 S.C. 428, 439, 641 S.E.2d 912, 918-19 (Ct. App. 2007) (emphasis added). This Court has also explained the primary requirements for obtaining a continuance based on an

absent witness—even one that is unexpectedly absent: "The party asking for the continuance **must show due diligence was used** in trying to procure the testimony of an absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005) (emphasis added).

Appellant relies on two primary cases, State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002), and State v. Williamson, 115 S.C. 315, 105 S.E.697 (1921). The two cases are clearly distinguishable from the instant case.

In McMillian, the Court found a continuance should have been granted in order for the defendant to obtain a transcript from the first trial which would be used to impeach the witnesses against him. Appellant fails to explain the key aspects resulting in the reversal in McMillian. First, the Court articulated: "**At the outset of the second trial**, McMillian moved for a continuance in order to obtain portions of the transcript of his Jan. 5-6 trial, which resulted in a hung jury and a mistrial." McMillian, 349 S.C. at 21, 561 S.E.2d at 604 (emphasis added). The Court makes it clear the motion for a continuance was made "at the outset" of trial and not on the third or fourth day of trial after the State had rested its case. Additionally, the Court noted limited time transpired between the first and second tapes so no transcript had been created, backup tapes were not available to be used at trial, and McMillian had a clear need for the transcript to properly present a defense because the credibility of the witness was essential, so the Court found "[u]nder the **limited circumstances** of this case" the reversal was warranted. Id. at 24, 561 S.E.2d at 605.

In describing Williamson, Appellant omits two important considerations from the Court's opinion finding the continuance should have been granted. First, the Court specifically found:

"Ordinarily a person tried for a capital felony **has a right** to have his wife present at the trial, and the wife has the right to be present." Williamson, 115 S.C. 315, 105 S.E. 697, 697 (emphasis added). The most significant factor is that the trial court required the defendant to proceed to trial knowing about his wife's absence, the reason for that absence, and her necessity to testify as to the circumstances of the case prior to trial. Williamson's counsel did not wait until she was to be testifying to determine her inability to testify. Counsel in Williamson used due diligence, whereas counsel in the instant case failed to use any diligence.

Because Appellant cannot demonstrate the trial court erred in failing to grant a continuance,[3] this Court should certainly find he was not entitled to a mistrial. He waited until the fourth day of trial, after the State had presented its entire case, to seek to end the trial based on his own counsel's failure to secure a witness's testimony prior to trial commencing. He should not be able to see the entire State's case and, based on his own conduct, get a second opportunity to prepare for and counter the evidence presented. He has not demonstrated the need for the extreme remedy of a mistrial.[4] See e.g., State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the **greatest caution**

[3] Additionally, as the trial court found much of the statement and likely testimony from Ms. Brockington would have been entirely cumulative to other testimony already in the record. As a result, the continuance and motion for a mistrial would have been properly denied on this ground. See State v. Morris, 376 S.C. 189, 209, 656 S.E.2d 359, 370 (2008) ("Furthermore, in light of the evidence introduced at trial, any testimony from unavailable witnesses or other unavailable evidence would likely have been cumulative."); United States v. Valenzuela–Bernal, 458 U.S. 858, 867 (1982) (noting "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses").

[4] Appellant has failed to demonstrate prejudice from the failure to present Ms. Brockington's testimony. As noted, much of the testimony was cumulative. Other testimony merely supported the mutual combat charge presented by the trial court and not self-defense. Her statement clearly indicates Appellant armed himself instead of retreating from the scene. See e.g., State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (finding no self-defense charge warranted when defendant approached victim with loaded gun at his side and stating: "Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense."); State v. Graham, 260 S.C. 449, 452, 196 S.E.2d 495, 496 (1973) (finding mutual combat supported by evidence when "[t]here was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point.").

under **urgent circumstances,** and for very **plain and obvious causes.**" (emphasis added)); State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) ("The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way.").

Accordingly, as a result of counsel's complete lack of due diligence in seeking to secure the testimony of Ms. Brockington, the trial court properly denied his motion for a continuance or mistrial. Appellant should not be able to hear the entirety of the State's case and either obtain a continuance or mistrial based on a witness he should have known would be unavailable before trial started. Appellant's counsel failed to exercise the "paramount" responsibility prior to seeking a continuance; the party asking for the continuance must "show 'due diligence' was used in trying to procure the absent witness." Colden, 372 S.C. at 439, 641 S.E.2d at 918-19. As a result, this Court should affirm the trial court's decision and affirm Appellant's convictions and sentences.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 7, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge
Appellate Case Tracking No. 2017-001406

The State, Respondent,

vs.

Antwuan Levon Nelson, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Respondent on Appellant by delivering copies of the same addressed to David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 7th day of September, 2018.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Antwuan L. Nelson, Appellant.

Appellate Case No. 2017-001406

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5768
Heard May 27, 2020 – Filed August 19, 2020

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, of Columbia; Assistant Attorney General Ambree Michele Muller, of Lexington; and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

HUFF, J.: Antwuan Levon Nelson was indicted for murder, possession of a weapon during the commission of a violent crime, and possession with intent to distribute cocaine base. He appeals from his convictions for voluntary manslaughter and possession of a weapon during the commission of a violent crime, asserting the trial court erred in refusing to grant him a continuance or declare a mistrial when his key defense witness was in the hospital. We reverse Nelson's convictions and remand for a new trial.

FACTUAL/PROCEDURAL HISTORY

I. The State's Presentation of Evidence

This matter stems from the shooting death of Michael Rogers (Victim) at an apartment complex where Victim lived. The State presented witnesses who testified as follows:

On the afternoon of January 27, 2014, police officers responded to a shooting at some apartments at 37th Avenue North in Myrtle Beach. Officers Mackin and Owens were the first on the scene, where they encountered numerous people who indicated a black male in the parking lot—wearing a black jacket and standing beside a red car—had just shot someone. The officers observed Nelson leaning against the back of the vehicle, at which time they drew their weapons. Nelson complied with their commands, and he was placed in handcuffs. When they put Nelson on the ground, they observed an AR-15 rifle—with the magazine out—on the ground behind Nelson.

The scene was described as chaotic, with about forty people making threats and yelling at Nelson. Some of the people told the officers that a bleeding victim was lying in the alley. Officer Mackin stayed with Nelson while Officer Owens went to render aid to Victim. Officer Owens testified there were probably a dozen people in the alleyway. He observed a white female, who was crying and upset, with Victim. Victim had a large bulge in his neck, and he was "bleeding out." Officer Owens attempted CPR, but he realized Victim had received a fatal blow. Victim died from a gunshot wound to the neck.

Officer Owens observed a shotgun lying close to Victim and observed two unfired shotgun shells, but no spent shells. The shotgun shells were 12 gauge No. 8 birdshot. Officer Owens stated the shotgun shells were close to Victim and the shotgun was across from him, next to a wall. He agreed that the shotgun would spit the shell out automatically when fired and there was "no telling where it's going to kick it to."

Officer Garrett arrived as backup, encountering a large, irritated crowd of people. He testified he knew he needed to remove Nelson from the scene for his own safety. Officer Garrett transported Nelson to the detention center, during which time Nelson told the officer "I shot him because he was going to shoot me."

When the officers arrived at the scene, Nelson's car was backed into a parking spot, and nothing was blocking the vehicle from leaving. Nelson was wearing clothing that was black and red trim, with red or black shoes. Officer Mackin acknowledged there were people standing all around the crime scene, and he did not know how long Victim had been lying in the alley and whether anyone had tampered with evidence prior to their arrival. However, he did not observe anyone running in and out of the alley or taking anything from there. Officer Owens testified he maintained the integrity of the scene as best he could until the Crime Scene officers arrived but stated it was difficult to do so before more officers arrived there.

Witness Michelle Cantey, who lived in a first floor condominium across from 37th Avenue North, testified she was in her unit around 4:30 on the afternoon of January 27, 2014, when she heard several shots and felt a reverberation in the building. A bullet entered her condo and embedded in an end table. Cantey heard the muffled sounds of neighbors talking outside and went to her window. When she looked out the window down an alley, she observed a black male in dark clothing with red trim on his jacket trying to reach the top of a fence. This person dropped something over the fence, which she assumed was a handgun since she had just heard the shots. After throwing the item over the fence, the man ran back toward a red car.

Officer Kenneth Harlow arrived on the scene with his K-9, Roscoe. Officer Harlow secured the AR-15 rifle that was in the area of the car. He found the rifle with the magazine out and also observed spent shell casings near a trash can. Upon learning something may have been thrown over a fence, he and Roscoe conducted an article search all the way down the fence on the opposite side of the apartments, retrieving a ball of saran wrap with a green leafy substance and white powder that looked like cocaine.[1]

Officer Rhett Ammons testified that when he arrived at the scene, he saw numerous irate people. Looking down the alley that runs behind the building, Officer Ammons observed a black male on the ground, with a white female and Officer Owens over him. He did not recall if there were other people in the alley. Officer Ammons testified that while looking down the alley he did not see anyone pick up any items and that nothing was picked up; however, he acknowledged "all

[1] The State presented evidence that the items found along the fence field sample tested positive for THC and cocaine. However, Nelson was ultimately acquitted of the drug charge.

the attention was to the victim." Officer Ammons stated he never saw anyone approach the shotgun that was in the alley, and no one picked up anything from the ground.

Crime Scene Investigator Michelle McSpadden collected the unloaded AR-15 rifle, and the magazine found next to it, at the back of the Crown Victoria car. Officer McSpadden testified the fired shell casings from a rifle were recovered by the side of trashcans. The State presented expert testimony that three .223 Remington caliber cartridge cases recovered from the scene were fired from the AR-15 rifle.[2] Officer McSpadden testified she spent quite a bit of time at the crime scene. She located a couple of places where a round could have struck: the hole in the wall of Cantey's home and a chip in the brick of the breezeway at the apartment complex that appeared to be fresh damage. In her examination of the alley, she found an unfired rifle round, an unloaded shotgun, and two unfired shotgun rounds that were filled with birdshot. She did not find any spent shotgun shells or any wadding from a fired shotgun shell. She also did not find any pellets or holes in the fence that looked like a strike from that kind of ammunition. She agreed, though, that such a shot would have to hit something for her to see physical evidence of a strike. Officer McSpadden also acknowledged she could not say that a shotgun shell was not removed from the scene; however, there was no evidence a shotgun had been fired. She reiterated she spent quite a bit of time at the scene and felt confident they would have seen evidence of a shotgun blast had it been there. Further, because birdshot contains dozens and dozens of pellets, it would have been difficult for someone to pick up every single one. Officer McSpadden also testified that she collected gunshot residue evidence from Nelson, and she checked Nelson for injuries. She stated she probably spent ten minutes looking at his hands and saw no injuries.

The State's Trace Evidence expert testified gunshot residue tests performed on Nelson and Victim revealed the presence of gunshot residue on Nelson's hands, but not on Victim's. She stated gunshot residue on a deceased person would remain on the hands until physically removed by an outside force. She acknowledged blood could dissolve the residue.

Kristen Bloomer, with whom Victim lived and shared a child, testified she was in the living room of her 37th Avenue North apartment in Myrtle Beach sometime

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[2] The expert did not have enough evidence to conclusively say recovered bullets, or bullet parts, from Cantey's home and Victim's body were fired from the AR-15 rifle, but they were consistent with .223 Remington or 5.56 Nato bullets.

after 3:00 p.m. on January 27, 2014, when Victim and Nelson entered the home. As they went into the kitchen area, their demeanors were calm. However, Bloomer started hearing them speak in a hostile manner. When she stood up, she saw Nelson throw a punch at Victim. Bloomer heard Victim—who sold drugs on occasion—say, "No, I'm not buying these, it does not look correct." In response, Nelson said, "You will, you will buy these." Bloomer was under the impression that whatever was being bought was not up to the standard of what someone else would want to purchase. Once Nelson threw the punch and hit Victim, the two started scuffling in the kitchen. At some point, Victim was on the ground with Nelson on top of him continuing to hit Victim. Victim yelled for Bloomer to get his gun. Bloomer froze because of the situation that was occurring and also because she did not know where the gun was. She then opened the door and told Victim to hit Nelson and get him out of the home. Not long after she opened the door, Nelson "took off running and went out [her] front door and went down the stairwell out of the building." The gun that Victim told her to retrieve was a shotgun.

After Nelson fled, Bloomer tried to calm Victim down and get him to stay in the apartment, but that did not happen as Victim was furious from having been attacked in his own home. Bloomer and Victim started walking down the stairs of the building, passing Victim's son, Jerome, who was staying there at the time. The three stopped and talked for a moment and then proceeded around to the front of the building. Bloomer could not remember if Victim had a gun when he went down the steps. She estimated two to two and a half minutes passed from the time Nelson left her home until she went down the steps of the building. Victim ran down the steps and, after Bloomer walked down them herself, she saw Victim at the front of the building. Victim was still outraged and began "yelling up to the top of the stairs of the front building" for Nelson to "come on, come out, fight like a man." Bloomer testified Victim did not have a weapon in his hands at that time, and her impression was that he wanted to engage in a fist fight. Victim yelled for a few minutes and was not really calming down, but Bloomer realized it was getting close to the time they needed to pick up their child from daycare and convinced Victim to go with her. Before Victim, Bloomer, and Jerome walked back to their apartment, Victim grabbed a shotgun from the bed of his truck. Bloomer testified this was the first time she remembered seeing the shotgun. This occurred around 4:15 p.m., and it had been at least twenty minutes since the initial altercation.

After approximately five minutes in their apartment, Bloomer and Victim walked back to Victim's truck. Victim, however, decided to not accompany Bloomer to pick up their child, and he headed back to their apartment. According to Bloomer,

Nelson came down the stairs from the top of the building, crouched down, looked around for a second, and then ran to the trunk of his car. Nelson opened the trunk, stood up, closed the trunk, and approached Bloomer with a black rifle. He did not point the weapon at her. Nelson told Bloomer to call Victim and "tell him to bring him his stuff," but Bloomer told him she would not because her phone was about to die. Bloomer then walked away from Nelson and started to go back up to her apartment. As she did so, she heard the front door to her apartment building that led to the stairway shut, and she saw Victim walk against the edge of the building toward a small breezeway area with a shotgun in his hand. Bloomer saw Victim peek around the corner and duck back, and she heard shots. Jerome told Bloomer to come to him, and she went into the hallway area and stood with Jerome for 10 to 15 seconds, during which time she heard a few more shots. About 10 seconds after the shots stopped, Jerome went to check on his father. As Jerome reached the breezeway, he started yelling and screaming. Bloomer ran over to Victim, who was lying on the ground, and applied pressure to his neck where he had been shot. While Bloomer was on the ground with Victim, Nelson approached, taking apart his rifle and saying, "He threatened me first, he threatened me first." Bloomer told Nelson he needed to get away from her, and he walked away. By the time Nelson reached the trunk of his car, the police arrived on the scene.

One of the officers attempted CPR on Victim, and a woman also tried to help Victim, after which EMS arrived. Bloomer stated she did not see anyone disturbing the scene or taking anything away from the scene, noting officers were "pretty quick at securing the alleyway." Bloomer also denied taking any fired shotgun shells out of the scene. When asked if she believed Victim fired the shotgun, Bloomer stated, "I really don't know." She testified she could not differentiate between sounds. She saw Victim with the shotgun and observed him peek out and duck back down, but she "[could not] really say whether or not [she] saw him take a shot or not." Bloomer acknowledged that in her statement to police, she told them she believed Victim shot the shotgun. Bloomer clarified that she saw Victim with the gun and heard the gunshots, so at the time she presumed he did. However, she could not say for sure that he did or did not. Bloomer believed she heard a total of three to four shots that were "[p]retty quick together." She could not say if any of the shots sounded different. Bloomer estimated thirty to forty-five minutes passed between the time Nelson came into their apartment with Victim and the time that Victim was shot.

Bloomer admitted that, after the physical fight between Victim and Nelson, she assumed law enforcement would be coming to the home and, because she did not want her child taken from her in the event officers found drugs in the residence,

she took drugs and paraphernalia from the home and put them in Victim's truck. She did not know if the drugs belonged to Victim or to Nelson, but she had not seen them in the apartment prior to Nelson being there. When asked on cross-examination whether Victim shot at Nelson when Nelson first ran from her apartment and ran around the building, Bloomer replied she could not say, because she was in her apartment and Victim "ran out before me." Bloomer did not recall seeing Victim take his shotgun to someone else's apartment looking for Nelson. She also did not remember pointing to Nelson and saying to Victim, "Here he is" when Victim came downstairs. However, after being confronted with her statement, Bloomer agreed that she said that in the statement. She agreed that she told the officer in her statement that she really should not have done that, because she knew Victim was looking for Nelson to shoot him. She testified, though, that she did not remember saying that either. Bloomer acknowledged that she said in her statement that she and Victim were outside "waiting" the first time when Victim was yelling up to Nelson. When asked what they were waiting for, Bloomer stated, "who knows," and "[f]or him to come down and duke it out like a man, that is what [Victim] was saying." She further acknowledged telling the officer in her statement that she did not see who swung first between Victim and Nelson.

II. Defense Motion

Following the presentation of this evidence on June 14, 2017, the State rested. Defense counsel informed the trial court it had an issue with two witnesses—Lillian Brockington and Tom Davis—who were under subpoena and were not in court. Counsel noted that Brockington was in a Georgetown hospital. Counsel acknowledged he had not complied with Rule 7, SCRCrimP, at that point by providing an affidavit concerning the expected testimony explaining, with respect to Davis, he expected him to be there. When the court asked what counsel wanted it to do, he replied he would like to recess for the afternoon to get his witnesses lined up. However, counsel noted he still had one witness present he could call that day. The solicitor "defer[ed] to the Court," noting it was "important for this man to get a defense." Preferring to begin the defense's case in the morning rather than to hear from one of its witnesses that afternoon, the trial court adjourned early that afternoon and instructed the parties to be ready at 9:30 the next morning.

When court resumed on June 15, defense counsel presented the court with an affidavit pursuant to Rule 7(b) concerning the unavailability of witness Brockington. The affidavit by defense counsel provided that Brockington was a material and indispensable witness whose testimony could not be attained. It

explained she was subpoenaed for the court proceeding at Georgetown Memorial Hospital where she was a patient, suffering from sickle cell anemia and awaiting blood transfusion. Counsel further averred that if Brockington could attend the trial, she would testify consistently with her pre-trial statement given to the Myrtle Beach Police Department. The affidavit provided defense counsel was not intentionally attempting to delay the proceedings, but he did not believe he could safely try the case without Brockington's testimony. Counsel attached a copy of Brockington's statement to police to the affidavit, as well as a hospital statement indicating Brockington was admitted to the hospital on June 13, 2017, and she would remain there until released by a doctor.[3] Counsel acknowledged he did not have Brockington subpoenaed when the trial started. When asked what he wanted the court to do, counsel requested a mistrial, citing in particular the substance of Brockington's statement that Victim came to her apartment with a shotgun looking for Nelson and that Victim shot at Nelson.

The solicitor argued Brockington was not hospitalized until the second day of trial and was not served with the subpoena until after that. He maintained the unavailability of a witness was not a ground for a mistrial. The trial court observed defense counsel had notice of this case being tried and this was the fourth day of trial. Defense counsel explained, however, that Brockington was going to appear voluntarily, he did not know Brockington was going into the hospital, and he approached the court when he first learned she was not there on the first day of trial but he did not think at that time she had been taken to the hospital. Defense counsel noted the importance of the substance of Brockington's testimony, particularly considering what the jury would be charged as to mutual combat,

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[3] Though not clear, it appears from the record that the trial started on June 12, 2017, with jury selection and a pre-trial hearing likely occurring on that date; opening statements and the presentation of the State's witnesses began on June 13 and concluded on June 14; after the State rested on June 14, the defense raised concern about the absence of two of its witnesses; and the court adjourned early that day. When court resumed on June 15, the defense made motions relative to the unavailability of witness Brockington. Defense counsel's affidavit indicates a subpoena was served on Brockington while she was a patient at the hospital, and the hospital note indicates she was admitted on June 13, 2017. Defense counsel informed the court he believed the subpoena was served on Tuesday after the case started. June 13, 2017, fell on a Tuesday. Accordingly, it would appear that is when the subpoena was served on Brockington.

voluntary manslaughter and self-defense, and he asserted her testimony was credible.

The solicitor argued the only issue as it related to Brockington's presentation of the facts was her claim that Victim shot first, but her statement indicated she was not in a position to actually see that. The solicitor did not believe there would be substantial prejudice to defense counsel's presentation of facts because he had evidence in the record to argue what Brockington would be able to offer. Further, the solicitor argued he would be able to show Brockington's bias, and her statement was internally inconsistent on the facts. Defense counsel countered that the solicitor argued issues that went to credibility, and Brockington's credibility was an issue for the jury. He argued there were key issues concerning: who shot first; when Victim had his gun; and whether Victim went to Brockington's apartment looking for Nelson with a shotgun.

The trial court ruled as follows:

> [Y]our motion for a continuation is denied. . . . I mean your motion for a mistrial is denied. I will not continue the case. According to this affidavit, she was not served with a subpoena until, when, Tuesday — — Wednesday?
>
> . . .
>
> After this case started. . . . You've had that statement for quite some time, and you knew this case was scheduled for quite some time, and now we're in the third, fourth day of it. I looked at her statement, and what I can see here are things that have been testified to. We've heard testimony that the victim in this matter did arm himself, did have a gun. . . . [Y]ou have a witness . . . who you say will testify that he actually shot the shotgun. . . .
>
> This case boils down to self-defense and mutual combat. There is nothing I've seen in her statement that cannot be confirmed or has not been confirmed or is not in dispute in this. So I'm going to deny your motion to postpone or continue this case, or to grant a mistrial.

III. The Defense's Presentation of Evidence

The defense recalled Bloomer to the stand. She agreed that in her statement to police, she said she heard Victim shoot at Nelson and that the first shot she heard was Victim shooting at Nelson. However, she maintained she could not, looking back, necessarily say that occurred. Bloomer testified that after the initial shot, she heard three or four shots. Bloomer testified her statement said, "The next thing I know I heard him shoot. I saw him do a duck-back to avoid a shot or something like that back into the alleyway. . . ." When asked during the police interview where she was when the shots were being exchanged, Bloomer's response was, "The first time I was right here and I saw one of [Victim's] shots." Bloomer maintained the statement did not explicitly say what she saw, and it could have been an indication of what she saw or heard, noting her position was such that she could not have seen the "additional shots fired that [she] heard." On cross-examination by the solicitor, Bloomer testified that when she initially heard the shots, the only person she could see with a gun was Victim, and she could not say for sure whether or not he fired the first shot. Her perception of the gunshot sound and seeing Victim peek out and duck back was what made her tell law enforcement that Victim fired a shot. However, she did not recall seeing Victim bring the shotgun to his shoulder or see him squeeze the trigger or see a flash come out of the barrel. Bloomer testified that after the initial scuffle between Nelson and Victim, over the course of the next forty-five minutes or so Nelson did not retreat or leave. She also stated that ten to fifteen minutes elapsed with Victim waiting downstairs yelling for Nelson to come out and fight like a man, and until that point, no one had seen a gun. Victim then took the shotgun out of his truck as they headed back upstairs and, at that point, Victim was retreating, leaving the situation and deescalating it. When they thereafter came back downstairs to go pick up their child, Bloomer claimed Victim did not have a weapon.

The defense also presented Thomas Davis as a witness. Davis, who owned an apartment building on 37th Avenue North, testified he received calls from tenants about a shooting and the presence of police cars when this incident occurred. Davis went to the area to see if there was any damage to his property and to talk to law enforcement. Davis stated he spoke to a City of Myrtle Beach police officer about damage to a backdoor, where five or six of the windowpanes had been shot out and there were several holes in the wooden door. Davis also testified he owned several guns, he specifically owned a shotgun, he had done a lot of shooting and, though he could not tell what kind of shotgun shot it was, the damage to the wood looked like it came from No. 8 birdshot. Davis clarified he could not say whether it was 8, 10 or 12 gauge buckshot, and he "just threw out No. 8 because [he] knew it was small caliber."

IV. Information Contained In Brockington's Statement Pertinent to Nelson's Defense

Brockington's statement, attached to defense counsel's Rule 7 affidavit, shows she gave the statement at 6:34 p.m. on the day of the shooting. It reflects in pertinent part as follows: Brockington told the police that she was a witness to some of the shooting incident. When Nelson—who is the cousin of Brockington's husband—"came down," she heard the guy that got shot (Victim) say "here we go babe, here we go babe," and he "got his gun and shot at him." Brockington clarified it was Victim's girlfriend who said "here we go babe, here we go babe," and Victim got his gun and he shot at Nelson first. After Victim shot first, "he shot back and then he shot again and then he shot back and that's when [Victim] got hit." Brockington thought she heard four total shots. Brockington also stated that Victim had run upstairs to Brockington's apartment with his shotgun at some point, looking for Nelson. Brockington told Victim that Nelson was not there, and Victim went back downstairs. When Nelson came out, that's when Victim's girlfriend hollered "here you go babe, here you go babe." The next thing Brockington heard was a shot fired at Nelson, then Nelson fired back at Victim. Brockington stated, "[H]e must have missed and then shot again that got shot, shot again, and then he shot again."[4] When asked if she saw this happen, Brockington stated "I was in my window." When asked where she saw Victim standing when she saw him shoot, Brockington stated he was in the back in the alleyway "shooting at him because he was going to his car." When asked how she could see him while looking out her window toward the street, Brockington clarified that she did not see him; rather, she heard a shot in the alleyway first. When the shot went off, she saw the guy at the red car duck. When asked if Nelson already had the long gun in his hand, Brockington replied, "No, he was at his trunk when the dude was shooting at him, he was getting his gun I guess to shoot back. Once he got it together he shot back and missed and then the other dude shot again, and then he shot again." Brockington did not see Nelson going to his trunk, but he had the gun in his hand when she looked down and that is when she heard the first shot. Before the shot went off, the girlfriend "must have seen" Nelson so she hollered "here we go babe, here we go babe." Brockington then heard the shot, looked and saw "him" shoot back, and then she heard another shot. When asked if she was certain the first shot came from the alleyway, Brockington stated, "It

[4] The phrase "that got shot" in this portion of the statement appears to be referring to Victim as the person shooting at that point, as Brockington refers to Victim throughout her statement as "the guy who got shot."

came from the alleyway because I was sitting at the window all day." Once Victim was hit, Nelson went to see if he was okay. Brockington stated that when the girlfriend was yelling "there you go babe," she was tracking Nelson on the outside of the building, telling Victim where Nelson was located. Brockington saw that Victim was hit in the neck, and that's when she saw Nelson over Victim "saying 'come on, come on, man' like he was trying to help him up." Brockington stated Nelson "really didn't want to shoot at him or whatever," and that "[h]e was trying to get in his car to leave."

V. The Jury Charge, the Verdict, and Sentencing

The trial court charged the jury on murder, voluntary manslaughter, self-defense, mutual combat, possession of a weapon during the commission of a violent crime, and possession with intent to distribute cocaine base. The jury found Nelson not guilty of murder and possession with intent to distribute cocaine base, but found him guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The trial court sentenced Nelson to twenty-five years' imprisonment on the voluntary manslaughter charge and gave him a consecutive five-year sentence for the weapon possession charge. This appeal follows.

ISSUE

In this self-defense case, whether the trial court erred in refusing to grant a continuance or declare a mistrial when the defense's key witness, who would have testified that the decedent came to her apartment looking for the defendant with a shotgun and shot first at defendant, was in the hospital.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "The granting or denial of a motion for a continuance is within the sound discretion of the trial [court]." *State v. Babb*, 299 S.C. 451, 454, 385 S.E.2d 827, 829 (1989). "The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant." *Morris v. State*, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006). Likewise, "[t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling

will not be disturbed on appeal unless an abuse of discretion amounting to an error of law occurs." *State v. Cooper*, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999).

LAW/ANALYSIS

Nelson argues the trial court erred in refusing to continue his case or declare a mistrial. He contends Brockington's testimony was essential for the jury's consideration of whether he acted in self-defense, and the trial court should have delayed the trial so she could testify. As to the trial court's criticism of his failure to subpoena Brockington until after the trial began, Nelson asserts he made the proper showing under Rule 7(b), SCRCrimP, for a continuance. Further, even if he had subpoenaed Brockington before trial, it would have made no difference because she was hospitalized. Nelson insists the trial court's refusal to continue the case or, in the alternative, grant a mistrial was error and it prevented him from having his case fairly heard by a jury. We agree.

"The granting or denial of a motion for a continuance is within the sound discretion of the trial judge whose ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant." *Babb*, 299 S.C. at 454, 385 S.E.2d at 829. "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Geer*, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)). "Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). "The party asking for [a] continuance [based upon an absent witness] must show due diligence was used in trying to procure the testimony of [the] absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief." *State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). Our courts have "repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial." *State v. McKennedy*, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002).

Generally, a motion for continuance should be made at the time the underlying reason for such becomes known. *See State v. Greuling*, 257 S.C. 515, 520, 186 S.E.2d 706, 708 (1972) (finding no merit to the argument the trial judge erred in refusing to entertain the motion for continuance when the motion was made after the trial had begun and upon grounds which existed prior to trial); *State v. Leonard*, 287 S.C. 462, 473, 339 S.E.2d 159, 165 (Ct. App. 1986), *rev'd on other*

grounds, 292 S.C. 133, 355 S.E.2d 270 (1987) ("[A] motion for continuance based on grounds which exist prior to trial ordinarily must be made before the jury is sworn.").

Rule 7(b) of our Rules of Criminal Procedure governs when a continuance may be granted based upon the absence of a witness and provides in pertinent part as follows:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP. "All components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are strictly required, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief." *State v. Colden*, 372 S.C. 428, 438, 641 S.E.2d 912, 918 (Ct. App. 2007). Testimony from an unavailable witness that is likely merely cumulative to other evidence introduced at trial does not supply a strong basis for a continuance pursuant to Rule 7(b), and there is no abuse of discretion in the trial court's denial of a continuance under such circumstances. *See State v. Morris*, 376 S.C. 189, 209, 656 S.E.2d 359, 370 (2008) ("[I]n light of the evidence introduced at trial, any testimony from unavailable witnesses or other unavailable evidence would likely have been cumulative. Accordingly, there is no indication that Appellant would have been able to make a successful argument for a continuance based upon Rule 7(b)."); *State v. Hawkins*, 310 S.C. 50, 54, 425 S.E.2d 50, 52 (Ct. App. 1992) (finding no abuse of discretion in the trial court's failure to grant a continuance on the ground of the absence of a material witness when a comparison of the affidavit with the testimony of other fact witnesses presented by the appellant indicated the testimony would have been cumulative).

A motion for mistrial is also in the discretion of the trial court.

> The grant or denial of a motion for mistrial lies within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for only very plain and obvious reasons. The burden is on the movant to demonstrate error and resulting prejudice in order to justify a mistrial.

City of Columbia v. Wilson, 324 S.C. 459, 464, 478 S.E.2d 88, 90 (Ct. App. 1996).

The denial of an opportunity for an accused to present a material witness on his behalf raises serious constitutional concerns. Our State Constitution provides as follows:

> The right of trial by jury shall be preserved inviolate. *Any person charged with an offense shall enjoy the right* to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor*, and to be fully heard in his defense by himself or by his counsel or by both.

S.C. Const. art. I, § 14 (emphases added).

Additionally, the Sixth Amendment of the United States Constitution states:

> *In all criminal prosecutions, the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor*, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI (emphases added).

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through *the calling* and interrogation *of favorable witnesses*, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Mizzell*, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002) (emphases added) (quoting *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)). "The Sixth Amendment is applicable to the states through the Fourteenth Amendment." *Id.*

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967).

Our courts have long recognized a defendant's constitutional right to compulsory process may be violated if the defendant is forced to go forward in a trial without the presence of a material witness. In *State v. Dodgens*, 120 S.C. 239, 241, 113 S.E. 77, 77-78 (1922), our supreme court found the trial court's refusal to postpone a trial in order to obtain the presence of a material witness was a denial of the defendants' constitutional right to have compulsory process for obtaining witnesses in their behalf. In *State v. Williamson*, 115 S.C. 315, 317, 105 S.E. 697, 697 (1921), the appellant argued that the trial court erred in forcing him to trial in the absence of his wife, who was a material witness. His wife was far advanced in pregnancy at the time, and the affidavit of her family physician provided that it would be dangerous for her to attend the trial and testify in her condition. *Id.* The court noted the wife could not be present by reason of physical incapacity; she was the most material witness her husband had, having been the prime cause that led up to the difficulty that ended in the killing; she was present and witnessed the killing; and she had no opportunity to refute testimony from another witness concerning what she allegedly said at the time of the incident. Thus, it held the trial court "was

manifestly in error in not continuing the case, on showing made and under all of the facts and circumstances of the case." *Id.* at 318, 105 S.E. at 697-98.

In the more recent case of *McMillian*, McMillian's first trial resulted in a mistrial when the jury was unable to reach a verdict after re-hearing the testimony of the State's only neutral witness, Dorothy Rumph. 349 S.C. at 19, 561 S.E.2d at 603. A week later, McMillian's defense counsel requested portions of the first trial transcript, including Rumph's testimony. *Id.* However, the case was called to trial two days later (nine days after the mistrial), prior to receipt of the transcript. *Id.* McMillian moved for a continuance at the outset of the second trial in order to obtain portions of the transcript from the first trial, which was denied. *Id.* at 19, 21, 561 S.E.2d at 603, 604. After noting a discrepancy between Rumph's testimony in the first and second trial—which was relevant to her overall credibility—and the lack of credibility of the other witnesses presented by the State, our supreme court reversed and remanded for a new trial, finding the verdict hinged on Rumph's credibility and McMillian was hindered in his ability to impeach her. *Id.* at 22-23, 561 S.E.2d at 604-05. The court held as follows:

> Under the limited circumstances of this case, we find the trial court abused its discretion in denying McMillian's motion for a continuance. Given the limited amount of time between the first and second trial, the critical nature of Rumph's testimony, and the fact that no tapes or transcripts were available at the time of the second trial, we find that McMillian should have been granted a continuance in order to obtain portions of the transcript, and the lack of such a transcript prejudiced his ability to effectively cross-examine the witnesses against him.

Id. at 24, 561 S.E.2d at 605-06.

We hold the trial court abused its discretion in failing to grant a continuance or mistrial, resulting in prejudice to Nelson under the facts of this case.[5] *See Babb*,

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[5] As a preliminary matter, the State does not argue, nor do we find, any error preservation problem with Nelson's assertion that the trial court erred in failing to grant him a continuance. Although defense counsel initially made a motion for a mistrial, it became clear that as the arguments before the court proceeded, the court

299 S.C. at 454, 385 S.E.2d at 829 ("The granting or denial of a motion for a continuance is within the sound discretion of the trial judge whose ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant."); *Wilson*, 324 S.C. at 464, 478 S.E.2d at 90 ("The grant or denial of a motion for mistrial lies within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion."); *id.* ("The burden is on the movant to demonstrate error and resulting prejudice in order to justify a mistrial."). The trial court appears to have denied the motion on two bases: (1) Nelson failed to exercise due diligence in procuring Brockington's testimony for trial and (2) Brockington's statement did not include anything on which the defense was not able to present evidence.

First, we agree with Nelson that he complied with Rule 7(b), SCRCrimP, and this includes the requirement that he act with due diligence in attempting to procure the testimony of Brockington. *See* Rule 7(b), SCRCrimP (requiring an oath that the party seeking a continuance based upon the absence of a witness "has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay"); *Yarborough*, 363 S.C. at 266, 609 S.E.2d at 595 ("The party asking for [a] continuance [based upon an absent witness] must show due diligence was used in trying to procure the testimony of [the] absent witness as well as set forth what the party believes the absent witness will testify to and the grounds for that belief."); *Colden*, 372 S.C. at 438, 641 S.E.2d at 918 ("All components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are strictly required, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief.").

The trial of this case started on Monday, June 12, 2017. The record reflects that defense counsel approached the trial court "the first day when [he] found out that [Brockington] wasn't here," but he was unaware she was going to the hospital at that time. Defense counsel explained that Brockington was going to appear voluntarily, he did not know Brockington was going into the hospital, and he approached the court when he first learned she was not there on the first day of trial, but he did not think at that time she had been taken to the hospital. Once counsel realized Brockington had been hospitalized, he had her subpoenaed at the hospital that Tuesday, June 13, 2017. When the State rested on Wednesday, June

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understood that the motion was one to either continue the case or grant a mistrial, and the trial court ruled on the same.

14, 2017, defense counsel noted to the trial court that Brockington was presently hospitalized. On the morning of Thursday, June 15, 2017, defense counsel presented his Rule 7(b) affidavit, in which defense counsel attested that Brockington was a material and indispensable witness but that her testimony could not be attained; explained Brockington had been subpoenaed for the court proceeding but she was suffering from sickle cell anemia and awaiting a blood transfusion; averred his belief that if Brockington could attend the trial she would testify consistently with her pre-trial statement given to the Myrtle Beach Police Department; and stated he was not intentionally attempting to delay the proceedings, but he did not believe he could safely try the case without Brockington's testimony. Counsel also attached a copy of Brockington's police statement to the affidavit, as well as a hospital statement indicating Brockington was admitted to the hospital on June 13, 2017, and she would remain there until released by a doctor.

In ruling as it did, the trial court relied in part on the fact that Brockington was not actually subpoenaed until after the trial started, and the State maintains defense counsel failed to use due diligence in securing the witness because he did not seek a continuance prior to the commencement of trial. However, it is clear that defense counsel did not see the need to subpoena Brockington prior to trial because she was going to appear voluntarily, and he subpoenaed her on the second day of trial once Brockington failed to appear and he realized she was hospitalized. Further, even if defense counsel had subpoenaed Brockington prior to the commencement of trial, she would have been unavailable due to her hospitalization. Additionally, defense counsel could not have sought a continuance prior to the commencement of trial because no grounds existed for such at that time. *See Greuling*, 257 S.C. at 520, 186 S.E.2d at 708 (finding no merit to the argument the trial judge erred in refusing to entertain the motion for continuance when the motion was made after the trial had begun and upon *grounds which existed prior to trial*); *Leonard*, 287 S.C. at 473, 339 S.E.2d at 165, *rev'd on other grounds*, 292 S.C. 133, 355 S.E.2d 270 ("[A] motion for continuance based on *grounds which exist prior to trial* ordinarily must be made before the jury is sworn."(emphasis added)). In short, it was not the failure of the defense to subpoena the witness prior to the commencement of trial that caused her absence; rather, it was the witness' unexpected hospitalization after the commencement of the trial that caused her to be unavailable to testify. Once defense counsel became aware that Brockington was not going to be available to testify at the appropriate time, he made the proper motion and complied with Rule 7(b). Accordingly, Nelson acted with due diligence in attempting to procure the testimony of Brockington.

We next turn to the question of whether the likely testimony of Brockington would have been merely cumulative to other testimony that was already in the record or to testimony which Nelson could introduce through other witnesses, such that the denial of the motion for continuance or mistrial would have been proper on that basis.

The State presented evidence that after engaging in a physical altercation over a drug deal with Victim, Nelson left Victim's apartment but stayed in the apartment complex for an additional thirty to forty-five minutes; when Victim was outside waiting and yelling up to Nelson, he was wanting to engage only in a fist fight with Nelson and did not have a weapon in his hands; Nelson removed a rifle from the trunk of his car and approached Bloomer with the rifle in hand, demanding that she call Victim and instruct him to bring Nelson his "stuff"—ostensibly drugs Nelson left in the apartment; and when Victim came outside, Nelson shot him. The State also presented evidence that Victim did not fire a weapon at Nelson. In particular, it presented evidence that, although a shotgun and unfired shotgun shells were found lying close to Victim, no spent shotgun shells were found in the area; police found a couple of places where a round from the AR-15 rifle could have struck in the area, but found no physical evidence of a strike from a shotgun shell nor fired shotgun shells or wadding from a fired shotgun shell and there was no evidence a shotgun had been fired; and there was gunshot residue on Nelson's hands, but not on Victim's. Although Bloomer acknowledged giving a statement to police after the incident wherein she indicated that Victim shot at Nelson with the shotgun, she backtracked from her statement, clarifying that she only presumed this because she saw Victim with the shotgun and heard gunshots and but could not say for sure that Victim shot at Nelson. Bloomer also testified that over the course of approximately forty-five minutes after the initial physical altercation, Nelson did not retreat or leave, and when Victim took the shotgun out of his truck as they headed back upstairs, Victim was retreating, leaving the situation and deescalating it.

Brockington's statement indicates she was a critical witness to Nelson's defense. Although the defense was able to present evidence that Bloomer told the police that Victim did shoot at Nelson—and even that Victim shot first—Bloomer backed away from this statement during the trial. Further, the State presented testimony that no evidence was found that the shotgun had been fired by Victim. While there was evidence submitted that a nearby apartment showed damage from birdshot after the incident, it is not clear exactly when the damage occurred, nor that Victim fired the shotgun that caused the damage. Brockington's statement suggests that she perceived a gunshot fired from the alley—where Victim was located—first,

and then observed Nelson duck, and Nelson did not have the rifle in his hand at that time. Rather, Nelson was at the trunk of his car getting his gun in order to shoot back at the time Victim shot at him. Further, Brockington's statement indicates that Victim came into her apartment with a shotgun looking for Nelson and when Nelson came outside, Bloomer yelled to Victim, "here you go babe, here you go babe." According to Brockington's statement, when Bloomer yelled this, she was tracking Nelson's location for Victim. Brockington indicated she was certain the first shot came from the alley. She also stated that once Victim was hit, she believed Nelson went to the alley to see if Victim was okay, and Nelson was standing over Victim as if he was trying to assist him to stand. She stated Nelson really did not want to shoot at Victim and Nelson "was trying to get in his car to leave." Contrary to the State's assertion, Brockington's statement, especially when considered in conjunction with testimony presented at trial, supports Nelson's claim of self-defense.[6]

Like the witness in *Williamson*, Brockington was unavailable for trial due to a medical condition; she was a—if not the most—material witness for Nelson, having been present and a witness to some of the critical events; and she was not available to refute some of the evidence which her statement indicates was contrary to that of Bloomer's and that was pertinent to Nelson's claim of self-defense. Additionally, as in *McMillian*, Nelson was deprived of the opportunity to present evidence that reflected on the credibility of one of the State's prime witnesses, Bloomer. Finally, we disagree with the State's assertion that the case at hand is distinguishable from *Williamson* and *McMillian* because counsel in those cases used due diligence and Nelson did not. As previously noted, there was no basis for seeking a continuance before or at the start of the trial, as Brockington was not hospitalized until the second day of trial. As in *Dodgens*, the trial court's refusal to postpone the trial in order to obtain the presence of the material witness

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[6] Assuming Brockington were to testify at trial consistent with her statement, there would be evidence before the jury that: Nelson retreated from Victim's apartment after Victim instructed Bloomer to get his gun during their initial physical altercation; within two and a half minutes of the altercation, Victim went down to the front of the building and, for several minutes, yelled up to the apartment building for Nelson to come down there and fight; Victim had a shotgun while he was down there; Victim went into the apartment of Nelson's cousin with his shotgun looking for Nelson; Bloomer was tracking Nelson to let Victim know of Nelson's whereabouts; and when Nelson did leave the apartment building and head toward his car, he did not have possession of his rifle and only after Victim began firing at Nelson did he retrieve his rifle.

was a denial of Nelson's constitutional right to have compulsory process for obtaining witnesses in his behalf. *See* S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."); U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."); *Mizzell*, 349 S.C. at 330, 563 S.E.2d at 317 ("The Sixth Amendment right[] to . . . compulsory process guarantee[s] that a criminal charge may be answered through the calling . . . of favorable witnesses." (quoting *Graham*, 314 S.C. at 385, 444 S.E.2d at 527)); *Washington*, 388 U.S. at 19 ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."). Accordingly, we hold the trial court abused its discretion in failing to grant a continuance or mistrial, resulting in prejudice to Nelson.

For the foregoing reasons, we reverse Nelson's convictions and remand for a new trial.

REVERSED AND REMANDED.

THOMAS, J., concurs. MCDONALD, J., concurs in result only.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case Tracking No. 2017-001406

State of South Carolina, Respondent,

vs.

Antwuan L. Nelson, Appellant.

PETITION FOR REHEARING

On August 19, 2020, this Court reversed and remanded Appellant's convictions for voluntary manslaughter and possession of a weapon during the commission of a violent crime, finding the trial court abused its discretion in failing to grant Appellant's motion for a continuance or mistrial made on the fourth day of trial based on the unavailability of a witness. This Court further found Appellant complied with Rule 7(b), SCRCrimP—including the requirement that he act with due diligence in attempting to procure the testimony of Lillian Brockington—and that Brockington's testimony was not cumulative to other evidence presented.

This Court overlooked the explicit language of Rule 7(b) of the South Carolina Rules of Criminal Procedure and its own case law—"All components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are **strictly** required, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief." State v. Colden, 372 S.C. 428, 438, 641 S.E.2d 912, 918 (Ct. App. 2007) (emphasis added). This Court ignored multiple

instances of defense counsel's failure to strictly comply with the requirements of Rule 7(b) and ignored facts of this case which support mutual combat. This Court failed to recognize that the only relevance of Brockington's testimony would be to support Appellant's self-defense claim although the facts clearly demonstrate a charge of self-defense was not warranted due to mutual combat. This Court ignored our Supreme Court's recent holding in State v. Williams—that a person who brings a gun to a drug deal is not without fault in bringing on the difficulty—which further supports the conclusion that a self-defense charge was not warranted. 427 S.C. 246, 830 S.E.2d 904 (2019). Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the State's petition for rehearing and affirm Appellant's convictions because the trial court did not abuse its discretion in denying the motion for continuance where Appellant failed to exercise due diligence in procuring the absent witness's testimony, and Appellant was not prejudiced because the absent witness's purported testimony was cumulative to evidence already presented.

Motion to Continue

This Court compares the present case to State v. McMillan and State v. Williamson. Williamson held that a continuance should have been granted based on Appellant's pregnant wife being unable to testify or be present at his trial. State v. Williamson, 115 S.C. 315, 105 S.E. 697 (1921). This Court, however, failed to note several important differences between Williamson and this case. As an initial matter, in Williamson, the absent witness was Appellant's wife. See Id. ("Ordinarily a person tried for a capital felony **has a right** to have his wife present at trial, and the wife has the right to be present." (emphasis added)). Most importantly, the appellant in Williamson moved for a continuance **before his trial began**, provided the court with notice of his wife's absence, the reason for her absence, what she would testify to, and the significance of her testimony. Id. This Court next compares this case to McMillian, and again fails to recognize that

the appellant in McMillian moved for a continuance at the outset of the trial. State v. McMillian, 349 S.C. 21, 561 S.E.2d 604 (2002). These two cases are significantly distinguishable from Appellant's, not only because Appellant's motion was not made pre-trial—or even on the second or third day of trial—but because Appellant waited until after the State presented its case to seek to end his trial based on his own counsel's failure to secure a witness's testimony prior to trial commencing.

This Court next cites our Supreme Court's opinion in State v. Grueling which held that "[g]enerally, a motion for continuance should be made at the time the underlying reason for such becomes known." State v. Grueling, 257 S.C. 515, 520, 186 S.E.2d 706, 708 (1972). However, this Court later states that "defense counsel could not have sought a continuance prior to the commencement of trial because no grounds existed for such at that time." State v. Nelson, Op. No. 5768 (filed August 19, 2020) (Shearouse Adv. Sh. No. 32 at 19). This Court notes that defense counsel approached the trial court on the first day of trial upon finding out that Brockington was not there, yet fails to address that the continuance motion could have been made at that time. Id. at 18. This Court also notes that defense counsel subpoenaed Brockington at the hospital on the second day of trial, but again fails to address that the continuance motion could have been made at any point on the second day once he became aware she was hospitalized. Id. Finally, this Court notes that the State rested on the third day of trial and that defense counsel informed the court that Brockington was hospitalized, but again fails to address that the continuance motion could have been made then. Id. Three separate times "grounds existed" and "the underlying reason" for a continuance became known to defense counsel, yet this Court came to the puzzling conclusion that " [o]nce defense counsel became aware that Brockington was not going to be available to testify at the appropriate time, he made the proper motion and complied with Rule 7(b)." Id. at 19.

Compliance with Rule 7(b), SCRCrimP

Next, this Court overlooked the requirements of Rule 7) of the South Carolina Rules of Criminal Procedure, which states:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and **has made use of due diligence to procure the testimony of the witness** or of such other circumstances as will satisfy the court that his motion is not intended for delay.
>
> (1) When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.
> (2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief.

Rule 7(b), SCRCrimP (emphasis added). This Court concluded Appellant complied with Rule 7(b) despite Appellant's failure to subpoena his "key witness" prior to trial. Specifically, this Court notes that Appellant "did not feel the need to subpoena Brockington prior to trial because she was going to appear voluntarily" State v. Nelson, Op. No. 5768 (filed August 19, 2020) (Shearouse Adv. Sh. No. 32 at 19). This Court recognizes Appellant waited until the day after he realized Brockington was not present to subpoena her until the next day. Id. Black's Law Dictionary defines due diligence as "the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACKS LAW DICTIONARY 523 (9TH Edition 2009). Not only did defense counsel not subpoena their most important witness before trial but waited another day after he found out she was missing.

When defense counsel eventually did subpoena Brockington on the second day of trial, he was still not compliant with Rule 7(b) requiring that if a subpoena had been issued, that subpoena be provided to the court and if proof cannot be provided, the reason for why it cannot be, neither of which were provided by defense counsel. Further, the requirement that an affidavit be provided to the court in regards to what witness would testify to was not satisfied until the **fourth** day of trial.

In Seay v. Cannon, the Fourth Circuit Court of Appeals considered whether the state court erred in granting a mistrial based on the State's critical witness failing to appear during the course of the trial. Seay v. Cannon, 927 F.3d 776 (4th Cir. 2019). In that case, the State—unlike Appellant—subpoenaed the witness **prior to trial**. The subpoena directed her to appear on the morning of each day of the term of court. Id. The State was in communication with the witness prior to trial and was under the impression that she would appear. Id. When the witness did not appear at trial, the State moved for a mistrial on the basis of surprise in her nonattendance, which the lower court granted. Id. In reversing, the Fourth Circuit reasoned:

> "[T]he government relies on the state trial court's finding that the government was 'caught by surprise' when [the witness] failed to appear in response to the subpoena. According to the government, this factual finding and the lack of any fault on the government's part support the state trial court's determination that a mistrial was warranted for reasons of manifest necessity. We disagree with the government's position."

Id. at 781. The Fourth Circuit determined a "foreseeable possibility that [the witness] would not appear in time to testify" existed because she had not appeared for two days despite being subpoenaed. Id. The State chose to go forward anyway. In concluding the mistrial was improperly granted, the Fourth Circuit found that "the government's allegation of surprise fails to support the state trial court's finding of manifest necessity." Id. at 783.

The Fourth Circuit properly found a continuance or mistrial was not warranted—even when counsel had his witness under subpoena—because the Government should not have been surprised. This Court refused to hold defense counsel accountable, finding he acted with due diligence despite his failure to subpoena Brockington until after trial began and failure to take any steps to prevent the trial from going forward knowing his witness was not present. This Court is wrong in concluding that defense counsel acted with due diligence when looking at the evidence they were presented.

Further, this Court previously held that "all components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are **strictly required**, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief." State v. Colden, 372 S.C. 428, 438, 641 S.E.2d 912, 918 (Ct. App. 2007)(emphasis added). This Court now seems to suggest whether or not to comply with the South Carolina Rules of Criminal Procedure is discretionary to counsel. This Court seems to turn on the fact that it would not have mattered whether defense counsel had subpoenaed Brockington prior to trial because she would have been unavailable due to her hospitalization. This is mere speculation, as there is nothing in the record indicating that the hospitalization was unavoidable. The only information provided by defense counsel was that Brockington was hospitalized for a blood transfusion for sickle cell anemia. Defense counsel did not indicate whether the procedure was emergent or a previously-scheduled treatment that could be postponed. Defense counsel failed provide the trial court with any information regarding when Brockington may be available to testify. This Court nonetheless concludes that she would have been unavailable, which is simply not supported by the record. This conclusion is further determined by the fact Appellant's counsel provided no information to the

trial court regarding an estimation of when she would be available to testify so the Court would know the possible length of the requested continuance.

Cumulative Testimony

This Court further held that Brockington's testimony would have supported Appellant's claim of self-defense. However, Brockington's testimony is cumulative to the evidence presented at trial. The only new information that the jury would have received by hearing Brockington's testimony is who fired their weapon first. This Court overlooks the fact that the limited new testimony would not have been material or relevant because self-defense was not properly charged. It is uncontested that both men were armed and looking for each other as established by evidence presented and Brockington's testimony. At best, we have a mutual combat case and who fired first is irrelevant. "South Carolina law has long recognized that criminal liability may be imposed on all combatants for the death of one of the participating parties because all are presumed to know and intend the consequences that naturally flow from their unlawful acts. State v. Young 429 S.C. 155, 150, 838 S.E.2d 516, 518 (2020). Brockington's statement clearly indicates that Appellant armed himself and there was a mutual willingness to fight.

Further, Appellant was not entitled to a self-defense charge, so allowing testimony solely related to supporting a self-defense claim would be well within the trial court's wide discretion.

A person is justified in using deadly force when:

(1) the defendant was without fault in bringing on the difficulty;
(2) the defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or he actually was in such imminent danger;
(3) if the defense is based upon the defendant's actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; and
(4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Sims, 426 S.C. 115, 131, 825 S.E.2d 731, 739 (Ct. App. 2019).

Appellant had multiple opportunities to leave the scene. The State produced evidence that Appellant had fled from victim's apartment and instead of going to his car to leave the scene he remained in the apartment grounds. The State also produced evidence that showed Appellant went to his car, opened his trunk, and armed himself with a rifle and then shut the trunk. Brockington's testimony also supports the fact that Appellant went to his car and armed himself. During the time it took for Appellant to get his gun out of the trunk he could have gotten into his car and left. Appellant cannot claim self-defense if he had other probable means of avoiding the danger. Further, Appellant cannot claim self-defense if he was not without fault in bringing on the difficulty. Our Supreme Court has recently ruled that someone who brings a gun to a drug deal is not without fault in bringing on the difficulty. State v. Williams 427 S.C. 246, 830 S.E.2d 904 (2019). There is little doubt Appellant arrived at the scene of what was a drug deal that turned south with a gun in the trunk of his vehicle. This is the same gun he went and retrieved instead of leaving the premises. In State v. Slater, 373 S.C. 66, 69–70, 644 S.E.2d 50, 52 (2007), our Supreme Court found the defendant was not without fault in bringing on the difficulty of a shooting and thus was not entitled to a self-defense charge because defendant's decision to approach an altercation underway with a loaded weapon by his side was the proximate cause of the ensuing gunfight which led to him "accidentally" shooting the victim. Although Slater testified that his purpose for approaching the altercation was to stop what he believed to be a robbery-in-progress, the Court specifically noted the defendant's actions "could be reasonably calculated to bring the difficulty that arose in [that] case." Id.

It is uncontested that Appellant was at the victim's apartment for a drug deal. In fact, Appellant's actions represent an extreme of behavior similar to that in both Williams and Slater.

Appellant arrived at a drug deal with a gun, but left it in the vehicle. After that situation escalated, Appellant went to his car, retrieved his weapon, and returned to the confrontation. However—unlike the defendants in Williams and Slater—Appellant was confronted with the potential of a violent confrontation, left, and elected to return. Accordingly, the undisputed evidence shows that Appellant's actions could not, under any scenario and even with the testimony of the missing witness, have been considered self-defense. Thus, this Court ignores that Brockington's testimony would not have assisted Appellant in this regard and was cumulative to other testimony.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find that the trial court did not abuse its discretion denying the motion for continuance and affirm Appellant's convictions.

Respectfully submitted,

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September 3, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr. Circuit Court Judge
Appellate Case Tracking No. 2017-001406

State of South Carolina, Respondent,

vs.

Antwuan L. Nelson, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the State's Petition for Rehearing on David Alexander, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of September, 2020.

Anne Mueller

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The South Carolina Court of Appeals

The State, Respondent,

v.

Antwuan L. Nelson, Appellant.

Appellate Case No. 2017-001406

ORDER

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

Thomas C. Hoff

_____ J.

Paula A. Thomas

_____ J.

Stephanie P. McDonald

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
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The Honorable Larry B. Hyman, Jr.

FILED
Sep 16 2020