

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

S.C. SUPREME COURT

State v. Plumer, S.C. Ct. App. Op. No. 5806 (filed March 3, 2021)
Court of Appeals Appellate Case No. 2017-000481

The State, ...Respondent,

v.

Ontavious Derenta Plumer, ...Petitioner.

APPENDIX – VOLUME I OF II

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

The State, Respondent,

v.

Ontavious Derenta Plumer, Appellant.

Appellate Case No. 2017-000481

Appeal From Greenwood County
Edward W. Miller, Circuit Court Judge

Opinion No. 5806
Heard February 11, 2020 – Filed March 3, 2021

AFFIRMED IN PART AND VACATED IN PART

E. Charles Grose, Jr., of Grose Law Firm, of Greenwood,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia; and Solicitor David Matthew Stumbo, of
Greenwood, Respondent.

LOCKEMY, C.J.: Ontavious Derenta Plumer appeals his convictions for attempted murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred by (1) refusing to charge the jury on the law of self-defense, (2) denying his motion to relieve trial counsel, (3) refusing to qualify a witness as an expert in gunshot residue analysis, and (4) sentencing him to an additional five years' imprisonment in addition to his sentence of life without parole. We affirm in part and vacate in part.

FACTS

On October 11, 2015, Oshamar Wells was shot during the course of a drug transaction. Wells later identified Plumer in a photographic lineup as the person who shot him. In July 2016, Plumer was indicted for attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime. He proceeded to a jury trial on February 6, 2017.¹

At trial, Wells testified that he had arranged to meet two men, who were supposed to purchase a pound of marijuana from him, around 6:00 p.m. on the evening of October 11.² Wells explained someone he knew setup the deal, he had never met the men before, and he did not know their names. Wells testified he planned to meet the two men at a convenience store in Greenwood and then have them follow him to his cousin's residence because the men were unfamiliar with the area. The men followed Wells in their black Mercedes and parked behind him in the driveway.³ After they arrived at the home, they smoked marijuana so that the two men could "try the product" before proceeding with the purchase. Wells explained that after some time passed, he began to wonder when the men were going to pull out cash to pay for the marijuana. Plumer pulled out a gun instead. Wells testified that as soon he saw what Plumer was doing, he turned around and retrieved a handgun from the cabinet behind him.⁴ He stated he shot at Plumer in defense of his life. Wells explained that Plumer then began firing at him and recalled he was "already getting hit when [he] reached to grab the gun out of the cabinet. And from the[n] on, he] just returned fire." Wells stated that after the shooting began, the third man got up, took the marijuana, and ran. Wells did not recall seeing the

¹ Prior to trial, the State served Plumer with a notice of intent to seek life imprisonment without the possibility of parole based on his previous conviction for a most serious offense. *See* S.C. Code Ann. § 17-25-45(A)(1)(a) (2015) (providing that "upon a conviction for a most serious offense . . . a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . one or more prior convictions for . . . a most serious offense"); S.C. Code Ann. § 17-25-45(C)(1) (2015 & Supp. 2020) (stating offenses defined as "most serious" include attempted murder and attempted armed robbery).

² Wells testified a pound of marijuana carried a street value of about \$3,600.

³ No one else was present at the home when the three men arrived.

⁴ Wells testified the gun belonged to his mother and he saw her place the holstered gun there earlier that day.

third man with a gun. Wells testified that as he returned fire at Plumer, Plumer continued to fire at him while backing out of the door.

Bullets struck Wells in his back, buttocks, and legs. He testified that as soon as the men were gone, he called his mother and an ambulance. Wells was taken to the local hospital in Greenwood, where Dr. Ricky Ladd treated him for his gunshot injuries. Dr. Ladd testified Wells was admitted with potentially life-threatening injuries. He explained Wells suffered six gunshot wounds consisting of wounds to the left upper buttock, the lower back region, the left anterior thigh, the right lateral thigh, and an entrance and exit wound to the left lower leg.

The same night, Plumer received treatment at Greenville Memorial Hospital for a gunshot wound to his kneecap. A Greenville County law enforcement officer interviewed him at the hospital that evening. Plumer told the officer that as he was walking down the street after leaving a friend's apartment in Greenville, a man he did not know approached him from behind and started shooting at him. Plumer stated he ran away when the shooting started. The officer testified that, at the time, law enforcement had no reason to suspect Plumer had fired a gun that night.

Wenona Wells, Wells's mother, testified the gun in the cabinet, which she identified at trial, belonged to her. She explained that when she went to the home the night of the shooting, her young grandson was with her and he found and picked the gun up off the floor. Ms. Wells testified she took the gun from him and when they left, she placed it in the trunk of her car. However, she testified she did not know Wells had used it during the altercation. Ms. Wells stated that about three days later, she turned the gun over to law enforcement at Wells's request.

Wells acknowledged that when law enforcement first approached him, he was not forthcoming because he was afraid they would charge him with selling drugs. Investigator William Kay, of the Greenwood Police Department, testified he took a statement from Wells the day after the shooting. Investigator Kay stated that in his first statement to law enforcement, Wells said that "two random guys came in the front door and tried to rob him" while he was sitting at his kitchen table and "ended up shooting him." He testified Wells gave a second statement to law enforcement in which he explained that he met two men to sell them marijuana, that they ended up trying to rob him, that he reached for a gun to defend himself, and that they began shooting and he returned fire. Law enforcement showed Wells a photographic lineup and he selected Plumer from the lineup as the person who shot him.

Thereafter, law enforcement arrested Plumer, and Plumer gave a statement admitting he was at the residence at the time of the incident and had also been shot. In addition, Greenwood officers determined the Mercedes parked behind Wells's car in the driveway belonged to Plumer's grandfather, who had loaned it to Plumer on the night of the shooting, and a blood sample retrieved from the sidewalk in front of the home matched Plumer's DNA profile.

Plumer did not testify at trial, but he called several defense witnesses. Shameka Hawes testified that on the evening of the shooting, she was sitting in her car when Plumer ran up to her and asked for a ride to the hospital. She stated she could see he had been shot. Hawes explained that on the way to the hospital, Plumer asked her to drop him off at his baby's mother's apartment instead. Hawes stated she did not know Plumer before this encounter and never saw him again afterwards. Plumer's cousin, Vanjarvis Martin, testified that on October 11, 2015, he picked Plumer up from his baby's mother's house and drove him to the hospital. Martin stated Plumer did not want to go to the Greenwood hospital, so he drove him to Greenville Memorial Hospital instead.

Deputy Wesley Smith, of the Greenville County Sheriff's Office, testified the sheriff's office performed a gunshot residue collection kit on and collected some evidence, including clothing, from Plumer at approximately 11:15 p.m. on October 11, 2015. He recalled that some of the evidence was covered in blood. Deputy Smith stated that between the time Plumer was admitted to the hospital at 10:55 p.m. and when he was released, there was a period of up to twenty-five minutes during which no one from law enforcement was with him. Deputy Smith explained the sheriff's office never completed an examination of the evidence and ultimately transferred it to Detective McClinton a few months later. The defense recalled Detective McClinton, who confirmed he received this evidence but it was never sent to the South Carolina Law Enforcement Division for analysis.

Joseph Best, a private detective hired by the defense, testified he collected the evidence from the Greenwood Police Department on January 6, 2017, and transferred it to Dr. Robert Bennett on January 10, 2017. Best testified the evidence included a gunshot residue kit that was collected from Plumer's hands, a tennis shoe, jeans, and a tee shirt.

The defense then called Dr. Robert Bennett, who testified he was a forensic scientist and held a pharmacy degree and a doctorate in drug sciences with a focus in toxicology. He stated he had "a number of training certifications from the Department of Justice, [including] a couple in the are[a] of firearms." Dr. Bennett

explained that the firearms training included "looking at a variety of subjects such as different types of ballistics, which include[d] gunshot residue analysis" and that he was "familiar" with gunshot residue and had "learned to test gunshot residue." Dr. Bennett explained that he worked with a lab that performed gunshot residue analysis as one of their "basic core service provisions." He admitted he had never personally performed a gunshot residue test and was instead interpreting the results of the test the lab performed. The State objected to Dr. Bennett's qualification, and the court refused to qualify him as an expert witness. Plumer did not attempt to proffer Dr. Bennett's testimony.

At the close of the defense's case, Plumer renewed his motion for a directed verdict, which the trial court denied. Plumer requested a jury charge on the law of self-defense, which the trial court denied, finding there was "insufficient evidence from which a reasonable inference could be drawn" that Plumer acted in self-defense.

The jury acquitted Plumer of armed robbery but found him guilty of attempted murder and possession of a weapon during the commission of a violent crime. Plumer moved for a new trial, arguing the jury returned an inconsistent verdict. The trial court denied the motion and sentenced Plumer to life imprisonment without parole for attempted murder and five years' imprisonment for the weapon offense. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

ANALYSIS

I. Self-Defense Instruction

Plumer argues the trial court erred by refusing to instruct the jury on the law of self-defense. He contends the following facts would have supported an inference that Wells was the first person to introduce a firearm and was therefore responsible for bringing on the difficulty: (1) Wells admitted he was prepared to use his gun during the drug transaction and placed himself in a position that would allow him to stand up and reach his gun; (2) according to Investigator Kay, Wells stated he reached for his gun before Plumer fired any shots; (3) according to Dr. Ladd, Wells would have fallen down when the bullet struck his femoral neck, meaning he stood

up and retrieved his handgun before Plumer fired that shot; (4) Wells and Ms. Wells conspired to hide the gun and cover up his culpability; (5) Plumer retreated from the violence; and (6) the jury acquitted Plumer of armed robbery, which removed the motive to commit murder. We disagree.

"A self-defense charge is not required unless it is supported by the evidence." *State v. Light*, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

Id. at 69-70, 644 S.E.2d at 52; *see also State v. Muller*, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984) (holding when the defendant testified he shot the victim after the victim "took out a gun and began shooting at him," the trial court erred by refusing to charge the law of self-defense because the defendant's testimony "constituted sufficient evidence from which the jury could infer that [he] acted in self-defense"); *State v. Smith*, 406 S.C. 547, 555, 752 S.E.2d 795, 798 (Ct. App. 2013) (stating that "going to a drug deal while armed with a deadly weapon is evidence of fault in bringing on the difficulty"); *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955) (stating "one cannot through his own fault bring on a difficulty and then claim the right of self-defense").

In *Slater*, our supreme court found there was no evidence to show the defendant was "without fault in bringing on the difficulty" and he was therefore not entitled to a self-defense instruction. 373 S.C. at 71, 644 S.E.2d at 53. There, the court concluded the defendant's actions of carrying a "cocked weapon, in open view, into an already violent attack in which he had no prior involvement . . . proximately caused the exchange of gunfire, and ultimately the death of the victim." *Id.*

We conclude the trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty. *See Light*, 378 S.C. at 649, 664 S.E.2d at 469 ("A self-defense charge is not required unless it is supported by the evidence."); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) ("The law to be charged to the jury is determined by the evidence presented at trial."); *Light*, 378 S.C. at 649, 664 S.E.2d at 469 (providing self-defense requires the defendant to "be without fault in bringing on the difficulty"). Of the three individuals present when the shooting occurred, only Wells testified at trial. Although it is undisputed Wells fired a gun during the encounter, he consistently testified Plumer was the first to draw and fire a gun. The record contains no evidence to contradict Wells's testimony that he stored a holstered handgun in a cabinet prior to the meeting and did not retrieve it until after Plumer pulled out a gun. Further, the record contains no evidence Wells was visibly armed or that Plumer knew Wells had a gun nearby when Plumer pulled out his own gun. Wells stated he shot at Plumer because Plumer was shooting at him and that if Plumer had not pulled out his gun first, he would not have retrieved the gun from the cabinet. Even though Wells's treating physician agreed the gunshot injury to his hip would likely have caused him to fall immediately, he testified it was impossible to determine which of Wells's gunshot injuries occurred first or otherwise discern the timing of those injuries. In addition, Wells testified that bullets were already striking him when he turned to retrieve the gun from the cabinet. As to Investigator Kay's testimony, he testified only that Wells initially told law enforcement that two random men came into his home, tried to rob him, and ended up shooting him. This testimony does nothing to suggest Wells, rather than Plumer, was at fault for bringing on the difficulty. As to Plumer's contention that Wells and Ms. Wells conspired to hide the gun, Wells admitted he initially withheld the truth from law enforcement because he was afraid he would get in trouble for dealing marijuana, and he admitted to shooting a gun that night. Further, Ms. Wells explained she took possession of the gun the night of the shooting because it belonged to her; she was concerned for the safety of her young grandson, who had just picked the gun up off of the floor; she did not know it was involved in the shooting; and she was most concerned with Wells's

condition at the time. In addition, Ms. Wells testified she turned the gun over to law enforcement within days of the incident. Regardless, the suggestion that Wells conspired to hide the gun made it no more or less likely that Wells was the first to present a gun or that Plumer was without fault in bringing on the difficulty.

Next, as to Plumer's contention he retreated from the violence, the evidence shows he only did so after firing his gun multiple times. Moreover, such facts pertain to whether he had a means of avoiding the danger rather than whether he was at fault for bringing on the difficulty. Finally, we find Plumer's argument regarding his acquittal for the charge of armed robbery is without merit. The lack of motive to commit murder is not an element of self-defense, nor does it negate Wells's testimony that Plumer drew a gun without any prior act of provocation or aggression on Wells's part.

Based on the foregoing, we find the only evidence presented at trial suggested that Plumer was at fault for bringing on the difficulty. Therefore, the record contained no evidence from which a jury could have inferred Plumer acted in self-defense, and we find the trial court did not err by refusing to give a self-defense instruction.⁵

II. Motion to Relieve Trial Counsel

Plumer argues the trial court should have treated his insistence to relieve his trial counsel as a motion to represent himself and the court denied him his Sixth Amendment right to represent himself by permitting counsel to continue representing him. We disagree.

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, "[a]n accused may waive the right to counsel and proceed *pro se*." *State v. Winkler*, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010); *see also Farett v. California*, 422 U.S. 806 (1975) (holding a criminal defendant has the right to waive his right to counsel and proceed *pro se* when he chooses to do so voluntarily and intelligently). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." *Winkler*, 388 S.C. at 586,

⁵ We note Plumer asserts the trial court inappropriately involved itself in plea negotiations. Because Plumer raised no exception on this basis at trial, this argument is unpreserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

698 S.E.2d at 602 (quoting *State v. Fuller*, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)); see also *Barnes*, 407 S.C. at 35, 753 S.E.2d at 550 ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by *Faretta*.").

Here, Plumer informed the court on the morning of the third day of trial that he wished to relieve his trial counsel and presented a written motion to relieve counsel or, in the alternative, for a competency evaluation. After the court confirmed Plumer had no competency issues, Plumer stated he wished to relieve counsel and find another lawyer. He alleged his trial counsel failed to relay a plea offer of seven years' imprisonment and he was unaware he faced a mandatory sentence of life without parole. Plumer's counsel denied this, and the trial court refused to suspend the trial to allow Plumer to hire new counsel.

We find Plumer did not clearly assert his right to self-representation. Plumer's written motion was styled as a "motion declining or terminating representation," and he told the trial court he wanted another lawyer. We acknowledge Plumer argued he had "a constitutional right to relieve [his] lawyer when [he] want[ed] to relieve him"; however, he never stated he wished to represent himself for the remainder of the trial. Rather, he repeatedly stated he wanted to hire a different lawyer. Because we conclude Plumer failed to clearly assert his right to proceed without counsel, *Faretta* warnings were not required, and the trial court did not deprive Plumer of his right to self-representation.

III. Expert Witness

Plumer argues the trial court erred by refusing to allow Dr. Bennett to testify as an expert in gunshot residue. He contends the record established Dr. Bennett had the necessary education, training, and experience to testify as an expert and the exclusion of this expert testimony denied Plumer his constitutional right to a complete defense. We find Plumer failed to preserve this issue for appellate review.

"The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* "For an error to warrant reversal, however, the error must result in prejudice to the appellant." *State v. Santiago*, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App. 2006).

We find this issue is unpreserved for appellate review because Plumer made no request or attempt to proffer Dr. Bennett's testimony at trial. *See id.* at 163, 634 S.E.2d at 29 ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been."); *see also State v. King*, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005) ("The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice.").

IV. Sentencing

Plumer argues the trial court erred by sentencing him to an additional five years' imprisonment for the weapons charge pursuant to section 16-23-490. We agree.

If a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

S.C. Code Ann. § 16-23-490(A) (2015) (emphasis added); *see also* S.C. Code Ann. § 16-1-60 (2015 & Supp. 2020) (defining attempted murder as a violent crime).

"[T]his Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999), *disapproved of by State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). In *Johnston*, our supreme court vacated an illegal sentence notwithstanding preservation rules. *See id.* at 463-64, 510 S.E.2d at 425. There, the court found there were exceptional circumstances in that the State conceded "the trial court committed error by imposing an excessive sentence," and there was a "real threat" that the defendant would "remain incarcerated beyond the legal sentence due to the additional time it w[ould] take to pursue [post-conviction relief]." *Id.*

In *Vick*, this court acknowledged the holding in *Johnston*, but addressed the sentencing issue even though there was no "threat" that the appellant would "remain incarcerated beyond the legal sentence." *Vick*, 384 S.C. at 202-03, 682 S.E.2d at 281-82. The court reasoned, "[O]ur courts have, in the past, 'summarily vacated' sentences for kidnapping whe[n] such sentences were precluded by [statute] because the defendant received a concurrent sentence under the murder statute." *Id.* at 202, 682 S.E.2d at 282. The court also noted that "our courts have at times considered an issue in the interest of judicial economy." *Id.* In *Vick*, we held:

[B]ecause the State concede[d] the kidnapping sentence was erroneously imposed, and in light of the fact our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand, in the interest of judicial economy we vacate the clearly erroneous kidnapping sentence.

Id. at 203, 682 S.E.2d at 282.

In *Bonner*, we vacated a defendant's sentence notwithstanding preservation rules when both parties fully briefed the issue, and we stated, "[T]his case presents an exceptional circumstance because the State concedes in its brief that the trial court committed error by imposing an improper sentence." *See State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012).

Plumer was convicted of attempted murder, a violent crime under section 16-1-60. The trial court sentenced him to life without parole for attempted murder and an additional five years' imprisonment for possession of a weapon during the commission of a violent crime. *See* § 16-23-490(A) (providing the five-year sentence required for possessing a firearm during the commission of a violent crime does not apply when the trial court imposes a sentence of life imprisonment without parole for the violent offense). Although the State argues the issue is unpreserved because Plumer failed to object at trial, it concedes the trial court erred by imposing the five-year sentence and acknowledges that under certain circumstances, our appellate courts have decided such issues on the merits notwithstanding preservation rules. The State argues, however, that the appropriate procedure for raising the issue is in post-conviction relief. Although

there is no "real threat" Plumer will remain incarcerated beyond the length of his legal sentence, because the State concedes error, we believe it is appropriate under these circumstances and as a matter of criminal equity to vacate the sentence pursuant to our holdings in *Bonner* and *Vick*. See *Bonner*, 400 S.C. at 567, 735 S.E.2d at 528 (opining a "case present[ed] an exceptional circumstance because the State concede[d] in its brief that the trial court committed error by imposing an improper sentence"). We therefore vacate the five-year sentence Plumer received for the weapons charge.

CONCLUSION

For the foregoing reasons, we affirm Plumer's convictions but vacate the trial court's imposition of the five-year sentence for the weapons charge.

AFFIRMED IN PART AND VACATED IN PART.

GEATHERS and HEWITT, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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April 07, 2021

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Mr. Mark Reynolds Farthing, Esquire
PO Box 11549
Columbia SC 29211-1549

Re: The State v. Ontavious D. Plumer
Appellate Case No. 2017-000481

Dear Counsel:

This will acknowledge receipt of the appellant's, and respondent's, petitions for rehearing.

By copy of this letter, opposing counsel is requested to file a return to these petitions no later than ten (10) days from the date of this letter.

Very truly yours,

V. Claire Allen

CLERK

cc: Alan McCrory Wilson, Esquire
David Matthew Stumbo, Esquire

The South Carolina Court of Appeals

The State, Respondent,

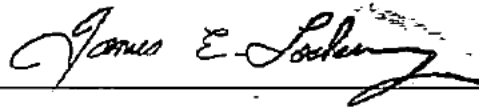
v.

Ontavious Derenta Plumer, Appellant.

Appellate Case No. 2017-000481

ORDER

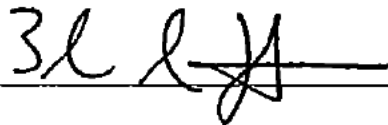
After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
E. Charles Grose, Jr., Esquire
Mark Reynolds Farthing, Esquire
David Matthew Stumbo, Esquire
The Honorable Edward W. Miller

FILED
May 20 2021

RECEIVED

Mar 11 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Ontavious Plumer petitions for rehearing because this Court overlooked or misapprehended the matters set forth in this pleading.

Question 1

Did the trial judge err as a matter of law by denying Ontavious Plumer's request for a jury instruction on self-defense when the jurors acquitted Mr. Plumer of armed robbery and direct and circumstantial evidence established the elements of self-defense?

This Court “conclude[d] the trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty.” *State v. Plumer*, No. 2017-000481, 2021 WL 800607, at 4 (S.C. Ct. App. Mar. 3, 2021). In reaching this conclusion, this Court committed three errors of law.

First, this Court shifted the burden to Mr. Plumer to prove self-defense when it held:

To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

Id. (citing *State v. Slater*, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007)). Although citing *Slater* for the “elements” of self-defense, these “elements” have been part of our state’s jurisprudence going back, at least, to *State v. Hendrix*, 270 S.C. 653, 657–58, 244 S.E.2d 503, 505-06 (1978). It is elementary that “elements” identify what a party must prove in order to prove a claim or offense. Indeed, our Supreme Court decided *Hendrix* during an error when an accused had the burden of proving self-defense. Today, a “defendant need not establish self-defense by a preponderance of the evidence but must merely produce evidence which causes the jury to have a reasonable doubt regarding his guilt.” *State v. Bellamy*, 293 S.C. 103, 105, 359 S.E.2d 63, 64-65 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *see also In re Winship*, 397 U.S. 358 (1970). “Once raised by the defense, the State must disprove self-defense beyond a reasonable doubt.” *State v. Bixby*, 388 S.C. 528, 553, 698 S.E.2d 572, 585 (2010) (citing *State v. Burkhardt*, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002)). Thus, this Court erred by shifting the burden to Mr. Plumer to prove self-defense.

Second, in reaching its holding, this Court reasoned, “Of the three individuals present when the shooting occurred, only Wells testified at trial,” *Plumer*, at 4, thereby imposing a requirement that an accused testify or call witnesses in order to receive a self-

defense instruction. An accused is entitled to a self-defense instruction if there is any evidence to support the instruction. *State v. Light*, 378 S.C. 641, 651, 664 S.E.2d 465, 470 (2008); *see also Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) (“petitioner presented sufficient evidence at trial to entitle him to a jury instruction on self-defense”). There is not requirement that the evidence supporting any jury instruction—including a self-defense jury instruction—come from the accused or a witness called by the accused.

Third, despite identifying evidence in the record supporting providing a self-defense instruction, this Court held, “[T]he trial court did not err by refusing to charge the law of self-defense because the record contains no evidence that Plumer was without fault for bringing on the difficulty.” *Plumer*, at 4. This Court’s opinion recognized Mr. Plumber brief identified

the following facts would have supported an inference that Wells was the first person to introduce a firearm and was therefore responsible for bringing on the difficulty: (1) Wells admitted he was prepared to use his gun during the drug transaction and placed himself in a position that would allow him to stand up and reach his gun; (2) according to Investigator Kay, Wells stated he reached for his gun before Plumer fired any shots; (3) according to Dr. Ladd, Wells would have fallen down when the bullet struck his femoral neck, meaning he stood up and retrieved his handgun before Plumer fired that shot; (4) Wells and Ms. Wells conspired to hide the gun and cover up his culpability; (5) Plumer retreated from the violence; and (6) the jury acquitted Plumer of armed robbery, which removed the motive to commit murder.

Id., at 3. Thus, this Court erred by overlooking these facts.

Question 2

Did the trial judge err as a matter of law by denying Ontavious Plumer’s motion to relieve his trial counsel from representation and allowing Mr. Plumer to represent himself?

Although recognizing Mr. Plumer had the constitutional right to represent himself, this Court held Mr. “Plumer did not clearly assert his right to self-representation.” *Plumer*, at 5. Mr. Plumer argued to this Court:

[T]he attorney-client relationship had deteriorated because of the lack of communication. The trial judge incorrectly told Mr. Plumer his only options were to plead guilty or continue the trial. Mr. Plumer correctly informed the trial judge his only choice as to continue trial. Had Mr. Plumer allowed the trial judge to persuade him to plead guilty, then the jurors would not have acquitted Mr. Plumer of armed robbery, and this issue—and the other issues raised in the brief—would not have been preserved for appeal. Continuing the trial presented the trial judge two options. First, trial counsel would continue representing Mr. Plumer through the conclusion of the trial. Second, after giving Mr. Plumer his *Faretta*¹ warnings, the trial could have continued with Mr. Plumer representing himself. The trial judge chose the former option, which denied Mr. Plumer his Sixth Amendment right to represent himself.

Brief of Appellant, at 15 (footnote added).

The trial judges have an obligation to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). Here, safeguarding Mr. Plumer’s rights included providing him the *Feretta* warnings and allowing him to represent himself.

Question 3

Did the trial judge err as a matter of law when by not qualifying Dr. Robert Bennett as expert in gunshot residue when the record establishes the witness has the necessary education, training and experience, and the exclusion of this expert testimony denied Ontavious Plumer his constitutional right to present a complete defense?

This Court held “this issue is unpreserved for appellate review because Plumer made no request or attempt to proffer Dr. Bennett's testimony at trial.” *Plumer*, at 6. However, the error Mr. Plumer asked this court to address occurred during the first two

¹ *Faretta v. California*, 422 U.S. 806 (1975).

prongs of *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Mr.

Plumer requested alternate relief from this Court:

This Court, accordingly, should order a new trial. In the alternative, this Court should remand this case for a hearing to determine whether Dr. Bennett's testimony is admissible under the third prong of *Watson*. See, e.g., *State v. Hughes*, 346 S.C. 339, 343, 552 S.E.2d 35, 37 (Ct. App. 2001) ("remand[ed] for an evidentiary hearing to determine whether Hughes was entitled to access to the notes as outlined in Rule 612," SCRE.). If the trial court find Dr. Bennett's testimony admissible and its exclusion impaired Mr. Plumer's defense, then the trial court should be allow[e]d to grant a new trial. *Hughes*, 346 S.C. at 343-44, 552 S.E.2d at 37.

Brief of Appellant, at 18. This Court overlooked ruling on Mr. Plumer's motion for a remand.

CONCLUSION

For the foregoing reasons, this Court should rehear this matter, withdraw its opinions, reverse the trial court, and remand for a new trial.

IT IS SO MOVED.

Respectfully submitted,

By E. Charles Grose, Jr.

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Attorney for Appellant

March 11, 2021
Greenwood, South Carolina

RECEIVED

Mar 11 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-12-16-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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March 11, 2021
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March 11, 2021

The Honorable Jenny Abbott Kitchings
Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

Mar 11 2021

SC Court of Appeals

Re: *State of South Carolina v. Ontavious Plumer*
Appellate Case Number 2017-000481

Dear Ms. Kitchings:

Enclosed please find Mr. Plumer's petition for re-hearing, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: Mr. Ontavious Plumer
Mark R. Farthing, Esquire

RECEIVED
Mar 16 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

RESPONDENT'S PETITION FOR REHEARING

Through a published decision issued on March 3, 2021, this Court affirmed Appellant Ontavious Derenta Plumer's convictions for the crimes of attempted murder and possession of a weapon during the commission of a violent crime along with his accompanying life-without-parole sentence but vacated his concurrent five-year sentence for the weapon charge. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021). In arriving at that result, this Court correctly rejected most of Plumer's four allegations of legal error after explicitly recognizing its role was limited to reviewing for errors of law only in light of the standard of review applicable to criminal cases. This Court further correctly applied our state's issue preservation requirements to the third of Plumer's allegations and determined the issue was not properly preserved for appellate review due to Plumer's failure to take the steps needed to preserve the issue at the trial level. However, when reviewing the fourth and final allegation of error raised by Plumer, this Court indicated it believed it was appropriate to address that particular issue—

which was unquestionably neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review under well-established South Carolina law— “notwithstanding issue preservation rules” because the State did not dispute an error had occurred *and also* “as a matter of criminal equity.” This Court then went on to vacate Plumer’s concurrent sentence for the weapon charge even though no challenge to that sentence was ever previously lodged. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent (“the State”) respectfully petitions for rehearing because this Court appears to have overlooked and misconstrued several important points when vacating Plumer’s weapon charge sentence.

First, this Court appears to have overlooked the fact our Supreme Court’s issue preservation precedent bound this Court to find Plumer’s sentencing challenge was unpreserved for appellate review. That is true because—despite appearing to recognize the limits of the highly-specific and unique issue preservation exception our Supreme Court created in State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)—this Court found it could address Plumer’s appellate challenge to his weapon charge sentence even though it did not fall within the parameters of the Johnston exception based solely on its *own* precedent that it described as *disapproving of* our Supreme Court’s holding in Johnston. See State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (addressing an unpreserved sentencing issue related to an improper concurrent sentence despite the fact “the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston”). Critically though, this Court is *constitutionally* bound to follow the precedent of our Supreme Court and cannot validly ignore that precedent simply because it disapproves of it. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); cf. Daniels v.

City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (“Of course, the decisions of the Supreme Court bind this Court as precedents. Thus, any modification or limiting of Abbeville Arms must be done by the Supreme Court.” (citation omitted)). As a result, this Court should reconsider its decision to ignore our Supreme Court’s precedent in favor of its own, faithfully adhere to the limits of the decision in Johnston just as it has correctly done in the past, and find Plumer’s issue with his concurrent five-year sentence for the weapon charge was not properly preserved for appellate review since it was indisputably neither raised to nor ruled upon by the trial judge.¹ Cf. State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 282-283 (Ct. App. 2005) (“We find the exceptional circumstance carefully carved out by the Johnston court is not present here. [Passmore] has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. Johnston does not control. . . . Regrettably, [Passmore] has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand.”).

Second, in addition to failing to faithfully follow our Supreme Court’s Johnston decision, this Court appears to have overlooked the fact “criminal equity” is not a recognized or proper

¹ As this Court readily acknowledged in its decision in Plumer’s case, there is no “real threat” Plumer will remain incarcerated beyond the length of his aggregate sentence due to the fact he was sentenced to life without parole for attempted murder, so a delay in the resolution of his sentencing challenge until it can be raised in the proper venue of post-conviction relief will not result in any harm at all to Plumer. See Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (addressing Johnston’s appellate challenge to her sentence despite issue preservation rules because there was a “real threat” she would be incarcerated beyond the permissible sentencing range for her conviction if she was not immediately granted relief). Meanwhile, inconsistent application of procedural rules can itself result in harm because such inconsistency undermines the integrity of the rules and can actually foster non-compliance by removing the disincentives that exist to ensure the purpose of the rules is achieved. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (recognizing procedural rules—through their enforcement and application—ensure the trial court is *guaranteed* a fair opportunity “to rule properly after it considered all relevant, facts, law, and arguments”).

basis for a grant of relief in a criminal appeal in South Carolina when relying on it as an *additional* ground upon which it was permitted to vacate the weapon charge sentence. Significantly, the phrase “criminal equity” has *never*—prior to the decision in Plumer’s case—appeared even a single time in any published South Carolina decision issued at any point throughout the long history of our state’s jurisprudence, and it does not have a defined meaning in South Carolina law due to the fact it has never previously been recognized or applied.² See, e.g., Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419, 422 (1938) (recognizing the existence of “the established rule that equity has no criminal jurisdiction”). In fact, the phrase “criminal equity” does not even appear in Black’s Law Dictionary, which is a more-than-a-century-old comprehensive source widely used by judges and lawyers in our nation to determine the accepted definition of any known legal term regardless of how common or obscure it may be.³ See BLACK’S LAW DICTIONARY (9th ed. 2009) (containing many definitions for different forms of equity but containing no definitions whatsoever for “criminal equity”); see also United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001) (recognizing Black’s Law Dictionary as a predictably-used source for ascertaining “the most widely accepted legal meaning” of terms). Therefore, “criminal equity”—whatever it may be—is simply not something that constitutes an accepted exception to South Carolina’s well-settled issue preservation rules, and, respectfully, this Court

² Notably, during the oral argument held in Plumer’s case, this Court described “criminal equity” as “a new term” it “*just created*.” (State v. Plumer Oral Argument Recording, 34:00 to 34:05) (emphasis added). This Court further appeared to suggest it viewed “criminal equity” as something separate and distinct from judicial economy. (State v. Plumer Oral Argument Recording, 29:21 to 29:29).

³ Beyond that, this Court itself did *not* provide a definition or any clear explanation as to what the phrase “criminal equity” means despite explicitly identifying the phrase as a basis upon which Plumer’s sentence could be and was vacated, which only adds to the confusion caused by this Court’s reliance upon “criminal equity” as a ground for appellate relief in a criminal—as opposed to an equity—case. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021).

is constitutionally prohibited from manufacturing “criminal equity” as a means by which it can ignore our Supreme Court’s binding precedent articulating those rules whenever it wishes to do so. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (reaffirming the existence of “settled” issue preservation rules that require a challenge to a sentence to be raised to and ruled upon by the trial judge in order to be preserved for appellate review but applying a limited exception to those rules in Johnston’s “unique” case based on its “exceptional circumstances” because: (1) the State had conceded error in regard to the sentence; *and* (2) a “real threat” existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action); cf. United States v. Reyes, 945 F.2d 862, 866 (5th Cir. 1991) (explaining there “seems to be no adequate statutory or historical warrant to authorize federal courts to” vacate a criminal conviction on equitable grounds and further instructing: “Absent a clearer statutory or historical basis, an article III court *should not arrogate such power unto itself*. We, too, operate under the law.” (emphasis added)).

Third and finally, this Court appears to have overlooked the fact “criminal equity”—which, presumably, is something that must surely have been intended to be equitable in nature based on its name alone—should not entitle Plumer to relief when the circumstances of his case are considered with principles of equity in mind. Specifically, pursuant to equitable principles, Plumer would not be entitled to equitable relief because he did *nothing* which ought to have been done to obtain the sentencing relief he has sought on appeal before he first tried to obtain it from this Court. Cf. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) (“A court of equity should scrutinize the conduct of the plaintiff with the

utmost care, to ascertain *he has done everything which ought to have been done* to secure the action requested.” (emphasis added)). Instead, Plumer remained silent regarding his sentence at the trial level and raised no objections to the concurrent term of imprisonment he received for the weapon charge even though he recognized—at least based on the arguments he has raised on appeal—that sentence was “expressly prohibit[ed]” by statute.⁴ (Final App. Br. p. 19). Under such circumstances, Plumer’s actions concerning the sentencing issue should not be rewarded with sentencing relief as a matter of equity since equitable principles would *deny* him that relief in an equitable action due to his failure to take the steps that ought to have been taken at the trial level when presented with an undeniable opportunity to do so. See Upton v. Tribilcock, 91 U.S. 45, 55 (1875) (“Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person.”); Hemingway v. Mention, 228 S.C. 211, 216, 89 S.E.2d 369, 371 (1955) (instructing “equity aids the vigilant”); Regions Bank, 394 S.C. at 260, 715 S.E.2d at 358 (recognizing the importance of the issue preservation rule requiring an issue to be raised to and ruled upon before it can properly be raised on appeal in a case involving *an action in equity*); see also State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) (“One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal.”). Accordingly, even if this Court believes its new creation—“criminal equity”—can be legitimately applied in a criminal case in South Carolina, this Court should not find “criminal equity” trumps our state’s issue preservation rules and other controlling precedent since such a finding would itself be plainly incompatible with well-

⁴ Interestingly, Plumer elected *not* to include any facts or statements in his appellate brief that would have alerted this Court the argument he raised on appeal in support of his request for sentencing relief was being raised for the first time, which—at least based on existing South Carolina precedent—would have been exceedingly pertinent to the matter of whether appellate review of the issue was proper. (Final App. Br. pp. 1-19).

established principles of equity.⁵ See Regions Bank, 394 S.C. at 254, 715 S.E.2d at 355 (“When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent.”); cf. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (“[T]he fact that the writ [of habeas corpus] has been called an equitable remedy . . . does not authorize a court to ignore this body of statutes, rules, and precedents. There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges. Rather, courts of equity must be governed by rules and precedents no less than the courts of law. As Selden pointed out so many years ago, the alternative is to use each equity chancellor’s conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor’s foot.”).

For all the foregoing reasons, the State respectfully urges this Court to reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, strike its highly-confusing reference to the newly-created—and totally undefined—field of “criminal equity,” and issue a new opinion correctly affirming Plumer’s convictions along with both his life-without-parole sentence for attempted murder and his *unobjected-to* five-year sentence for possession of a weapon during the commission of a violent crime. By doing so, this

⁵ Relatedly, while equity abhors a wrong without a remedy, the remedy of post-conviction relief will remain available to Plumer to obtain the sentencing relief he has prematurely sought from this Court through his unpreserved allegation of error even if this Court reconsiders its decision to create a new field of law—“criminal equity”—to award such relief to him at this juncture. Lane v. New York Life Ins. Co., 147 S.C. 333, ___, 145 S.E. 196, 207 (1928); see S.C. Code Ann. § 17-27-20(A)(3) (recognizing one of the express grounds upon which a person may seek and obtain post-conviction relief is when “the sentence exceeds the maximum authorized by law”); Johnston, 333 S.C. at 464, n. 3, 510 S.E.2d at 425 (explaining its decision based on the “unique” circumstances of Johnston’s case was “not intended to disrupt our settled rules on issue preservation and PCR applications”). And, a post-conviction action already appears inevitable regardless of whether this Court does or does not address Plumer’s unpreserved sentencing error for the first time on appeal based on Plumer’s appellate counsel’s representations during the oral argument, which seems to raise some compelling questions about whether any judicial efficiency concerns would truly be served by ignoring our long-standing issue preservation rules and precedent in Plumer’s case. (State v. Plumer Oral Argument Recording, 32:42 to 32:54).

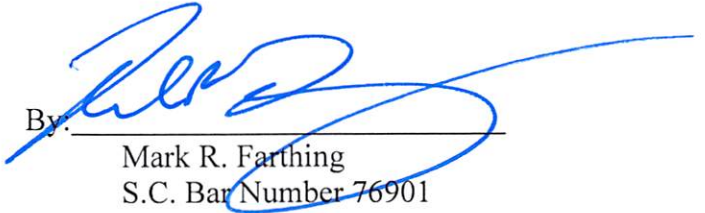
Court will ensure it has faithfully complied with our Supreme Court’s precedent as it is duty-bound to do, adhered to our State’s previously well-settled issue preservation rules, and remained within the constitutional limits that have been established for it by our citizenry. S.C. Const. art. V, § 9; see State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) (“In criminal cases, the appellate court sits only to review *errors of law which have been properly preserved*, i.e., the issue has been raised to and ruled on by the trial court.” (emphasis added)); see also Marbury v. Madison, 5 U.S. 137, 176-177 (1803) (“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”).

Respectfully submitted,

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Attorney General

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Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

By: 

Mark R. Farthing
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March 16, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Mar 16 2021

SC Court of Appeals

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Respondent's Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

E. Charles Grose, Jr., Esq.
Grose Law Firm
404 Main St.
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I further certify all parties required by Rule to be served have been served.
This 16th day of March, 2021.


SHANA MONTGOMERY
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Shana Montgomery

From: Shana Montgomery
Sent: Tuesday, March 16, 2021 4:40 PM
To: Charles Grose
Cc: Shana Montgomery; Mark Farthing; William Blitch
Subject: Plumer.Pet for Rehearing (02516911.PDF;1).PDF
Attachments: 02516911.PDF

Good Afternoon,

Attached please find a copy of the Respondent's Petition For Rehearing along with proof of service for Ontavious D. Plumer (2017-000481). Please confirm receipt. This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. Please don't hesitate to contact us should you have any questions or concerns.

Thank You.

Shana Montgomery
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RECEIVED
Apr 08 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

RETURN TO STATE'S PETITION FOR REHEARING

On March 16, 2021, the State petitioned this Court for rehearing regarding the section of this Court's opinion vacating the five-year sentence for possession a firearm during the commission of a violent crime, even though the State acknowledges the trial judge imposed this sentence contrary to S.C. Code § 16-23-490(A). On April 7, 2021, this Court requested Ontavious Plumer respond to the State's petition for rehearing. This return follows. This Court should deny the State's petition for four reasons.

First, this Court correctly identified cases in which our appellate courts correct obvious sentencing errors of this very nature, to wit: *State v. Johnston*, 333 S.C. 459, 510 S.E.2d 423 (1999); *State v. Bonner*, 400 S.C. 561, 567, 735 S.E.2d 525, 528 (Ct. App. 2012); *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). Thus, the State is not correct when it accuses this Court of not following binding precedent of our Supreme Court.

Second, the State’s criticism of this Court for using the term “criminal equity,” *e.g.* Petition for Rehearing, at 3, is a red herring. As discussed above, this Court’s opinion vacating the sentence for the weapons charge resulted from correct application of our state’s precedent.

Third, the State argues, “[P]ursuant to equitable principles, Plumer would not be entitled to equitable relief because he did nothing which ought to have been done to obtain the sentencing relief he has sought on appeal before he first tried to obtain it from this Court.” Petition for Rehearing, at 5. Notably, Mr. Plumer did not do anything to place himself in this predicament as he was relying on his trial counsel to object to any illegal sentence. Judicial economy—as recognized by *Johnston*, *Bonner*, and *Vick*—militates in favor of correcting this error at this stage. Nothing is served by pushing resolution of this issue into post-conviction relief, as the State advocates. *See, e.g.*, Petition for Rehearing, at 7, fn. 5 (“while equity abhors a wrong without a remedy, the remedy of post-conviction relief will remain available to Plumer to obtain the sentencing relief”).

Fourth, the State is not prejudiced by this Court vacating a sentence that it concedes is contrary to law. Brief of Respondant, at 39 (“Pursuant to South Carolina law, Appellant should not have been sentenced to five years for possession of a firearm during the commission of a violent crime since he received a life without parole sentence for attempted murder.”).

(conclusion on next page)

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for rehearing.

Respectfully submitted,

By E. Charles Grose, Jr.

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Attorney for Appellant

April 8, 2021
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Apr 08 2021

SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

The State, ...Respondent

v.

Ontavious Plumer,.....Appellant.

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2021-03-04-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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April 8, 2021
Greenwood, South Carolina

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April 8, 2021

The Honorable Jenny Abbott Kitchings
Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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Apr 08 2021

SC Court of Appeals

Re: *State of South Carolina v. Ontavious Plumer*
Appellate Case Number 2017-000481

Dear Ms. Kitchings:

Enclosed please find Mr. Plumer's Return to the State's Petition for Re-hearing, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: Mr. Ontavious Plumer
Mark R. Farthing, Esquire

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Apr 19 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On March 3, 2021, this Court issued a published decision affirming Appellant Ontavious Derenta Plumer's convictions for attempted murder and possession of a weapon during the commission of a violent crime. State v. Plumer, Op. No. 5806 (S.C. Ct. App. filed Mar. 3, 2021). In affirming those convictions, this Court correctly rejected the majority of Plumer's appellate allegations of error. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, both the State and Plumer petitioned this Court for rehearing, and this Court—along with asking Plumer to file a return to the State's petition—asked the State to file a return to Plumer's petition. For the following reasons, Plumer's petition should be denied.

Turning to the first question raised in his petition, Plumer contends this Court committed three distinct "errors of law" by concluding the request for a self-defense jury instruction was properly rejected by the trial judge. Specifically, Plumer maintains this Court: (1) "shifted the burden" of proving self-defense to him by quoting a portion of our Supreme Court's decision in

State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), that recited the required elements of self-defense; (2) imposed a requirement upon him to testify or call witnesses on his behalf in order to be entitled to a self-defense instruction; and (3) overlooked the specific facts he identified in support of his claim of being entitled a self-defense instruction.

Initially, since the elements of self-defense are critically important to any analysis of a self-defense issue, it is wholly unclear how this Court could have shifted the burden of proof to Plumer merely by identifying and acknowledging those elements. Indeed, Plumer himself identified the same elements of self-defense in his own brief, and the appellate decision he relied upon when doing so expressly characterized them as “elements.” See State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998) (stating “self-defense is comprised of four *elements*” (emphasis added)). Beyond that, this Court—in resolving Plumer’s appeal—recognized a jury instruction on self-defense must be given “[i]f there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense[.]” (emphasis added and citation and internal quotations omitted). Once again, Plumer acknowledged the existence of that same principle in his appellate brief as part of his own argument on the issue. See State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000) (“ ‘If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge’s refusal to do so is reversible error.’ ” (quoting State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984))). Under such circumstances, it is clear this Court understood and applied the correct non-burden-shifting analysis for evaluating whether a self-defense instruction should have been presented, and any suggestion to the contrary is lacking in merit. See Rule 220(b)(2), SCACR (“The Court of Appeals need not address a point which is manifestly without merit.”).

Similarly, this Court in no way “impos[ed] a requirement” on Plumer to testify or affirmatively call witnesses in order to be entitled to a self-defense instruction simply by noting in its opinion Plumer did not testify. Instead, this Court simply identified a fact that was: (1) indisputably true; and (2) relevant to the matter of whether any evidence existed from which the jury could have inferred Plumer acted in self-defense. See State v. Williams, 427 S.C. 246, 249, 830 S.E.2d 904, 906 (2019) (instructing South Carolina law on self-defense “places the burden on the defendant to produce some evidence to support the existence of each element”); see also State v. Soukup, 656 N.W.2d 424, 432 (Minn. Ct. App. 2003) (“[Soukup] did not testify, nor did he present other witnesses on his behalf. Though a defendant may still raise self-defense without testifying, the lack of testimony makes it difficult for a defendant to meet the burden of production necessary to go forward with a claim of self-defense.” (citations omitted)); cf. State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 2008) (“Conversely, Breeze did not contradict [the officer]’s testimony with respect to the issue of whether the statement was voluntary. . . . Faced with [the officer]’s undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement. Based on [the officer]’s testimony, we cannot conclude the trial court’s ruling is unsupported by any evidence.”). After that, this Court properly conducted the applicable analysis for determining whether a self-defense jury instruction was warranted and correctly found the trial judge did not err by refusing to instruct the jury on self-defense *because there was no evidence in the record* from which the jury could have inferred Plumer was acting in self-defense. See Williams, 427 S.C. at 249, 830 S.E.2d at 905-906 (“If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury.”). Thus, this Court faithfully adhered to South Carolina law in addressing the self-defense issue on appeal and did *not* impose any improper

requirements or burdens upon Plumer when doing so.

Likewise, this Court did *not* overlook the specific facts Plumer identified in support of his claim related to the trial judge's failure to instruct the jury on self-defense. To the contrary, this Court both thoroughly analyzed each of the facts identified by Plumer and explained why they did not support an inference Plumer was acting in self-defense at the time of the shooting, and its analysis of those facts was entirely correct. See State v. Williams, 427 S.C. at 249, 830 S.E.2d at 905-906 (2019) ("If there is no evidence to support the existence of any one element, the trial court must not charge self-defense to the jury."); Slater, 373 S.C. at 69, 644 S.E.2d at 52 ("A self-defense charge is not required unless it is supported by the evidence."). Therefore, rehearing could not be—and is not—warranted on the basis this Court overlooked facts that it clearly did not actually overlook.

Turning to the second question raised in his petition, Plumer appears to contend this Court somehow erred by failing to conclude the trial judge violated his right to self-representation. In support of that apparent contention, Plumer acknowledges this Court found he never clearly asserted that particular right during the trial. Following that, Plumer simply repeats a portion of the argument section of his appellate brief without ever specifically: (1) disputing the accuracy of this Court's finding concerning his failure to invoke his right to self-representation; (2) identifying anything to establish he actually desired to represent himself at any point during trial; (3) explaining how his right to self-representation could have been violated without it being asserted; or (4) citing to any authority from South Carolina or anywhere else that would support a conclusion a trial judge must discuss the dangers and disadvantages of self-representation with a criminal defendant who makes a mid-trial request for defense counsel to be relieved and replaced with new counsel.

Because Plumer has not actually contested in his petition for rehearing the accuracy of this Court’s finding he did clearly invoke his right to self-representation during trial, that dispositive finding—which was indisputably correct—has now become the law of the case regardless of whether it was right or wrong. See State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (instructing an unappealed ruling—regardless of whether it is right or wrong—becomes the law of the case); State v. Mazique, 419 S.C. 282, 295, 797 S.E.2d 730, 737 (Ct. App. 2016) (explaining “the request to proceed pro se must be clearly asserted by the defendant” in order to be valid). However, even assuming the law-of-the-case doctrine was somehow not applicable, Plumer’s mid-trial request to relieve his defense counsel was simply not a valid or timely assertion of his right to self-representation, and, therefore, this Court’s determination Plumer’s right to self-representation was not violated was entirely correct on the merits. See City of Columbia v. Assa’ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017) (instructing the assertion of the right to self-representation must be clear and unequivocal in order to be effective); State v. Winkler, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) (recognizing the assertion of the right to self-representation must be timely made *prior to trial* in order for the procedure articulated in Faretta v. California, 422 U.S. 806 (1975), to be mandated).

Lastly, turning to the third and final question raised in his petition, Plumer contends this Court “overlooked ruling on [his] motion for a remand” when it rejected his appellate challenge to the trial judge’s decision not to qualify Dr. Robert Bennett, an intended witness for the defense, as an expert in gunshot residue. As support for that contention, Plumer merely points to a portion of his appellate brief in which he argued either: (1) he should be granted a new trial; or (2) his case should be remanded “for a hearing to determine whether Dr. Bennett’s testimony [wa]s admissible under the third prong of Watson.”

Importantly though, Plumer appears to himself overlook the likely reason this Court did not explicitly address his remand request in its decision. Specifically, during oral argument before this Court, Plumer’s appellate counsel asserted the “best thing” he could probably hope for concerning the issue with Dr. Bennett’s testimony was for a remand to be granted. (State v. Plumer Oral Argument Recording, 33:40 to 33:46). In response to that assertion, this Court quickly pointed out a remand would “reward someone for not proffering something” while noting defense counsel did, in fact, have an opportunity to proffer Dr. Bennett’s testimony during trial. (State v. Plumer Oral Argument Recording, 33:47 to 33:54). At that point, Plumer’s appellate counsel responded: “I would rather just leave that issue for post-conviction.” (State v. Plumer Oral Argument Recording, 33:54 to 33:58). Based on that response, the request for a remand was abandoned during oral argument, and, as a result, there was no longer a need for this Court to address that particular matter on appeal. Cf. State v. Oglesby, 384 S.C. 289, 294, 681 S.E.2d 620, 623 (Ct. App. 2009) (“Two other issues were raised by Oglesby in his brief but were abandoned at oral arguments; thus, we do not address them.”).

However, even ignoring Plumer’s abandonment of the matter during oral argument, a remand was—and is—unwarranted in Plumer’s case because defense counsel had a clear opportunity to proffer Dr. Bennett’s testimony if he wished to do so during trial, and he failed to avail himself of that opportunity. See United States v. Simons, 206 F.3d 392, 399, n. 11 (4th Cir. 2000) (explaining a remand “for further factual development” would *not* be appropriate when an issue was clearly raised in the original proceeding and there was already an opportunity to introduce evidence on the matter). As a result, this Court correctly resolved Plumer’s case by applying our state’s well-established issue preservation law and declining to unjustly reward him with a remand purely so he could have yet another opportunity to do something he already had a

full and fair opportunity to do during trial.¹ See State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984) (explaining “[f]ailure to make an offer of proof *precludes the appellant from raising the issue on appeal*” (emphasis added)); see also State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) (“The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just.”); cf. Lewis v. Lewis, 392 S.C. 381, 393, n. 11, 709 S.E.2d 650, 656, n. 11 (2011) (“The court of appeals’ remand instructions invited the family court to ‘accept additional evidence . . . or order supplemental information on its own motion.’ Given Respondent’s incomplete presentation at trial, it would be fundamentally unfair to Petitioner to give Respondent a second bite at the apple.”).

Accordingly, for all those reasons coupled with the arguments raised in the Final Brief of Respondent and during oral argument before this Court, this Court should deny Plumer’s petition for rehearing and uphold its decision correctly affirming Plumer’s convictions. However, for the reasons urged in the State’s petition for rehearing, the State respectfully submits this Court should reconsider the matter pursuant to Rule 221(a) of the South Carolina Appellate Court

¹ Notably, in his appellate brief, Plumer relied upon this Court’s decision in State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), as support for his remand request. (App. Br. p. 18). In that case, Hughes’s defense counsel did everything possible during trial to obtain evidence that was being sought pursuant to Rule 612 of the South Carolina Rules of Evidence, and a remand was only ordered on appeal after those efforts were thwarted by an error of law committed by the trial judge. Id. at 343, 552 S.E.2d at 37. Contrastingly, in the case at bar, Plumer’s defense counsel did *not* take the steps necessary to preserve the issue related to Dr. Bennett’s testimony by failing to proffer it despite having an unmistakable opportunity to do so during trial. See State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) (holding an issue related to the exclusion of testimony was “waived” because the testimony was not proffered and instructing “[i]t is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been”). Therefore, since the circumstances justifying a remand in Hughes’s case were absent from Plumer’s, this Court’s earlier decision in Hughes does not in any way support Plumer’s request for a remand.

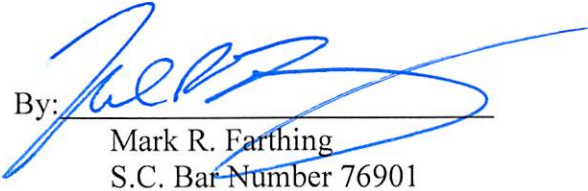
Rules, vacate its prior opinion, strike its reference to “criminal equity,” and issue a new opinion correctly affirming Plumer’s convictions *and* sentences, including his unobjected-to five-year sentence for possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

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By: 

Mark R. Farthing
S.C. Bar Number 76901

April 19, 2021

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Apr 19 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

E. Charles Grose, Jr., Esq.
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I further certify all parties required by Rule to be served have been served.
This 19th day of April, 2021.



SALLY ELLISON
Legal Assistant
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From: [Sally Ellison](#)
To: [Charles Grose](#)
Cc: [Mark Farthing](#); [William Blitch](#); [Victim Services](#); [Sally Ellison](#)
Subject: Emailing: Plumer.Return to Pet for Rehearing (02544587xD2C78).PDF
Date: Monday, April 19, 2021 4:43:04 PM
Attachments: [Plumer.Return to Pet for Rehearing \(02544587xD2C78\).pdf](#)

Good Afternoon:

Attached for service upon you this date is the State's Return to Appellant's Petition for Rehearing in the above appeal. This Petition will be filed today with the Court of Appeals through AIS One Drive. Please confirm receipt of this email.

Thank you.

Sally Ellison
Legal Assistant
SC Attorney General's Office
1000 Assembly Street
Columbia, South Carolina 29201

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

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SC Court of Appeals

The State,..... Respondent,

v.

ONTAVIOUS DERENTA PLUMER

..... Appellant.

FINAL BRIEF OF APPELLANT

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QUESTION'S PRESENTED

Question 1

Did the trial judge err as a matter of law by denying Ontavious Plumer's request for a jury instruction on self-defense when the jurors acquitted Mr. Plumer of armed robbery and direct and circumstantial evidence established the elements of self-defense?

Question 2

Did the trial judge err as a matter of law by denying Ontavious Plumer's motion to relieve his trial counsel from representation and allowing Mr. Plumer to represent himself?

Question 3

Did the trial judge err as a matter of law when by not qualifying Dr. Robert Bennett as expert in gunshot residue when the record establishes the witness has the necessary education, training and experience, and the exclusion of this expert testimony denied Ontavious Plumer his constitutional right to present a complete defense?

Question 4

Did the trial judge err as a matter of law by sentencing Ontavious Plumer to five years imprisonment when S.C. Code Ann. § 16-23-490(A) expressly prohibits imposing an additional sentence with the court imposed a life sentence without the possibility of parole?

STATEMENT OF THE CASE

For an incident occurring on October 11, 2015, the State charged the appellant, Ontavious Plumer, with armed robbery, attempted murder, and possession of a firearm during the commission of a violent crime. The Greenwood County Grand Jury returned “true bill” indictments for these charges on July 8, 2016. R. 438-42.

On or about December 21, 2016, the State served its notice of intent to seek life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45. R. 444.

From February 6 – 8, 2017, the State tried Mr. Plumer before the Honorable Edward Miller and a jury. Elizabeth White and Josh Thomas represented the State. William Yarborough represented Mr. Plumer. The jurors convicted Mr. Plumer of attempted murder and possession of a weapon during the commission of a violent crime. The jurors acquitted Mr. Plumer of armed robbery. Judge Miller sentenced Mr. Plumer to life imprisonment without the possibility of parole for attempted murder and five years for possession of a weapon during the commission of a violent crime. The sentences are concurrent. R. 446-47.

This appeal follows.

STATEMENT OF FACTS

Christopher "Jock" Maggiacomo arranged a drug deal between Oshamar Wells and Jamel Brownlee. On October 11, 2015, Mr. Wells met Mr. Brownlee and Ontavious Plumer at the Mr. Chip convenience store on South Main Street in Greenwood, South Carolina. Mr. Brownlee and Mr. Plumer followed Mr. Wells to Kema Moore's house on the west side of Greenwood. Ms. Moore is Mr. Wells' cousin. When they arrived at Ms. Moore's house, the three men sat at the kitchen table. In a cabinet next to the table, only an arm's reach away, Mr. Wells had a handgun he planned to use during the drug deal. The three men "smoked a couple of [marijuana] blunts," as Mr. Wells was letting his buyers try the product. Mr. Wells testified the two men expected him to sell them a pound of marijuana for \$3,600.00. R. 13-34, 71-72.

After smoking the blunts, Mr. Wells claims, "instead of pulling out the money," Mr. Plumer pulled out a gun. Mr. Wells "instantly" grabbed a 40-caliber handgun from the kitchen cabinet.¹ According to Mr. Wells, "everything happened so fast" it was a "blur." Mr. Wells testified, "I think I was actually getting hit when I reached to grab the gun out of the cabinet." Mr. Wells fell to the floor. Mr. Plumer "was returning fire" and "stepping back out of the door."² Mr. Wells fired his gun five or six times. R. 20-31, 44-46; State's Exhibits 1, 2.

¹ This gun belongs to Mr. Wells' mother, Wenona Wells. On direct examination, Mr. Wells claimed he saw his mother place the gun in the kitchen cabinet earlier in the day. On cross-examination, Mr. Wells acknowledged he planned for the gun to be in the kitchen cabinet in case he needed it during the drug deal. Mr. Wells is not allowed to possess a gun because of his criminal record. R. 21-22, 50, 68, 76-79, 81-83.

² Mr. Plumer went the Greenville Memorial Hospital in Greenville, South Carolina for treatment of his gunshot wounds. Deputy Andrew Reese of the Greenville

Mr. Wells called an ambulance, his aunt, and his mother, Wenona Wells. Ms. Wells arrived before the ambulance and law enforcement. One of Ms. Wells' grandchildren found the handgun Mr. Wells used to shoot Mr. Plumer. Ms. Wells put that handgun in her purse. She later put it in the trunk of her car, where it remained until her son asked her to deliver it to Investigator Wesley McClinton a couple of days later. R. 74-87, 233-34, State's Exhibit 10.

Officer Kerry Cooper of the Greenwood Police Department was the first law enforcement officer to arrive. He tried to get a description of possible suspects from Mr. Wells to provide to other patrol officers in the area. Mr. Wells said he was robbed by "two black males and that one was wearing a white tee shirt," but he did not provide any other specifics. Mr. Wells denied having a firearm, and he did not tell Officer Cooper about the drug deal. EMS arrived and transported Mr. Wells to the hospital. Officer Cooper secured the scene to be processed for evidence. R. 87-93, 100-04.

At the hospital, Mr. Wells told Greenwood Police Department Officer Patrick Durkin that two black males entered the residence, "told him to give it up," and began shooting. Mr. Wells continued to conceal his culpability in the confrontation. Officer Durkin photographed Mr. Wells' injuries and collected gunshot residue samples. R. 228-45.

Dr. Ricky Ladd, an emergency room physician at Self Regional Hospital, treated Mr. Wells' gunshot wounds. Mr. Wells had three entrance wounds and three exit wounds. Mr. Wells had two fractures in his hip and leg. A bullet transacted the femur neck. The second fracture below that area could have been caused by a bullet or by a fall.

County Sheriff's Office interviewed Mr. Plumer, who said he had been shot at a location in Greenville County. R. 107-11.

Dr. Ladd explained the bullet traveling through the femoral neck, which is a weight bearing bone, would have caused Mr. Wells to fall down immediately. R. 282-97.

Investigators located a black Mercedes Benz at Mr. Moore's residence. According to Department of Motor Vehicle records, the license tag for the black Mercedes Benz is registered to Walter Plumer of Starr, South Carolina, which is in Anderson County. Investigators Wesley McClinton and Mike Dixon spoke to Walter Plumer at this home, and he provided a written statement. Walter Plumer is Ontavious Plumer's grandfather. Walter Plumer initially denied knowing who was driving his Mercedes Benz and reported it stolen. He later acknowledged allowing his grandson, Ontavious Plumer, drive his Mercedes Benz on October 11, 2015. Mr. Plumer acknowledged being at Ms. Moore's residence and being shot. R. 128-30, 174-77, 181-83, 194-95.

Investigators Wesley McClinton and William Kay interviewed Mr. Wells at Self Regional Hospital in Greenwood. By his own admission, Mr. Wells did not tell the investigators the truth because he was afraid of getting into trouble. Mr. Wells initially told law enforcement "he was sitting at the kitchen table and two random guys came in the front door and tried to rob him, and that they ended up shooting him when he didn't have anything." Mr. Wells told law enforcement about the drug deal only after law enforcement confronted him about finding the Mercedes Benz driven by Mr. Plumer. Investigator McClinton testified about Mr. Wells' second statement:

The story was a drug deal was set up. He had met the two individuals at Mr. Chip. They followed him to the house on [redacted]. They were sitting at the table smoking marijuana and talking about the marijuana. [Mr. Wells] produced the marijuana and looked to who he said was Mr. Plumer to get the money and instead of pulling out the money Mr. Plumer pulled out a handgun and began firing at him.

R. 130-32.³ Investigator Kay, however, recalled Mr. Wells admitting he reached for his gun before Mr. Plumer started shooting. Investigator Kay testified Mr. Wells said “he was meeting two guys to sell them a quantity of marijuana and that they ended up trying to rob him, and during the robbery he reached for a gun to defen[d] himself and they began shooting and he returned fire.”⁴ Mr. Wells ultimately identified Mr. Plumer in a six-person photograph lineup. R. 26-29, 59-60, 115-19, 132-33; State’s Exhibit 8.

Investigator Mike Dixon of the Greenwood Police Department obtained a search warrant to process Kema Moore’s house. R. 178-80. Kenya Griffin, who is the crime scene and evidence technician for the Greenwood Police Department, processed Ms. Moore’s house for evidence. After photographing the residence, Officer Griffin collected numerous shell casings and projectiles. Officer Griffin also obtained a DNA sample from Mr. Plumer. Additionally, Officer Kerry collected a projectile from a residence across the street and provided it to Officer Griffin. Investigator McClinton collected a blood sample from the sidewalk in front of the residence and provided it to Sargent Griffin. Sargent Griffin transferred all of this evidence to the South Carolina Law Enforcement Division (“SLED”). R. 164-65, 200-215.

Tracey Thrower, a firearms examiner at SLED, determined at least two firearms were involved in the confrontation. Ten cartridge cases and two projectiles were fired by the handgun used by Mr. Wells. Agent Thrower determined that two projectiles were not

³ At some point, Mr. Wells told law enforcement that both Mr. Plumer and Mr. Brownlee “produced handguns and commenced shooting him striking him numerous times.” R. 136.

⁴ Mr. Plumer wanted to play Mr. Wells’ recorded statements for the jurors, but the trial judge sustained the solicitor’s objection. R. 154-56.

fired by Mr. Wells gun, but the examination could not determine whether these two projectiles were fired by the same gun. Agent Thrower determined six cartridge casings were fired by a gun other than the one fired by Mr. Wells. These six cartridge casings were fired by the same gun. Agent Thrower's examined an additional projectile but the result was inconclusive whether it was fired by Mr. Wells gun or another gun. R. 252-69.

Jennifer Clayton, a DNA analyst at SLED, determined the blood collected by Investigator McClinton from the sidewalk in front of Ms. Moore's residence matched the know DNA standard from Mr. Plumer. R. 269-75.

Megan Fletcher, a forensic scientist with SLED with training and experience analyzing gunshot residue, testified the Solicitor's Office requested SLED *not* conduct an analysis of the gunshot residue kit collected from Mr. Wells. She also testified that SLED never received the gunshot residue kit collected from Mr. Plumer. R. 236-52. The trial court judge sustained the State's objection to Dr. Robert Bennett testifying as an independent gunshot residue analyst. R. 356-66.

STANDARD OF REVIEW

“In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous.” *State v. McBride*, 416 S.C. 379, 385, 786 S.E.2d 435, 438 (Ct. App. 2016). “Thus, on review, the court is limited to determining whether the trial court abused its discretion.” *Id.* “An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law.” *Id.*

ARGUMENTS

Question 1

Did the trial judge err as a matter of law by denying Ontavious Plumer's request for a jury instruction on self-defense when the jurors acquitted Mr. Plumer of armed robbery and direct and circumstantial evidence established the elements of self-defense?

Mr. Plumer requested the trial judge instruct the jurors about the law of self-defense, but the trial judge declined. R. 371-73. "The law to be charged to the jury is determined by the evidence presented at trial. . . . , [and] a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). *And see State v. Blurton*, 352 S.C. 203, 207, 573 S.E.2d 802, 804 (2002) ("The evidence presented at trial determines the charged jury instruction. The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." (internal citations and quotations omitted)). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." *State v. Day*, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000) (quoting *State v. Muller*, 282 S.C. 10, 316 S.E.2d 409 (1984)). "[W]hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt. *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (citing *State v. Wiggins*, 330 S.C. 538, 544-45, 500 S.E.2d 489, 492-93 (1998)). A person is justified in using deadly force in self-defense 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 reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; 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. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998) (citing *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

Seven facts establish that a self-defense instruction was required in this case. First, Mr. Wells admitted he was prepared to use his handgun during the drug transaction. Second, Mr. Wells placed himself in a location where he could stand up and his gun would be within an arm's reach. Third, Investigator Kay recalls Mr. Wells saying he reached for his gun before any shots were fired by Mr. Plumer. Fourth, according to Dr. Ladd, Mr. Wells would have fallen down when a bullet broke his femoral neck, meaning Mr. Wells had stood up and retrieved his handgun prior to that shot that broke that bone was fired. Fifth, Mr. Wells and his mother conspired to hide the gun and cover up his culpability in this incident, which is circumstantial evidence of a consciousness of guilt. *See, e.g., State v. Pace*, 337 S.C. 407, 415, 523 S.E.2d 466, 470 (Ct. App. 1999) ("As a general rule, any act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt."). Sixth, Mr. Wells testimony provides evidence Mr. Plumer retreated from the confrontation. Seventh, the jurors acquitted Mr. Plumer of armed robbery, thereby removing the prosecution's motive for Mr. Plumer to commit attempted murder, including the inference of malice arising from shooting someone during the commission of another crime. *See, e.g., Gore v. Leeke*, 261 S.C. 308,

315, 199 S.E.2d 755, 757 (1973) (“The law itself implies the malice from proof of the felony.”).

Based the facts presented in this case, reasonable jurors could infer that Mr. Wells was the first person to introduce a firearm into the encounter, meaning Mr. Wells—not Mr. Plumer—was responsible for bringing on the difficulty. Once Mr. Wells introduced his handgun into the encounter, Mr. Plumer and Mr. Brownlee actually were in imminent danger of sustaining serious bodily harm or death. A reasonable person would have entertained such a belief. Under the circumstances, Mr. Plumer and Mr. Brownlee were justified in returning fire. Finally, it is not disputed that Mr. Plumer and Mr. Brownlee retreated from the incident location.

The trial judge seemingly believed Mr. Plumer was guilty of attempted murder and armed robbery and involved himself in plea negotiations.⁵ When Mr. Plumer wanted to continue his trial, the trial judge scolded Mr. Plumer, “Sometimes pride can be a real dangerous asset to have.” R. 319. From the record it is not clear whether the trial judge wanted Mr. Plumer to plead guilty because of the trial judge’s personal beliefs about Mr.

⁵ Our Supreme Court has adopted the American Bar Association’s Criminal Justice Standard 13-3.3, Guilty Pleas, Responsibility of the Trial Judge. *Harden v. State*, 276 S.C. 249, 250, 277 S.E.2d 692 (1981); *Medlin v. State*, 276 S.C. 540, 280 S.E.2d 648 (1981). Under this rule, the trial judge may participate in plea negotiations, but “the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.” *Medlin*, 276 S.C. at 542, 280 S.E.2d at 649. “The Standard is designed to prevent both the fact and the appearance of the trial judge’s becoming an advocate against the desires of the defendant or the State of a particular resolution.” *Harden*, 276 S.C. at 257, 277 S.E.2d at 695. “Due to the force and majesty of the judiciary, a trial court’s participation in the plea negotiation may skew the defendant’s decision-making and render the plea involuntary because a defendant may disregard proper considerations and waive rights based solely on the trial court’s stated inclination as to sentence.” *McDaniel v. State*, 271 Ga. 552, 553, 522 S.E.2d 648, 650 (1999).

Plumer's guilt or out of a "paternalistic" desire to protect Mr. Plumer from the mandatory life without parole sentence.⁶ R. 312. Regardless of his intentions, the trial judge never considered the possibility that Mr. Wells was responsible for the difficulty, and Mr. Plumer was innocent of armed robbery. *See, e.g. State v. Niles*, 400 S.C. 527, 532, 735 S.E.2d 240, 243 (Ct. App. 2012) ("The circuit court charged the jury on self-defense. . . . reasoning that 'either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting ... [and] killed the victim during the commission of an armed robbery.'") *reversed on other grounds by State v. Niles*, 412 S.C. 515, 772 S.E.2d 877 (2015). This Court, accordingly, should order a new trial.

⁶ *See, e.g., State v. Rivera*, 402 S.C. 225, 243, 741 S.E.2d 694, 703 (2013) ("It is apparent the trial court, like defense counsel, was operating under the paternalistic belief that it wanted to protect Appellant from potentially undermining his own defense.").

Question 2

Did the trial judge err as a matter of law by denying Ontavious Plumer's motion to relieve his trial counsel from representation and allowing Mr. Plumer to represent himself?

At the close of the second day of trial, the trial judge informed Mr. Plumer, "[T]he consequences of life without parole are just hard to enumerate." At the beginning of the third day of trial, Mr. Plumer moved the trial judge to relieve his trial counsel. Mr. Plumer explained the last offer from the state was for a term of imprisonment of seven years. Trial counsel had informed Mr. Plumer he "shouldn't worry about the life sentence because if I get found guilty of attempted murder that they was going to give me a lot of time anyway." Mr. Plumer further explained he did not understand that the life sentence was mandatory until the trial judge informed him the prior day. The colloquy between the trial judge, prosecutor, and trial counsel, revealed trial counsel's failure to communicate clearly with Mr. Plumer. The following exchange took place between Mr. Plumer and the trial judge:

THE COURT: "Do you want to go forward with this trial?"

THE DEFENDANT: I want to get me another lawyer.

THE COURT: No, that ain't happening. The jury is sworn. We are in the middle of your case. I'm not relieving him and we're not stopping this case so you can get a new lawyer. You want to go forward with this trial?

THE DEFENDANT: Yes, sir. I don't have no choice.

THE COURT: You do have a choice and you know what it is.

THE DEFENDANT: *I have a constitutional right to relieve my lawyer when I want to relieve him*, but I guess that don't – that ain't work like that down here.

THE COURT: So you want to go foreward with this? You know what your options are.

THE DEFENDANT: I don't have a choice.

THE COURT: You know what the options are that were discussed yesterday in the bench conference. The State would be willing to lift the life without parole notice in return for a guilty plea, so – and you – but you want to go forward to the jury; is that right?

THE DEFENDANT: I don't have a choice.

THE COURT: You do have a choice, and it's your choice and yours alone. You said you wanted to talk to your family.

THE DEFENDANT: I talked to more than my family though.

THE COURT: Okay. So you want to go forward; is that right?

THE DEFENDANT: Yes, sir. I ain't got no choice. I can't –

THE COURT: Stand up when you talk to me.

THE DEFENDANT: Obviously the Court don't believe nothing I'm saying anyway about me being able to get – my disability. They ain't believing nothing about that. You're going to believe what my lawyer said about it. But it's my life on the line and I know what was told to me – and I know how I took it and I understood. So, I mean, I don't have no choice but to go forward with it. And my constitutional rights being violated the whole time I've been down here. So let's go on with the trial.

R. 311-18 (emphasis added).

“A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions.” *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010)). The trial judge should have treated Mr. Plumer's insistence to relieve his trial counsel as a motion to represent himself. Mr. Plumer, in fact, correctly stated he has the constitutional right to relieve his trial counsel at any time. *Faretta v. California*, 422 U.S. 806 (1975).

Here, the attorney-client relationship had deteriorated because of the lack of communication. The trial judge incorrectly told Mr. Plumer his only options were to plead guilty or continue the trial. Mr. Plumer correctly informed the trial judge his only choice as to continue trial. Had Mr. Plumer allowed the trial judge to persuade him to plead guilty, then the jurors would not have acquitted Mr. Plumer of armed robbery, and this issue—and the other issues raised in the brief—would not have been preserved for appeal. Continuing the trial presented the trial judge two options. First, trial counsel would continue representing Mr. Plumer through the conclusion of the trial. Second, after giving Mr. Plumer his *Faretta* warnings, the trial could have continued with Mr. Plumer representing himself. The trial judge chose the former option, which denied Mr. Plumer his Sixth Amendment right to represent himself.

This Court, accordingly, should order a new trial.

Question 3

Did the trial judge err as a matter of law when by not qualifying Dr. Robert Bennett as expert in gunshot residue when the record establishes the witness has the necessary education, training and experience, and the exclusion of this expert testimony denied Ontavious Plumer his constitutional right to present a complete defense?

Greenville County Sheriff Deputy Spurgeon collected gunshot residue evidence from Mr. Plumer. R. 113-15. Wes Smith, legal coordinator for the Greenville County Sheriff's Office, testified this evidence remained secure in the evidence locker at the Greenville County Sheriff's Office until released to Detective McClinton. R. 319-28; Defendant's Exhibits 3, 4, 5. Detective McClinton transferred Mr. Plumer's gunshot residue kit to Joseph Best, who is a private investigator retained by Mr. Plumer's trial counsel. Mr. Best transferred this evidence to Dr. Robert Bennett. R. 348-55.

Dr. Robert Bennett is a forensic scientist. He has a pharmacy degree and Ph.D in drug sciences and toxicology from the Medical University of South Carolina. He has additional training certifications from the United States Department of Justice involving ballistics, including gunshot residue analysis. "For the past 20 years [gunshot residue analysis] has been a core study" for Dr. Bennett. He works with JR Regrove, which is "an accredited facility" that provides gunshot residue analysis to over 400 laboratories in the United States and Europe. Trial courts have qualified Dr. Bennett in "[m]any different areas of forensic scien[ce]." The Solicitor objected to Dr. Bennett's qualification as an expert because he was not the technician that actually conducted the test. The trial judge sustained the objection." R. 356-65.

In *Watson v. Ford Motor Co.*, our Supreme Court adopted a three-part test for determining the admissibility of expert testimony. "First, the trial court must find that the

subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (citing *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009)). Second, “while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” *Id.* (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596 (1997)). Third, “the trial court must evaluate the substance of the testimony and determine whether it is reliable.” *Id.* (citing *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)). *See also* Rule 702, SCRE.

Here, gunshot residue analysis is a subject matter where expert testimony assists jurors. *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (granting post-conviction relief because trial counsel did not retain independent expert in gunshot residue analysis). Dr. Bennett has a Justice Department certification in gunshot residue analysis and gunshot residue analysis has been a “core study” of his for 20 years. The first two prongs of *Watson*, therefore, are satisfied. The trial judge denied Mr. Plumer’s request for Dr. Bennett to proffer “the results of the test,” which goes to the subject matter of the testimony under the third prong of *Watson*. R. 364. The exclusion of this evidence prejudiced Mr. Plumer by denying his constitutional right right to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 319, 126 S. Ct. 1727, 1728, 164 L. Ed. 2d 503 (2006) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”).

The State might argue—as it did at trial—that Dr. Bennett not being the technician that ran the machinery is significant. Expert witnesses, however, are allowed to testify based on “facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing” when those facts and data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Rule 703, SCRE. *And see Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000) (“An expert witness may state an opinion based on facts not within his firsthand knowledge.”).

This Court, accordingly, should order a new trial. In the alternative, this Court should remand this case for a hearing to determine whether Dr. Bennett’s testimony is admissible under the third prong of *Watson*. *See, e.g., State v. Hughes*, 346 S.C. 339, 343, 552 S.E.2d 35, 37 (Ct. App. 2001) (“remand[ed] for an evidentiary hearing to determine whether Hughes was entitled to access to the notes as outlined in Rule 612,” SCRE.). If the trial court find Dr. Bennett’s testimony admissible and its exclusion impaired Mr. Plumer’s defense, then the trial court should be allowed to grant a new trial. *Hughes*, 346 S.C. at 343-44, 552 S.E.2d at 37.

Question 4

Did the trial judge err as a matter of law by sentencing Ontavious Plumer to five years imprisonment when S.C. Code Ann. § 16-23-490(A) expressly prohibits imposing an additional sentence with the court imposed a life sentence without the possibility of parole?

S.C. Code Ann. § 16-23-490(A) provides:

If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

(emphasis added).

S.C. Code Ann. § 16-1-60, of course, classifies attempted murder as a violent crime. The trial judge sentenced Mr. Plumer to life imprisonment without the possibility of parole for attempted murder. The additional five-year sentence for violating § 16-23-490 is prohibited by the express terms of the statute. This Court, accordingly, should vacate that sentence. *See, e.g., State v. Palmer*, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016) (sentence for possession of a weapon during the commission of a violent crime was inapplicable, in light of life imprisonment without parole sentence for murder charge).

CONCLUSION

For the forgoing reasons, this Court should reverse Ontavious Plumer's convictions and sentences and remand this case for a new trial.

In the alternative, this Court should remand this case for an evidentiary hearing to determine whether Dr. Bennett's expert testimony was admissible pursuant to the third prong of *Watson*. If the trial court on remand determines Dr. Bennett's testimony stratifies the third prong of *Watson*, then the trial court should order a new trial. See *Hughes, supra*.

In any event, this Court should vacate the sentence for a violation of section 16-23-490.

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November 13, 2018
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

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The State,..... Respondent,

v.

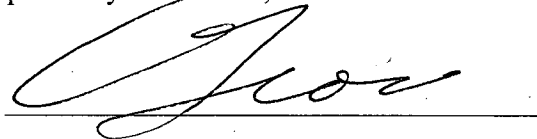
Ontavious Plumer, ... Appellant.

Rule 211, SCACR Certification

This Final Brief of Appellant complies with Rule 211(b), SCACR.

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November 13, 2018
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ORIGINAL

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ONTAVIOUS DERENTA PLUMER,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly declined to instruct the jury on self-defense because the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Appellant unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction.

II.

The trial judge neither erred in any manner nor violated Appellant's constitutional right to self-representation by denying Appellant's mid-trial request to relieve defense counsel in order to obtain "another lawyer" because that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation since it was a request to replace defense counsel with a different attorney as opposed to a request for Appellant to be permitted to represent himself.

III.

Any issue with the trial judge's exclusion of the testimony of a purported expert witness on gunshot residue was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of the witness's intended testimony. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by refusing to qualify the witness as an expert so the witness could testify about the results of a gunshot residue analysis he did not personally perform because that testimony would have simply constituted improper and inadmissible hearsay disguised as an expert opinion.

IV.

Any issue with Appellant's five-year sentence for possession of a firearm during the commission of a violent crime was not properly preserved for appellate review because defense counsel did not raise any objections to Appellant's sentence during trial.

STATEMENT OF THE CASE

In December of 2015, Appellant Ontavious Derenta Plumer was arrested following an investigation into a shooting that occurred a few months earlier in Greenwood, South Carolina. In July of 2016, the Greenwood County Grand Jury indicted Appellant for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior conviction for a "most serious" offense. On February 6, 2017, a jury trial was commenced in the Greenwood County Court of General Sessions with the Honorable Edward W. Miller, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant of attempted murder and possession of a firearm during the commission of a violent crime and acquitted him of armed robbery. Following the verdict, the trial judge sentenced Appellant to terms of imprisonment of life without parole for attempted murder and five years for possession of a weapon during the commission of a violent crime. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the evening of October 11, 2015, Oshamar Wells (“Victim”), who was making money at that time by selling marijuana, met up with Appellant and another man identified as “Mel” at a pre-arranged location so he could sell them one pound of marijuana, which was worth roughly \$3,600.¹ (R. pp. 13-14; p. 18; p. 20; pp. 31-32; pp. 40-41; pp. 72-73). After meeting up with the men, Victim led them to his cousin’s residence, which was located on Spring Woods Trail in Greenwood, South Carolina, in order to complete the transaction. (R. pp. 15-16). Once there, they parked their vehicles outside, entered the residence, sat down at the kitchen table, and proceeded to smoke “a couple of blunts” to test the “product.” (R. pp. 17-20). After doing so, Victim placed a bag containing the agreed-upon pound of marijuana onto the table and waited for the men to produce his payment for it. (R. pp. 18-20; p. 132). However, instead of presenting the money, Appellant suddenly pulled out a gun and began firing it at Victim while “Mel” grabbed the bag of marijuana and fled from the home. (R. pp. 20-21; p. 43; pp. 66-67). In response, Victim quickly turned to retrieve his mother’s holstered gun from a nearby cabinet, and, as he was doing so, he was hit by bullets in his back, buttocks, and legs. (R. pp. 20-24; p. 29; p. 44; p. 50; pp. 66-67; p. 70; p. 72; pp. 81-82). Victim then collapsed to the floor, but he was able to fire several shots in Appellant’s direction, which caused Appellant to flee from the home so rapidly he left his vehicle’s keys behind. (R. pp. 23-24; p. 41; p. 43; pp. 173-174).

Once Appellant was gone, Victim, who was gravely injured, placed a number of phone calls seeking help, including one to his mother. (R. p. 25; p. 74; p. 284). In response, Victim’s mother, Wenona Wells (“Mother”), quickly responded to the scene along with several young

¹ According to Victim, the drug deal was arranged by Christopher Maggiacomo, who also was known as “Jock.” (R. p. 33; pp. 71-72). In the past, “Jock” had served as a middleman for Victim, but “Jock” was out of town at the time of the incident. (R. pp. 33-34).

children in her care. (R. pp. 74-75). Upon arriving, Mother found Victim on the floor in the kitchen, and her grandson found her gun on the floor nearby. (R. pp. 75-76). After her grandson picked up the gun, Mother took it from him, secured it in her purse to keep it away from the children present, and later transferred it to the trunk of her vehicle. (R. pp. 75-76; p. 78; p. 84). Shortly thereafter, Officer Kerry Cooper of the Greenwood Police Department arrived at the residence and was directed inside to Victim's location. (R. pp. 88-90). At that point, Victim reported to the officer he had been shot by two unknown men who tried to rob him. (R. pp. 91-93; pp. 103-104). Victim was then rapidly transported to the hospital by emergency medical personnel who responded to the scene. (R. p. 93).

At the hospital, Dr. Ricky Ladd, a board-certified emergency room physician, provided treatment to Victim, who reported he had been shot during a home invasion. (R. p. 284). During that treatment, Dr. Ladd discovered Victim's femur was broken and Victim had sustained potentially life-threatening gunshot injuries to his buttocks, lower back, thighs, and lower leg. (R. pp. 284-285; pp. 288-289).

Once Dr. Ladd and the other medical personnel were able to stabilize Victim's condition, Officer Patrick Durkin of the Greenwood Police Department briefly spoke with Victim at the hospital, and, during that discussion, Victim reported two unknown men entered the residence and told him to "give it up" before shooting at him. (R. pp. 228-229; p. 231; p. 234). Officer Durkin then collected evidence for gunshot residue testing from Victim's hands, which had been bagged upon his arrival at the hospital.² (R. p. 232).

² Ultimately, no gunshot residue testing was conducted in regard to the evidence collected from Victim's hands due to the fact Victim eventually admitted to firing a weapon and had unquestionably been shot during the incident. (R. pp. 241-247; p. 251).

At the same time Victim was being treated at the hospital, officers and other law enforcement personnel began conducting an investigation into the shooting at the Spring Woods Trail residence. (R. pp. 94-95; pp. 124-125; pp. 178-180; p. 200). As part of that investigation, the officers checked the information connected to the vehicles present at the scene and discovered one of the vehicles was registered to an individual named Walter Plumer, who was Appellant's grandfather. (R. p. 94; p. 119; pp. 125-126; p. 128; p. 175). Additionally, the officers processed the crime scene, which was in disarray, and discovered blood spots, a number of fired and unfired bullets, multiple shell casings, numerous bullet holes, some unpackaged marijuana, a holster, and several sets of keys, including the keys to Appellant's vehicle. (R. p. 95; p. 98; pp. 101-102; p. 136; pp. 173-174; pp. 202-203; pp. 205-208; p. 210; pp. 216-217; p. 220). Upon making those discoveries, the officers collected and secured the evidence, and a number of those items were subsequently submitted for analysis, including a swab collected from blood located on the ground outside of the residence.³ (R. pp. 165-166; pp. 211-213).

Meanwhile, in the immediate aftermath of the shooting, Appellant, who had been shot in the leg during the incident, ran from the scene and was able to solicit a ride from Sameka Hawes, who was driving through the area in her car. (R. pp. 109-110; pp. 301-303; p. 306). Upon doing so, Appellant initially requested Hawes drive him to the hospital, but he quickly changed his mind and directed her to transport him to "his baby mom's house." (R. p. 303; p. 346). Hawes then drove Appellant to an apartment complex as directed. (R. p. 304). Thereafter, while at the apartment complex, Appellant sought assistance from several of his family members, and his

³ Upon analysis, Lieutenant Tracey Thrower, a firearm and toolmark examiner at SLED, determined two of the recovered bullets were fired from the gun used by Victim, two other recovered bullets were fired by a different gun, ten of the recovered shell casings were fired by the gun used by Victim, and six other shell casings were fired by a different gun. (R. p. 252; pp. 254-255; pp. 259-260; pp. 263-265). Based on those determinations, Lieutenant Thrower concluded between two and four guns were involved in the shooting. (R. p. 267).

cousin, VanJarvis Martin, ultimately picked him up and drove him to a hospital in Greenville, South Carolina, at his request. (R. p. 335; pp. 366-367). Subsequently, at the hospital, Deputy Andrew Reese of the Greenville County Sheriff's Office made contact with Appellant based on the fact Appellant had sustained a gunshot injury. (R. pp. 107-108; p. 112). During their conversation, Appellant claimed he was shot in the leg by a stranger as he was walking along a roadway in Greenville and was transported to the hospital by a random bystander after the shooting. (R. pp. 109-110). Another officer then took possession of Appellant's clothing from hospital staff and, at approximately 11:15 p.m., collected evidence from Appellant's hands for potential gunshot residue testing. (R. p. 112; p. 323; pp. 332-333).

On the following morning, Detective Wesley McClinton and Detective William Kay of the Greenwood Police Department went to speak with Victim at the hospital in Greenwood.⁴ (R. p. 26; p. 47; pp. 115-116; p. 124; p. 130; p. 166). During the conversation, Victim, who was afraid he would get in trouble if he revealed the truth about being shot during a drug transaction, falsely claimed two random men came to the residence, tried to rob him, and shot him when did not have anything for them to steal.⁵ (R. p. 27; p. 48; pp. 58-59; p. 117; p. 130).

After speaking with Victim, Detective McClinton went to speak with Appellant's grandfather at his home in Starr, South Carolina, along with Lieutenant Mike Dixon, who was

⁴ Due to the severity of his injuries, Victim was at the hospital for approximately one week following the shooting. (R. p. 26).

⁵ In addition to being involved in a drug transaction, Victim also had prior convictions for possession of marijuana and possession of marijuana with intent to distribute, so he could not lawfully possess a firearm. (R. p. 31; p. 68). Notably, prior to the shooting, Appellant had previously been convicted of attempted armed robbery. (R. p. 429; p. 444). Therefore, Appellant *also* could not lawfully possess a firearm at the time of the incident. See S.C. Code Ann. § 16-23-500(A) ("It is unlawful for a person who has been convicted of a violent crime, as defined by Section 16-1-60, that is classified as a felony offense, to possess a firearm or ammunition within this State."); see also S.C. Code Ann. § 16-1-60 (identifying attempted armed robbery as a violent crime).

the supervisor of the investigations unit at the Greenwood Police Department. (R. p. 174; p. 176; p. 178). During that conversation, Appellant's grandfather initially claimed his car had been stolen. (R. p. 177; p. 182). However, he eventually acknowledged his car was not actually stolen and, instead, was loaned to Appellant, whom he called "Too-Too." (R. p. 175; p. 177; p. 182). Appellant's grandfather further admitted he was initially untruthful because his vehicle had been "involved in something." (R. p. 183).

On the following day, Detective McClinton and Detective Kay returned to the hospital to speak with Victim again, and Victim again claimed to have been shot during an attempted robbery. (R. p. 48; pp. 60-61; p. 131; p. 167). However, after being confronted about the implausibility of his account and speaking with a family member, Victim eventually told the truth and revealed he was shot during the course of a drug transaction. (R. p. 27; p. 49; pp. 116-117; pp. 131-132; p. 157). Additionally, Victim revealed he shot at Appellant during the incident, but he consistently indicated he only fired his weapon after Appellant first began shooting. (R. pp. 116-117; p. 133; pp. 148-149; pp. 164-165). Victim also revealed his mother was currently in possession of the gun he used to defend himself, which enabled Detective McClinton to retrieve the gun from Mother a short time later. (R. pp. 78-79; p. 84; pp. 133-134). Furthermore, Detective McClinton showed a photographic lineup containing Appellant's picture to Victim, and Victim immediately identified Appellant as the person who shot him.⁶ (R. pp. 27-28; pp. 118-119; pp. 121-122; pp. 132-133).

Thereafter, the investigating officers obtained an arrest warrant for Appellant in connection to the shooting, but they were initially unable to locate him despite searching "quite a few places." (R. p. 183; pp. 345-346). However, a few months after the shooting, Appellant was

⁶ Later on during trial, Victim identified Appellant in the courtroom as the person who shot him. (R. p. 21).

finally apprehended and arrested. (R. p. 184). Following his arrest, Appellant was brought before a judge for a bond hearing, and, during the hearing, Appellant acknowledged he was present at the scene of the shooting while asserting he had also been shot. (R. pp. 184-185; p. 195). Furthermore, a sample of Appellant's DNA was collected for comparative purposes, and, upon analysis, Appellant's DNA profile was conclusively matched to the DNA profile developed from the blood recovered on the ground outside of the Spring Woods Trail residence shortly after the shooting. (R. pp. 213-214; pp. 271-276).

Subsequently, Appellant was indicted for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime, and he chose to proceed forward to trial. (R. pp. 3-4; pp. 438-443). At the conclusion of trial, the jury convicted Appellant solely of attempted murder and possession of a firearm during the commission of a violent crime. (R. p. 426). The trial judge then sentenced Appellant to an aggregate sentence of life without parole based on his prior "most serious" conviction for attempted armed robbery. (R. pp. 429-430).

ARGUMENT

I.

The trial judge properly declined to instruct the jury on self-defense because the evidence and testimony presented during trial did not establish any of the required elements of self-defense and, instead, established Appellant unlawfully shot his victim after pulling out a gun and attempting to rob him during the course of a drug transaction.

Appellant contends the trial judge committed reversible error by refusing to instruct the jury on self-defense. In support of that contention, Appellant maintains the evidence and testimony presented during trial warranted such a charge, and he points to a variety of things he alleges support an inference Victim first produced a gun during the incident.⁷ To the contrary, the testimony and evidence presented during trial established Appellant attempted to rob Victim at gunpoint and unlawfully shot him when Victim turned to retrieve his own gun to protect himself, and Appellant neither testified in his own defense nor offered anything else to refute that version of events. Therefore, because no testimony or evidence was presented to establish the required elements of self-defense, the trial judge properly declined to instruct the jury on self-defense. Appellant's convictions should be affirmed.

RELEVANT FACTS

During the course of trial, the officers and other witnesses who responded after the shooting testified about the events that followed it and the ensuing investigation that culminated

⁷ Through his appellate challenge to the trial judge's jury instructions, Appellant has raised entirely new arguments in support of a self-defense charge. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a party cannot properly argue one ground in support of an issue during trial and then argue an alternative ground on appeal). However, because those arguments were not properly presented to the trial judge during trial, they cannot appropriately be raised or considered for the first time on appeal. Cf. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding Benton's appellate challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence).").

in Appellant's arrest. (R. pp. 74-75; pp. 87-88; pp. 115-116; pp. 124-125; pp. 178-179; p. 184; p. 200; pp. 228-229; pp. 252-254; pp. 270-271). Likewise, Dr. Ladd testified about Victim's injuries after the shooting, and, during his testimony, he indicated Victim "more than likely" fell when he was shot and would not have been able to bear weight on his leg after his femur was broken. (R. p. 289; p. 291; p. 297). However, he specifically noted he had no idea which of Victim's injuries was caused first or last. (R. p. 297).

Furthermore, regarding the shooting itself, Victim consistently and unwaveringly testified Appellant produced a gun during the course of the drug transaction and shot him when he reached for his own gun, which was stored nearby for defensive purposes, solely to defend himself from Appellant's actions. (R. pp. 20-21; p. 25; pp. 43-44; p. 50; pp. 66-67; pp. 70-71). Similarly, the officers who spoke with Victim after the shooting testified about his various out-of-court accounts of the incident, and, in those accounts, Victim never indicated he reached for his own weapon at any point before Appellant and his confederate either attempted to rob him or pulled out a gun. (R. p. 103; pp. 116-117; p. 130; p. 132; pp. 148-149; pp. 164-165; p. 232).

Beyond that testimony and evidence, Appellant elected *not* to testify during trial and, thus, did not personally offer an alternative version of events that could have supported a conclusion he acted in self-defense during the incident. (R. p. 365). However, testimony was presented establishing Appellant made claims at different times after the shooting he either was shot by a stranger while walking along a roadway in an entirely different city or was present at the time of the incident and was *also* shot during it. (R. pp. 108-110; p. 195). Notably, in neither of those accounts did Appellant assert he acted in self-defense at any point in time. (R. pp. 108-110; p. 195).

At the conclusion of the evidentiary phase of trial, the trial judge asked the parties if they had any requests for jury instructions, and defense counsel responded by requesting a charge on self-defense based on the fact Appellant “may have been shot at [the] incident location.” (R. p. 369; pp. 371-372). However, the solicitor noted nothing had been presented during trial to establish Appellant acted in self-defense, and the trial judge indicated he agreed. (R. p. 372). In response, defense counsel alleged “a good bit of evidence” had been presented establishing Appellant was not the individual who fired the first shots, and the trial judge asked defense counsel to identify the specific evidence supporting that particular contention while noting the only evidence of how the shooting occurred had come from Victim. (R. p. 372). At that point, defense counsel incorrectly claimed Dr. Ladd testified Victim would not have been able to shoot when his femur was broken, and both the trial judge and the solicitor immediately responded Dr. Ladd had not, in fact, testified in that fashion. (R. p. 372). The trial judge then denied defense counsel’s request for a self-defense instruction after having been presented with nothing to justify such a charge. (R. p. 373).

Subsequently, the trial judge instructed the jury on the applicable law. (R. pp. 410-420). In doing so, the trial judge—consistent with his earlier ruling—did not present a jury instruction on self-defense.⁸ (R. pp. 410-420).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge’s jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355

⁸ At the conclusion of the trial judge’s jury instructions, defense counsel renewed all his prior motions and objections while raising no new arguments. (R. p. 420).

S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (“[J]ury charges should be examined in their entirety and not in isolation[.]”). Significantly, the appellate court will only reverse a trial judge’s decision regarding jury instructions when that decision constituted a prejudicial abuse of discretion. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.”); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) (“[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.”). Meanwhile, if the jury instructions presented were substantially correct and covered the applicable law, the trial judge’s decision will not be reversed on appeal. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (“A jury charge which is substantially correct and covers the law does not require reversal.”); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) (“A trial court’s decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.”).

ANALYSIS

In South Carolina, four elements must be present in order for the defense of self-defense to be established. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Specifically, the required elements of self-defense are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must either have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or have actually been in imminent danger; (3) if the defense is based on the belief of imminent danger, the belief must have been the same as one that would have been entertained by a reasonably prudent person of ordinary firmness and courage in the same situation; if the defendant was in actual imminent danger, the circumstances must have been such that would warrant a person of ordinary prudence, firmness, and courage to

strike the fatal blow in order to prevent serious bodily injury or loss of life; and (4) there was no other probable manner of avoiding the danger than to act as the defendant did in the situation. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). Critically, it is axiomatic all four elements of self-defense must be established in order for that defense to apply. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

When determining whether the issue of self-defense should be submitted to the jury, the trial judge must look to the evidence actually introduced during trial because “[t]he law to be charged to the jury is determined by the evidence presented at trial.” Goodson, 312 S.C. at 280, 440 S.E.2d at 372. If any evidence of self-defense is presented, the trial judge should instruct the jury on self-defense in the event such an instruction is requested. State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993); see State v. State, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) (“Upon request, a defendant is entitled to a jury instruction on self-defense *if he has produced evidence tending to show the four elements of that defense.*” (emphasis added)).

Conversely, if no evidence is presented to support the issue of self-defense, the trial judge should *not* present a self-defense instruction to the jury. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007); see State v. Wigington, 375 S.C. 25, 31, 649 S.E.2d 185, 188 (Ct. App. 2007) (“A jury charge on self-defense is not required unless it is supported by the evidence.”); see also State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) (“If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. Only law applicable to the case should be charged to the jury. Instructions that do not fit the facts of the case may serve only to confuse the jury.” (citations omitted)).

In the case sub judice, the testimony and evidence presented during trial did not establish all the required elements of self-defense. Specifically, regarding the first element, both Victim’s

trial testimony and the testimony regarding Victim's out-of-court accounts of the shooting established Appellant pulled out a firearm during the course of an attempt to rob Victim, and no testimony was presented to establish a contrary version of events in which Appellant was not the person responsible for the gunfight that ensued. Under those circumstances, the evidence and testimony presented only supported a conclusion Appellant brought about the difficulty that transpired, which meant Appellant could not validly raise a claim of self-defense. Cf. State v. Santiago, 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006) (finding a self-defense jury instruction was not warranted where the evidence presented did not support a finding Santiago was without fault for bringing about the difficulty). Furthermore, due to the absence of any testimony from Appellant regarding his account of the shooting, there was no evidence or testimony presented establishing Appellant shot Victim in order to defend himself from imminent danger of losing his life or sustaining serious bodily injury. Cf. State v. Bruno, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) ("Bruno was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury."). Because no testimony or evidence was presented that established those required elements of self-defense, Appellant was simply not entitled to a jury instruction on that defense. See Goodson, 312 S.C. at 280, 440 S.E.2d at 372 (finding the trial judge committed no error by declining to instruct the jury on self-defense where no evidence was presented establishing several of the required elements of self-defense).

In arguing to the contrary, Appellant first contends a charge on self-defense was supported by the fact Victim had a gun nearby at the time of the drug transaction and was willing to use it. However, Victim's act of keeping a holstered gun in close proximity for defensive purposes in no way constituted evidence *Appellant* was acting in self-defense at the time he shot

Victim as individuals can unquestionably arm themselves for protection. See, e.g., State v. Burriess, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (recognizing “a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting”).

Additionally, Appellant maintains a charge on self-defense was warranted because some testimony, including the testimony establishing Victim would have fallen when his femur was broken, could have supported a conclusion Victim reached for his gun before he was shot. Importantly though, the testimony presented during trial only established Victim reached for his gun *after* Appellant pulled out his own gun and tried to rob him. In light of that testimony, Victim’s act of reaching for his gun—even if it occurred before he was actually shot—could not have justified Appellant shooting Victim in self-defense since Victim was only responding to an unlawful provocation from Appellant when reached for his own weapon.⁹ See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 (explaining an individual who provokes or initiates an assault cannot escape criminal liability by invoking self-defense); cf. Santiago, 370 S.C. at 160, 634 S.E.2d at 27 (“Even assuming, as Santiago testified, that [the victim] reached for the gun while in Santiago’s hands, he did so after Santiago brought about the difficulty by removing the shotgun from the trunk and aiming it at [him].”).

Next, Appellant contends a charge on self-defense was warranted because Victim allegedly conspired to hide the gun he used during the incident with Mother. However, notwithstanding the fact no testimony was actually presented to establish Victim conspired with

⁹ Had any actual testimony or evidence been presented to establish Victim first brandished a weapon during the drug transaction without any provocation, Appellant very well might have been entitled to a jury instruction on self-defense. Cf. State v. Muller, 282 S.C. 10, 10, 316 S.E.2d 409, 409 (1984) (finding the trial judge erred by refusing to charge the jury on self-defense where Muller testified during trial “he shot [the victim] after [the victim] took out a gun and began shooting at him”).

his mother for any purpose, Victim's actions after the shooting—even if they were designed to conceal or minimize his own criminal responsibility—simply did not constitute evidence of Appellant's actions during the shooting and could not have justified a charge on an otherwise unsupported theory of self-defense. See Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438-439 (2011) (recognizing there must be some evidence presented on a particular issue in order to warrant a jury instruction on that issue while speculation based on the possibility “the jury may believe some of the evidence and disbelieve other evidence” is not sufficient to warrant an instruction); State v. Funchess, 267 S.C. 427, 430, 229 S.E.2d 331, 332 (1976) (explaining the presence of evidence “determines whether [an issue] should be submitted to the jury and the ‘mere contention that the jury might accept the State’s evidence in part and might reject it in part will not suffice’ ” (citation omitted)).

Furthermore, Appellant maintains self-defense should have been charged because there was evidence establishing he retreated at some point. While unquestionable the evidence established Appellant fled after the shooting, the fact Appellant fled did not establish he attempted to retreat *before* shooting Victim or otherwise acted in self-defense *before* taking flight. See, e.g., Santiago, 370 S.C. at 161, 634 S.E.2d at 27 (“If the defendant provokes or initiates the assault, he cannot invoke self-defense; however, he may restore his right to self-defense *if he withdraws from the conflict and communicates that decision to his adversary*.” (emphasis added)). Therefore, the evidence of Appellant’s escape from the area after the shooting did not constitute evidence of any of the required elements of self-defense. See Bryant, 336 S.C. at 345, 520 S.E.2d at 322 (“A robber, who is met with such violent resistance by his victim that he has no opportunity to convince the victim that he has abandoned his criminal

intentions and only wants to withdraw, may not claim self defense if he injures or kills his victim.” (citations, brackets, and internal quotations omitted)).

Finally, Appellant maintains his acquittal for the armed robbery charge somehow warranted a jury instruction on self-defense. Critically though, the jury’s verdict on the armed robbery charge neither was evidence of anything for the jury to consider nor converted the actual evidence presented during trial into evidence of self-defense when it otherwise was not such evidence. See, e.g., State v. Minor, 171 S.C. 120, ___, 171 S.E. 737, 737 (1933) (“The fact that [Minor] was acquitted on [one] charge does not now make the evidence incompetent, and cannot result in a reversal of her conviction on the other charge of having in possession.”). Therefore, the jury’s verdict did not establish Appellant was entitled to a jury instruction on self-defense. See State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) (“The law to be charged to the jury is determined by *the evidence presented at trial*.” (emphasis added)).

Accordingly, because none of the evidence and testimony presented during trial supported a conclusion Appellant was acting in self-defense at the time he shot Victim, a self-defense instruction was not warranted in Appellant’s case. See Slater, 373 S.C. at 69, 644 S.E.2d at 52 (“A self-defense charge is not required unless it is supported by the evidence.”). As a result, the trial judge committed no error by declining to instruct the jury on a legal theory wholly unsupported by any of the evidence and testimony presented during trial. See Bryant, 336 S.C. at 345-346, 520 S.E.2d at 322 (“[Bryant]’s statements fail to establish the elements of self-defense entitling [Bryant] to a self-defense charge. No question of fact for the jury is created on this issue. . . . Accordingly, [Bryant] was not entitled to a self-defense charge and the trial judge correctly refused the charge.”). Appellant’s convictions should be affirmed.

II.

The trial judge neither erred in any manner nor violated Appellant's constitutional right to self-representation by denying Appellant's mid-trial request to relieve defense counsel in order to obtain "another lawyer" because that request was untimely and did not constitute a clear and unequivocal assertion of his right to self-representation since it was a request to replace defense counsel with a different attorney as opposed to a request for Appellant to be permitted to represent himself.

Appellant contends the trial judge erred by denying his mid-trial motion to relieve defense counsel and by not allowing him to represent himself in a pro se capacity. In support of that contention, Appellant does *not* allege he ever actually attempted to invoke his right to self-representation at any point during trial. Nonetheless, Appellant maintains the trial judge should have construed his request to relieve defense counsel in order to replace defense counsel with "another lawyer" as a motion for self-representation and somehow violated his right to represent himself by failing to do so. Importantly though, in order to effectively invoke the right to self-representation, Appellant was required to assert that right in a clear, unequivocal, and timely manner. Since Appellant did not do so at any point during his trial, he did not properly invoke his right to self-representation, and the trial judge was under no obligation to ensure Appellant was knowingly, voluntarily, and intelligently invoking a right he never actively sought to invoke. Accordingly, the trial judge committed no error through the manner in which he handled Appellant's mid-trial request to relieve defense counsel and in no way violated Appellant's constitutional right to represent himself. Appellant's convictions should be affirmed.

RELEVANT FACTS

Over the course of the first two days of trial, the State fully presented its case against Appellant and rested after introducing the testimony of fifteen separate witnesses. (R. p. 2; p. 13; p. 74; p. 87; p. 107; p. 115; p. 124; p. 156; p. 174; p. 178; p. 200; p. 223; p. 228; p. 236; p. 252; p. 270; p. 283). Once the State's case was concluded, defense counsel unsuccessfully moved for

a directed verdict and then presented the first witness for the defense. (R. pp. 298-300). At the conclusion of that witness's testimony, the trial judge released the jury for the day. (R. p. 309). Thereafter, following a brief discussion about a potential defense witness, the trial judge cautioned Appellant about the seriousness of the sentence he was facing in the event he was convicted before suspending the trial for the day.¹⁰ (R. p. 312).

On the following morning, the trial resumed, and Appellant personally presented a motion seeking to relieve counsel and to have a competency evaluation conducted that had apparently been prepared by an inmate who was incarcerated with him at the jail. (R. p. 313; pp. 435-437). In response to the motion, the trial judge noted Appellant had appeared competent throughout the proceedings, and defense counsel confirmed he did not have any concerns about Appellant's competency. (R. p. 314). Appellant then indicated he wished to relieve defense counsel because defense counsel purportedly failed to "make it so [he] could understand what was going on." (R. pp. 314-315). In support of that request, Appellant claimed he did not know he was facing a mandatory sentence of life without parole until the second day of trial, alleged he had received a plea offer of seven years at some point, and asserted defense counsel told him not to worry about the life without parole sentence because he would be facing a lengthy sentence upon conviction under any circumstances. (R. pp. 314-315). In rebuttal, the solicitor promptly denied ever extending a seven-year offer during plea negotiations, and defense counsel clarified he was the one who proposed the seven-year offer, which was rejected by the solicitor. (R. p.

¹⁰ Regarding the substance of the brief discussion, defense counsel identified the next witness who might testify for the defense, and the solicitor responded by noting that particular witness appeared to have been instructed how to testify by multiple individuals who contacted her from jail. (R. pp. 309-310). Upon hearing that information, the trial judge warned he would take any efforts to manipulate the proceedings "very seriously" and cautioned there would be "a price to pay" if falsified evidence was introduced. (R. p. 311). Defense counsel then conferred with the prospective witness and, after doing so, confirmed she did not wish to testify. (R. p. 311).

315). Appellant then claimed defense counsel had never relayed that information to him, and defense counsel refuted that contention while confirming he relayed all plea offers to Appellant and also discussed the life without parole sentence with him. (R. pp. 315-316).

At that point, the trial judge asked Appellant if he wanted to go forward with the trial, and Appellant responded he wanted “to get [himself] another lawyer.”¹¹ (R. p. 316). However, because the trial was already underway and the jury had been sworn, the trial judge indicated he was not going to relieve defense counsel and stop the trial to allow Appellant to get a new attorney. (R. p. 316). The trial judge then again asked Appellant if he wanted to go forward with the trial, and Appellant confirmed he did while stating he had “no choice.” (R. p. 316). Immediately in response, the trial judge advised Appellant he did, in fact, have a choice of which he was aware, and Appellant replied he had a constitutional right to relieve his counsel whenever he wanted to do so. (R. p. 316). The trial judge then again asked Appellant if wanted to go forward with the trial while noting Appellant was aware of his choices, and, once again, Appellant claimed he did not have a choice. (R. p. 316). Thereafter, the trial judge advised Appellant the solicitor was willing to remove the prospect of mandatory life without parole in the event he elected to plead guilty, but Appellant continued to insist he did not have a choice while affirming he wanted to go forward with the trial. (R. pp. 316-317).

As the discussion continued, Appellant complained the trial judge did not believe him about his “disability,” asserted the trial judge believed defense counsel over him, and alleged his constitutional rights had been violated repeatedly. (R. p. 317). He then instructed the trial judge to “go on” with the trial. (R. p. 317). After listening to those remarks, the trial judge informed

¹¹ Notably, Appellant’s statement indicating he wanted “another lawyer” was consistent with the relief requested in his motion, which was an order relieving defense counsel so he could “obtain further representation[.]” (R. pp. 435-437).

Appellant he was facing his “last chance” to avoid a mandatory life without parole sentence and asked him if he understood, which Appellant confirmed he did. (R. p. 318). The trial judge then provided one final warning to Appellant before giving him an opportunity to confer with defense counsel. (R. p. 319). Following a brief pause in the proceedings, defense counsel indicated Appellant wished to proceed forward with the trial. (R. p. 319). The jury then returned to the courtroom, and the trial continued on without Appellant ever making any actual request to represent himself. (R. pp. 313-319).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Mazique, 419 S.C. 282, 288, 797 S.E.2d 730, 733 (Ct. App. 2016). When a defendant requests to proceed pro se after his trial has begun, “the grant or denial of the right to proceed pro se rests within the sound discretion of the trial judge[.]” and, therefore, such a ruling must necessarily be reviewed on appeal for an abuse of discretion. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 171 (1999); see United States v. Singleton, 107 F.3d 1091, 1099 (4th Cir. 1997) (reviewing a trial judge’s ruling on a mid-trial assertion of the right to self-representation for an abuse of discretion). “An abuse of discretion occurs when the court’s decision is unsupported by the evidence or controlled by an error of law.” Mazique, 419 S.C. at 288, 797 S.E.2d at 733.

ANALYSIS

Pursuant to both the United States Constitution and the South Carolina Constitution, a criminal defendant brought to trial in South Carolina “must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975); see U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); S.C.

Const. art. I, § 14 (“Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both.”). However, “[t]he right to defend is personal.” Faretta, 422 U.S. at 834. As a result, a defendant is permitted to waive his right to counsel and represent himself during a trial in a pro se capacity. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003); see State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (“A South Carolina criminal defendant has the constitutional right to represent himself under both federal and state constitutions.”). Thus, even though it ultimately may be detrimental for a defendant to personally conduct his own defense, that defendant’s choice to do so “must be honored out of ‘that respect for the individual which is the lifeblood of the law.’ ” Thompson, 355 S.C. at 262, 584 S.E.2d at 134 (citation omitted).

In order to invoke the right to self-representation, a defendant “must take affirmative steps” to advise the trial judge of his desire to proceed in that manner. Benitez v. United States, 521 F.3d 625, 632 (6th Cir. 2008); see United States v. Leggett, 81 F.3d 220, 224 (D.C. Cir. 1996) (“The law presumes that a defendant has not exercised his right to represent himself nor waived the right to counsel in the absence of an articulate and unmistakable demand by the defendant to proceed pro se.”). Therefore, if a defendant actually wishes to proceed pro se during trial, the defendant must *clearly and unequivocally* make an assertion of the right to self-representation *prior to trial*. Mazique, 419 S.C. at 291, 797 S.E.2d at 734; see State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (“The right to proceed pro se must be clearly asserted by the defendant prior to trial.”). Significantly, the requirement for a clear and unequivocal assertion of the right to self-representation both “protect[s] against an inadvertent waiver of the right to counsel by a defendant’s occasional musings on the benefits of self-representation” and “prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the

rights to counsel and self-representation.” United States v. Frazier-El, 204 F.3d 553, 558-559 (4th Cir. 2000) (citations and internal quotations omitted)).

If a criminal defendant in South Carolina makes a proper request to exercise his right to self-representation, the trial judge must take steps to ensure the defendant is knowingly, voluntarily, and intelligently waiving his right to counsel, including by advising the defendant of his right to counsel and adequately warning him of the dangers and disadvantages of self-representation. See Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (“So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta.”); see also Ex parte Jackson, 381 S.C. 253, 259, 672 S.E.2d 585, 588 (Ct. App. 2009) (“It is the trial court’s responsibility to determine whether there was a knowing and intelligent waiver [of the right to counsel] by the accused.” (citation omitted)); Thompson, 355 S.C. at 262-263, 584 S.E.2d at 135 (explaining the preferred method for determining whether the defendant knowingly and voluntarily waived his right to counsel is for the trial judge to conduct a specific inquiry addressing the dangers and disadvantages of pro se representation with the defendant).

However, absent an unambiguous and timely assertion of the right to self-representation, the trial judge is under no obligation to conduct any inquiry on the matter. See United States v. Cromer, 389 F.3d 662, 682 (6th Cir. 2004) (“Faretta procedures are only required when a defendant has clearly and unequivocally asserted his right to proceed pro se.”); see also Benitez, 521 F.3d at 632 (instructing the trial judge has a duty to determine the validity of an attempted waiver of the right to counsel *when the defendant has taken steps to communicate his desire for self-representation*); cf. State v. Winkler, 388 S.C. 574, 587, 698 S.E.2d 596, 603 (2010) (“[Winkler] argues the trial court erred by failing to properly provide [him] with Faretta warnings when [he] sought to proceed pro se at the beginning of the sentencing phase. . . . [Winkler] did not timely

waive his right to counsel and proceed pro se. Hence, [Winkler]’s reliance on Faretta is misplaced. Had [Winkler] moved to proceed pro se before the trial began, then Faretta would apply.”).

In the case at bar, Appellant did nothing to invoke his right to self-representation at any point prior to the beginning of his trial. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (instructing the right to self-representation must be clearly invoked prior to trial). As a result, Appellant did not make a timely assertion of his right to represent himself, and the trial judge was under no obligation of any kind to permit Appellant to begin representing himself after the trial had begun. See Singleton, 107 F.3d at 1099 (“[T]he court was under no obligation to allow Singleton to begin representing himself *at all* at mid-trial[.]” (emphasis added)); cf. State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991) (“Sims . . . argues that the trial judge erred in not allowing him to proceed pro se. We disagree. The right to appear pro se must be clearly asserted by the defendant before trial. Here, Sims gave no indication of a desire to proceed pro se prior to trial. This contention is without merit.” (citation omitted)).

However, even if the trial judge did somehow have an obligation to let Appellant begin representing himself after the trial was underway, Appellant never at any point during the course of trial actually made a clear attempt to assert his right to self-representation as was necessary in order for him to invoke that right. See City of Columbia v. Assa’ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017) (instructing the assertion of the right to self-representation must be, amongst other things, clear and unequivocal in order to be effective). Instead, on the third day of the three-day trial, Appellant sought to relieve defense counsel in order to get “another lawyer.” Cf. State v. Shumaker, 914 So. 2d 1156, 1162 (La. Ct. App. 2005) (“[Shumaker] never expressly asked that he be allowed self-representation. He simply indicated that he wanted to fire his

counsel. That statement certainly does not reach a clear and unequivocal expression requesting the right to represent oneself as required by Faretta.”). As representation by another lawyer is obviously not self-representation for a pro se defendant, Appellant’s request for an opportunity to get new defense counsel—which the trial judge had no duty to grant—did *not* clearly and unequivocally constitute an invocation of the right to represent himself. See State v. Jones, 270 S.C. 587, 588, 243 S.E.2d 461, 462 (1978) (“[A]t least after the trial has begun, a mere disagreement between a defendant and his counsel as to a matter of trial tactics is not sufficient cause, in itself, to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time.”); cf. United States v. Callwood, 66 F.3d 1110, 1114 (10th Cir. 1995) (recognizing Callwood’s complaints about defense counsel’s performance and suggestion he would prefer for defense counsel not to represent him did “not qualify as an unequivocal request for self-representation”). Under those circumstances, the trial judge was free to presume Appellant was not waiving—or attempting to waive—the right to counsel and was under no obligation to conduct an inquiry to determine if Appellant was knowingly, voluntarily, and intelligently exercising the right to self-representation. See Brewer v. Williams, 430 U.S. 387, 404 (1977) (instructing courts must “indulge in every reasonable presumption against waiver” of the right to counsel); see also Cromer, 389 F.3d at 682 (6th Cir. 2004) (instructing a Faretta colloquy is only necessary when a defendant clearly and unequivocally asserts his right to self-representation); cf. Assa’ad-Faltas, 420 S.C. at 46-47, 800 S.E.2d at 791 (“In light of the record and the constitutional primacy of the right to counsel over the right to self-representation . . . along with the presumption against waiver of the constitutional right to counsel, . . . we cannot say that the municipal court erred in failing to construe [Assa’ad-Faltas]’s musings as a waiver of the right to counsel.” (citations and internal quotations omitted)).

Accordingly, because Appellant did not make a timely and unequivocal invocation of his right to self-representation at any point during trial, the trial judge neither erred through the manner in which he addressed Appellant's motion to relieve defense counsel nor infringed in any way upon Appellant's constitutional right to represent himself. See Frazier-El, 204 F.3d at 559 ("In ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel because the right serves both individual good and collective good, as opposed to only the individual interest served by protecting the right of self-representation." (citations omitted)); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (instructing a trial judge is allowed "safely to presume that the defendant should proceed with counsel absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes"); cf. Benitez, 521 F.3d at 632 (holding the appellate decisions addressing the right to self-representation were inapplicable because "[t]he record in the present case clearly demonstrates that Benitez did not attempt to waive his right to counsel by requesting self-representation"); United States v. Nunez, 877 F.2d 1475, 1478 (10th Cir. 1989) (holding Nunez's request to invoke his right to self-representation on the third day of trial was untimely and, thus, properly denied). Appellant's convictions should be affirmed.

III.

Any issue with the trial judge's exclusion of the testimony of a purported expert witness on gunshot residue was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of the witness's intended testimony. However, notwithstanding any issue preservation concerns, the trial judge did not abuse his broad discretion by refusing to qualify the witness as an expert so the witness could testify about the results of a gunshot residue analysis he did not personally perform because that testimony would have simply constituted improper and inadmissible hearsay disguised as an expert opinion.

Appellant contends the trial judge committed reversible error by refusing to qualify Dr. Bennett as an expert witness. In support of that contention, Appellant maintains Dr. Bennett personally met the requirements to testify as an expert and should have been permitted to present the results of a gunshot residue analysis that he admittedly did not actually perform. Initially, any issue with the exclusion of Dr. Bennett's testimony was not properly preserved for appellate review because defense counsel never proffered or attempted to proffer the substance of Dr. Bennett's intended testimony. Absent such a proffer, it is not clear what Dr. Bennett would have testified to if he had, in fact, been qualified as an expert, and the prejudice resulting from the exclusion of that evidence cannot accurately be evaluated on appeal. Therefore, the issue was simply not preserved for appellate review and cannot appropriately be considered or reviewed on appeal. However, even assuming the issue had somehow been preserved for appellate review despite the fact no proffer was made or attempted, Dr. Bennett's testimony was not admissible during trial because he merely intended to relay the results of a gunshot residue analysis he did not personally conduct and, thus, was attempting to present the out-of-court conclusions of another individual for the truth of the matter asserted under the guise of offering an expert opinion. Accordingly, the trial judge did not abuse his broad discretion by refusing to qualify Dr. Bennett as an expert merely so Dr. Bennett could present inadmissible hearsay evidence. Appellant's convictions should be affirmed.

RELEVANT FACTS

On the date of the shooting, evidence was collected from the hands of both Victim and Appellant for potential gunshot residue testing.¹² (R. pp. 232-233; pp. 323-324; pp. 332-333). After the evidence was collected from Victim's hands, it was secured and later transported to SLED. (R. p. 233; pp. 244-245). However, the evidence was never ultimately analyzed. (R. p. 244). Meanwhile, the evidence collected from Appellant's hands was secured by the Greenville County Sheriff's Office until it was transferred to the Greenwood Police Department a few months later. (R. pp. 319-320; pp. 324-325; p. 327; p. 337). After that, the Greenwood Police Department released the evidence to a private investigator working for defense counsel, and the investigator delivered the evidence to Dr. Robert Bennett, a forensic scientist from Charleston, South Carolina, who had been retained by defense counsel. (R. pp. 350-351). Dr. Bennett then sent the evidence to an "accredited facility" identified as "RJ Regroove," and an unidentified individual at that facility purportedly analyzed the evidence to determine if gunshot residue was present. (R. pp. 360-362).

Later on during trial, Agent Megan Fletcher, a forensic scientist at SLED, testified—without objection—as an expert on gunshot residue. (R. p. 236; p. 238). Through her testimony, Agent Fletcher explained gunshot residue analysis involved looking for particles associated with a gunshot, including lead, barium, and antimony, and, to conduct such an analysis, she indicated she used a scanning electron microscope with an energy dispersive x-ray detector, which magnified the microscopic particles associated with gunshot residue so they could be seen. (R. pp. 238-239). Additionally, Agent Fletcher instructed gunshot residue could travel up to twenty

¹² Significantly, the evidence from Appellant's hands was collected roughly four hours after the shooting in an entirely different county from where that shooting took place. (R. pp. 13-15; p. 41; pp. 107-108; pp. 323-324; pp. 332-333).

feet in a forward direction and a few feet in the opposite direction when a gun was fired, and she noted anyone in the vicinity of a fired gun could get gunshot residue on them. (R. pp. 239-240). Likewise, Agent Fletcher explained gunshot residue was very fragile, could be washed or wiped away, and would begin to dissipate within a few hours of a gun being fired. (R. p. 240). She also noted gunshot residue was ordinarily found on and expected to be present on gunshot *victims*. (R. p. 241; pp. 246-247). Furthermore, Agent Fletcher explained the presence of gunshot residue meant a person either was in the vicinity of a shooting, shot a firearm, or had touched something with gunshot residue on it, and she indicated it was only possible to eliminate one of those alternatives in rare circumstances. (R. p. 248). Meanwhile, Agent Fletcher explained the absence of gunshot residue could not eliminate the possibility an individual was involved in a shooting because any residue that had been present could have simply been removed or washed away. (R. p. 242).

Subsequently, as part of the defense's case, defense counsel offered the testimony of Dr. Bennett. (R. p. 298; p. 356). During his testimony, Dr. Bennett noted he had received a pharmacy degree, a doctorate in drug sciences with a focus on toxicology, and "a couple" of training certifications from the United States Department of Justice in the area of firearms, which included "a basic primer" on gunshot residue analysis. (R. p. 357). Additionally, Dr. Bennett explained he had previously "worked" with gunshot residue in the past, was familiar with it, had learned to test it, and had made it a part of his "core study" for approximately twenty years. (R. pp. 359-360). However, he conceded he had never previously testified or been qualified as an expert on gunshot residue analysis. (R. p. 359; p. 363). Likewise, Dr. Bennett conceded his gunshot residue analyses were actually performed by an "accredited facility," which he asserted conducted the "mechanistic" and "technical" function of "proving the gunshot residue stuff on

the instrument.” (R. pp. 360-361). Similarly, Dr. Bennett conceded a “visual examination” was part of the analysis process, and he acknowledged the visual examination—like the other parts of the analysis—was conducted solely by the laboratory staff. (R. pp. 360-361). He further noted he did not put the evidence in the instrument used to conduct the analysis in Appellant’s case and was not, in fact, present when that process was performed. (R. p. 362). Moreover, Dr. Bennett acknowledged he had *never* actually conducted a gunshot residue analysis personally, but he asserted he had witnessed the testing being performed at some unspecified point in the past. (R. p. 362). Furthermore, he claimed any report of the results he received following an analysis had been reviewed by “the professionals at the laboratory” before it was given to him. (R. pp. 361-362).

Following the presentation of that testimony, the solicitor indicated she objected to Dr. Bennett testifying as an expert in light of the facts he had never personally performed a gunshot residue analysis, did not conduct the analysis of the evidence collected from Appellant’s hands, was not present when that evidence was placed into the testing instrument, and did not know how the evidence was handled since he was not present for the actual analysis. (R. p. 362). Based on those factors, the solicitor asserted Dr. Bennett would merely be interpreting another person’s results and, therefore, could neither qualify as an actual expert nor establish a complete chain of custody regarding the evidence. (R. p. 362). In rebuttal, defense counsel asserted Dr. Bennett intended to testify “about the test that he had run” and had brought the report he received with him. (R. p. 364). However, the trial judge pointed out Dr. Bennett had simply interpreted a report prepared by a laboratory from which no one was present for trial and, if permitted to testify, would be offering an opinion without even looking through the electron microscope used

to conduct the analysis in Appellant's case. (R. p. 364). Nevertheless, defense counsel asked the trial judge to let Dr. Bennett "give the results of the test." (R. p. 364).

After considering the arguments of counsel and taking a brief recess, the trial judge declined to permit Dr. Bennett to testify as an expert. (R. p. 364). Defense counsel then urged the trial judge to reconsider his ruling while contending Dr. Bennett was "clearly" personally qualified as an expert. (R. pp. 364-365). However, in seeking reconsideration, defense counsel acknowledged "[a]ll [Dr. Bennett] [was] doing [was] looking at the report that was run that he asked to have run at the place that he worked where he knows it's a controlled situation." (R. p. 365). Following defense counsel's remarks, the trial judge reaffirmed his ruling excluding the evidence, and the trial proceeded forward without any proffer being made or attempted in regard to the substance of Dr. Bennett's intended testimony. (R. p. 365).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also Bixby, 388 S.C. at 556, 698 S.E.2d at 587 ("[D]eference is due to the trial court's admission of the evidence."). Likewise, a decision

as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."); see also State v. Myer, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990) ("The qualification of a witness as an expert falls largely within the discretion of the trial judge."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.").

ANALYSIS

A. Appellant's Failure to Preserve Any Issue with the Exclusion of the Purported Expert's Testimony for Appellate Review

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the trial court is guaranteed a fair opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

When an issue arises during trial involving the exclusion of evidence or testimony, a party is required to proffer the evidence or testimony sought to be admitted in order to preserve any issue related to its exclusion for appellate review. See Santiago, 370 S.C. at 163, 634 S.E.2d at 29 (“[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been.”). By proffering the disputed testimony and evidence, the party enables an appellate court to accurately review the issue and discern any prejudice that may have resulted in the event an error occurred. State v. King, 367 S.C. 131, 137, 623 S.E.2d 865, 868 (Ct. App. 2005). Critically, “[f]ailure to make an offer of proof precludes the appellant from raising the issue on appeal.” State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984).

In Appellant’s case, Appellant seeks to challenge on appeal the trial judge’s decision to exclude Dr. Bennett’s testimony about the results of an analysis purportedly performed by an unidentified individual who was not present to offer any testimony during trial. However, once that testimony was ruled to be inadmissible during trial, Appellant did *not* proffer Dr. Bennett’s intended testimony, did *not* proffer the report of the test results, and did *not* ask the trial judge to permit any proffer to occur. Cf. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (finding no issue was preserved for appellate review regarding the trial judge’s refusal to allow a defense witness to testify further where “no proffer was made as to what [the defense witness’s] testimony would have been had he been allowed to continue”). Without such a proffer, the substance of Dr. Bennett’s testimony remains entirely unclear, and the findings of the absent analyst who supposedly conducted the gunshot residue analysis remain wholly unknown. See King, 367 S.C. at 137, 623 S.E.2d at 868 (“The reason for the rule requiring a proffer of

excluded evidence is to enable the reviewing court to discern prejudice.”). Under those circumstances, any issue related to the exclusion of Dr. Bennett’s intended testimony was not properly preserved for appellate review and cannot appropriately be reviewed on appeal. See State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979) (“[I]t should be pointed out that such an exception was waived in that no proffer of testimony was made. It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been.”); see also Taylor v. Taylor, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987) (“The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review.”). Appellant’s convictions should be affirmed.

B. Propriety of the Trial Judge’s Decision to Exclude the Purported Expert’s Testimony

During trial, an expert’s testimony “may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Pursuant to the South Carolina Rules of Evidence, such testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Therefore, before admitting expert testimony, the trial judge must find: (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011).

In order for a witness to properly be qualified as an expert, the witness must have “acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). When determining whether a witness’s knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Id. at 274, 495 S.E.2d at 467. Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, “[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness’s reference to the subject[,]” and “defects in the amount and quality of education and experience go to the weight of the expert’s testimony and not its admissibility.” Lee v. Suess, 318 S.C. 283, 285-286, 457 S.E.2d 344, 346 (1995).

Assuming a witness is personally qualified to testify as an expert and the other requirements for the admission of expert testimony are satisfied, an expert witness ordinarily may offer an opinion *based on* hearsay evidence that is not itself admissible *if* the evidence is the type of evidence ordinarily and reasonably relied upon by experts to form their opinions or inferences. See Rule 703, SCRE (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type *reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject*, the facts or data need not be admissible in evidence.” (emphasis added)). Importantly though, an expert’s ability to base their own independent opinions on hearsay evidence in certain situations does *not* allow the admission of

hearsay evidence simply because an expert used it in forming an opinion. Jones v. Doe, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006); see State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (“[Rule 703] does not . . . make hearsay automatically admissible simply because it was relied upon by the expert.”). Thus, an expert witness may not simply transmit and repeat inadmissible hearsay evidence under the guise of offering an expert opinion. See United States v. Mejia, 545 F.3d 179, 197 (2nd Cir. 2008) (“The expert may not . . . simply transmit that hearsay to the jury. Instead, the expert must form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials. Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever, a practice that allows [a party] to circumvent the rules prohibiting hearsay.” (citations and internal quotations omitted)); see also Price, 368 S.C. at 498, 629 S.E.2d at 365 (concluding the testimony of a witness qualified as an expert violated the prohibition against out-of-court statements being offered for the truth of the matter asserted where the witness “did not testify to his expert opinion, but rather relayed information from informants”).

In the case sub judice, defense counsel sought to introduce the testimony of Dr. Bennett, who had *never* personally conducted a gunshot residue analysis at any point in his lifetime, for the expressly-stated purpose of “giv[ing] the results of [a] test.” However, that test was *not* conducted by Dr. Bennett and, instead, was conducted by one of the unidentified “professionals at the laboratory,” who might—or might not—have actually placed the evidence collected from Appellant’s hands into a testing instrument and conducted a *visual examination* of that evidence before generating the results Dr. Bennett wanted to relay to the jury. Significantly though, since Dr. Bennett was *not* present for the test, he—and, thus, the jurors—had no way of knowing—outside of blind faith in the experts retained to generate the test results—whether Appellant’s

sample was actually tested, whether an accurate and complete chain of custody was maintained prior to the analysis, and whether the appropriate protocols were followed in generating the analysis results. Cf. Young v. United States, 63 A.3d 1033, 1045 (D.C. 2013) (“Because Craig was not personally involved in the process that generated the profiles, she had no personal knowledge of how or from what sources the profiles were produced. She was relaying, for their truth, the substance of out-of-court assertions by absent lab technicians that, employing certain procedures, they derived the profiles from the evidence furnished by Villatoro or [Young]. Those assertions were hearsay. Without them, what would have been left of Craig’s testimony—that she matched two DNA profiles she could not herself identify—would have been meaningless.” (footnote omitted)).

Under such circumstances, Dr. Bennett could not properly “give the results of the test” by virtue of testifying as an expert because he would have merely been relaying the out-of-court statements and conclusions of a non-testifying witness purely for the truth of the matter asserted.¹³ See Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 136 (2nd. Cir. 2013) (explaining “a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony” (citation and internal quotations omitted)); see also People v. Sanchez, 374 P.3d 320, 334 (Cal. 2016) (“When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert’s opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.”). Therefore, regardless of whether Dr. Bennett personally had the minimum level of training and experience necessary to qualify as an expert, the trial judge properly declined to qualify Dr. Bennett as an expert and

¹³ Importantly, “giv[ing] the results of the test” was the *only* purpose for Dr. Bennett’s testimony that was identified by defense counsel. (R. p. 364).

allow him to serve as a mere conduit for inadmissible hearsay in Appellant's case, and the trial judge's ruling in that regard in no way constituted an abuse of discretion.¹⁴ See Jones, 372 S.C. at 62-63, 640 S.E.2d at 519 (recognizing our evidentiary rules governing expert testimony do "not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion"); see also Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 728 (6th Cir. 1994) (recognizing the federal evidentiary rules regarding expert testimony—which are identical to the related South Carolina evidentiary rules—"do not . . . permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible"); cf. Price, 368 S.C. at 498, 629 S.E.2d at 365 (concluding the testimony of a witness qualified as an expert violated the prohibition against out-of-court statements being offered for the truth of the matter asserted where the witness "did not testify to his expert opinion, but rather relayed information from informants"). Appellant's convictions should be affirmed.

¹⁴ Even assuming the trial judge somehow erred by excluding Dr. Bennett's testimony, it is quite possible any error in the exclusion of that testimony—regardless of what the testimony revealed—would have been entirely harmless since: (1) the presence of gunshot residue would have been expected based on the fact Appellant had indisputably been shot during the incident; (2) the absence of gunshot residue would have been virtually meaningless based on the fact the evidence was not collected from Appellant's hands until hours after the shooting; and (3) the presence of gunshot residue following a shooting would have only revealed a range of possibilities that could not ordinarily be narrowed further. See State v. Lyles, 379 S.C. 328, 345, 665 S.E.2d 201, 210 (Ct. App. 2008) (recognizing an error resulting from the exclusion of evidence can be harmless where the excluded evidence "would have no impact on the outcome of the case"). However, due to the lack of an evidentiary proffer, it is not possible for such a harmless error analysis to be conducted, which emphatically demonstrates why our issue preservation requirements are so fundamentally important. Cf. Cabbagestalk, 281 S.C. at 36, 314 S.E.2d at 11 ("We are unable to determine from the record whether the testimony was so material as to render its exclusion prejudicial. Failure to make an offer of proof precludes the appellant from raising the issue on appeal.").

IV.

Any issue with Appellant's five-year sentence for possession of a firearm during the commission of a violent crime was not properly preserved for appellate review because defense counsel did not raise any objections to Appellant's sentence during trial.

Appellant contends the trial judge erred by sentencing him to a five-year term of imprisonment for possession of a firearm during the commission of a violent crime. In support of that contention, Appellant maintains he could not lawfully be sentenced for the firearm conviction because he was sentenced to life without parole for his other conviction. Pursuant to South Carolina law, Appellant should not have been sentenced to five years for possession of a firearm during the commission of a violent crime since he received a life without parole sentence for attempted murder. However, defense counsel did *not* object to Appellant's five-year sentence at any point during trial. As a result, any issue with Appellant's five-year sentence—which could not result in Appellant being incarcerated for longer than permissible for his crimes—was not properly preserved for appellate review and cannot appropriately be raised or addressed for the first time on appeal. Appellant's convictions and sentence should be affirmed.

RELEVANT FACTS

At the conclusion of trial, the jury convicted Appellant of attempted murder and possession of a firearm during the commission of a violent crime, and the trial judge sentenced him to terms of imprisonment of life without parole for attempted murder and five years for the firearm offense. (R. p. 426; p. 430). After the sentences were imposed, neither Appellant nor defense counsel raised any objections of any kind. (R. p. 430).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016); see generally State v. Kimbrough, 212 S.C.

348, 353, 46 S.E.2d 273, 275 (1948) (“The power of an appellate court to review a sentence for the purpose of determining whether it offends the constitutional provision against cruel and unusual punishment may be sustained under the grant of power to correct errors of law in the judgment appealed from.”). As a result, an appellate court is limited to determining on appeal whether the trial judge abused his discretion, which occurs when the trial judge’s decision is unsupported by the evidence or controlled by an error of law. Palmer, 415 S.C. at 511, 783 S.E.2d at 827.

ANALYSIS

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an issue is not presented to and ruled upon by the trial judge, it cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”). Critically, as our appellate courts have repeatedly recognized, plain error review is simply not permitted in South Carolina. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (“[T]he plain error rule does not apply in South Carolina state courts.”); State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997) (“South Carolina has no ‘plain error’ rule.”).

Therefore, based on our issue preservation rules, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998). Importantly, a defendant's failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) ("No objection to sentencing was raised at trial and this issue is not properly before the court."); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant's contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal." (citations omitted)).

Notably though, in State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999), our Supreme Court crafted a very specific and limited exception to our issue preservation requirements. In that case, Johnston was convicted of conspiracy to possess marijuana with intent to distribute and was sentenced—without objection—to a term of imprisonment of ten years for that offense despite the fact the maximum sentence statutorily authorized was only five years. Id. at 462, 510 S.E.2d 424. Johnston subsequently appealed her sentence, and, on appeal, this Court affirmed on issue preservation grounds since no objections were raised during trial. Id. at 461, 510 S.E.2d at 424. Thereafter, the Supreme Court granted a petition for a writ of certiorari and reversed. Id. In reversing, the Supreme Court noted it had "consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate

review.” Id. at 462, 510 S.E.2d at 425. However, the Supreme Court found Johnston’s case involved “exceptional circumstances” because: (1) the State had conceded error in regard to the sentence; *and* (2) a “real threat” existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action.¹⁵ Id. at 463-464, 510 S.E.2d at 425. Based on those limited circumstances, the Supreme Court remanded Johnston’s case for resentencing despite the fact the sentencing issue had not been preserved during trial. Id. at 464, 510 S.E.2d at 425. Importantly though, the Supreme Court expressly cautioned its holding in Johnston’s case was based on the “unique” facts involved, which “demand[ed] an expedited result,” and was “not intended to disrupt our settled rules on issue preservation and PCR applications.” Id. at 464, n. 3, 510 S.E.2d at 425.

In the case at bar, Appellant was convicted of attempted murder and possession of a firearm during the commission of a violent crime, and he was respectively sentenced to terms of imprisonment of life without parole and five years for those convictions. However, pursuant to

¹⁵ Subsequent to the decision in Johnston, this Court has recognized the limited nature of that case’s holding and has declined to apply its carefully-crafted exception broadly. See State v. Passmore, 363 S.C. 568, 585-586, 611 S.E.2d 273, 282-283 (Ct. App. 2005) (“We find the exceptional circumstance carefully carved out by the Johnston court is not present here. [Passmore] has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. Johnston does not control. . . . Regrettably, [Passmore] has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand.”). However, at other times, this Court has addressed unpreserved sentencing issues that did not squarely fall within the limited exception created in the Johnston decision. See State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) (“[A]n exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances.”); State v. Vick, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (“While the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston, our courts have, in the past, ‘summarily vacated’ sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute.” (citations omitted)); but see Johnston, 333 S.C. at 462, n. 2, 510 S.E.2d at 425 (“[N]one of these cases addressed error preservation. Thus, they provide no support for Defendant’s position here.”).

South Carolina law, the five-year sentence statutorily authorized for possession of a firearm during the commission of a violent crime is *not* applicable when a criminal defendant is sentenced to life without parole for the underlying violent crime. See S.C. Code Ann. § 16-23-490(a) (“This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.”). Therefore, in light of his life without parole sentence for attempted murder, Appellant could not properly be sentenced to five years for the firearm offense, and the five-year sentence that was actually imposed was unquestionably objectionable. See Palmer, 415 S.C. at 525, 783 S.E.2d at 835 (vacating Palmer’s five-year sentence for possession of a weapon during the commission of a violent crime where Palmer was sentenced to life without parole for murder *and* “Palmer objected to the [five-year] sentence”).

Critically though, defense counsel did *not* object to Appellant’s objectionable five-year sentence—which in no way could create a “real threat” Appellant would be incarcerated for a longer period of time than he permissibly could be incarcerated since he was also sentenced to life without parole—at any point during trial, and no arguments were raised to or ruled upon by the trial judge in regard to the propriety of the five-year sentence. See In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.”); see also Johnston, 333 S.C. at 463-464, 510 S.E.2d at 425 (addressing an unpreserved sentencing issue where a “real threat” existed Johnston would be incarcerated beyond the permissible sentencing range for her conviction if she was forced to pursue relief through a post-conviction relief action). Because defense counsel did not raise the sentencing issue Appellant is now attempting to raise on appeal, the sentencing judge was wholly denied an opportunity to consider, address, or rule upon it during trial. See Queen’s Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 (“Issue

preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” (citations omitted)); see also State v. Torrence, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J., concurring in result for the majority) (“[A] contemporaneous objection requirement to preserve legal errors operates to procedurally preclude a defendant from allowing error to occur at trial and then complaining of it on appeal.”). Under those circumstances, Appellant’s appellate challenge to his sentence is not properly preserved for appellate review and simply cannot appropriately be raised or addressed for the first time on appeal.¹⁶ See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court “cannot address unpreserved errors”); cf. State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker’s appellate contention the sentence he received could not have properly been imposed “on the elementary ground that the question was not raised below”). Otherwise, any appellate review of Appellant’s sentencing issue would constitute plain error review, which is not permitted in South Carolina. See Sheppard, 391 S.C. at 421, 706 S.E.2d at 19 (instructing plain error review is not applicable in South Carolina). Appellant’s convictions and sentence should be affirmed.

¹⁶ Although Appellant’s sentencing issue was not properly preserved for appellate review on direct appeal, Appellant will in no way be prevented from seeking a remedy for that issue through the post-conviction relief process, which has been specifically designed to address and remedy the exact situation involved in Appellant’s case. See S.C. Code Ann. § 17-27-20(A)(3) (recognizing one of the express grounds upon which a person may seek and obtain post-conviction relief is when “the sentence exceeds the maximum authorized by law”); see also Johnston, 333 S.C. at 464, n. 3, 510 S.E.2d at 425 (“Our holding today is not intended to disrupt our settled rules on issue preservation and *PCR applications*. The facts here are unique and demand an expedited result.” (emphasis added)); cf. Passmore, 363 S.C. at 586, 611 S.E.2d at 283 (“Appellant will be forced to seek redress through the avenue of post-conviction relief.”).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

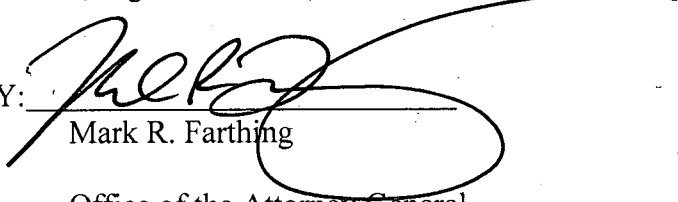
Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 19, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
NOV 19 2018
SC Court of Appeals

Appeal from Greenwood County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case No. 2017-000481

THE STATE,

Respondent,

vs.

ONTAVIOUS DERENTA PLUMER,

Appellant.

CERTIFICATE OF COUNSEL

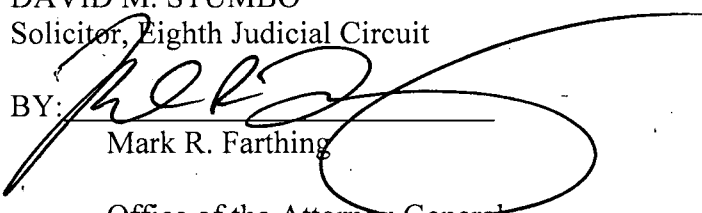
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

November 19, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000481

RECEIVED
NOV 21 2018
SC Court of Appeals

The State,..... Respondent

v.

ONTAVIOUS DERENTA PLUMER

..... Appellant.

RECORD ON APPEAL

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State's Exhibit No. 1, 2, 8, and 10 will be transported to the Court.

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
)
 PLAINTIFF,)
)
)
 -VS-)
)
 ONTAVIOUS DERENTA PLUMER,)
)
 DEFENDANT.)
 _____)

CASE NO.: 2016-GS-24-0999
2016-GS-24-1000
2016-GS-24-1001

TRANSCRIPT OF RECORD

FEBRUARY 6, 7, 8, 2017
GREENWOOD, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD MILLER, JUDGE, AND A JURY

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

ELIZABETH WHITE, ASSISTANT SOLICITOR
JOSH THOMAS, ASSISTANT SOLICITOR

ATTORNEY FOR DEFENDANT:

WILLIAM YARBOROUGH, ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

1 TRIAL DAY 1-02/06/17

2 (Whereupon, the proceedings commenced at 10:33 a.m.)

3 THE COURT: A couple of things I want to just tell you
4 before we go into qualifying for you to serve this week.
5 The first thing is it say in my notes, I've been doing this
6 long enough, my note say please turn off all pagers. Please
7 raise your hand if you have a pager. Please raise your hand
8 if you remember what a pager is. It's important that you
9 turn off your cell phones or any communication devices while
10 you're in the courtroom. If you are lucky enough to be
11 selected to serve on the jury you will -- there will be a
12 place where you can leave your phone that will be secure so
13 there won't be any problem while you're in the courtroom.
14 But if you're here now and you have a phone, you've probably
15 already been told, just make sure it's turned off.

16 I want to tell you that it's vital that while you're
17 serving as a juror that you have no contact with any of the
18 parties involved in any case, any of the witnesses, or any
19 of the attorneys. And you all might think, okay, I can do
20 that, but how do I know who they are. Well, you don't have
21 to know who they are, but they need to know who you are.
22 And that's why when you're in and around the courthouse we
23 ask you to wear your badge that identifies you as a juror
24 and those people know that if they contact you
25 inappropriately that there will be consequences. And for an

1 we resolve our disputes in court and not out in the streets
2 with vigilante justice. So thank you for your service.

3 With that, ladies and gentlemen, we're going to move
4 right into qualifying you to serve for a particular case
5 that's up for trial this week. And in order for me to do
6 that I'm going to introduce the case to you and then make
7 some comments to you about it.

8 This is a case that has three separate indictments.
9 The first indictment is an indictment for attempted murder,
10 and this indictment alleges that Ontavious Derenta Plumer,
11 on or about October 11th, 2015 in Greenwood County willfully
12 and unlawfully with the intent to kill and with malice
13 aforethought attempted to kill Oshamar Ontarios Wells in
14 violation of our laws. The next one is *State of South*
15 *Carolina v Ontavious Derenta Plumer*, or Plumer,
16 P-l-u-m-e-r. It's an indictment for armed robbery, and it
17 alleges that Ontavious Derenta Plumber on or about October
18 11th, 2015 in Greenwood County willfully and unlawfully
19 while armed with a deadly weapon, or while alleging either
20 by action or words he was armed while using a representation
21 of a deadly weapon or any objection which a person present
22 during the commission of the robbery reasonably believed to
23 be a deadly weapon, feloniously took from the person or
24 presence of Oshamar Ontarios Wells by means of force or
25 intimidation goods or monies described as follows: illegal

1 drugs with the intent to deprive the owner permanently of
2 the property in violation of our laws. And the final
3 indictment, *State v Ontavious Derenta Plumer*, is an
4 indictment for possession of a firearm during the commission
5 of a violent crime, and it alleges that Ontavious Derenta
6 Plumer on or about October 11, 2015, in Greenwood County,
7 possessed a firearm or visibly displayed what appeared to be
8 a firearm, or visibly displayed a knife during the
9 commission of a violent offense, that is attempted murder
10 and/or armed robbery, all in violation of our statutes and
11 laws.

12 Now, ladies and gentlemen, to this case Mr. Plumer, or
13 Plumer -- I'm not sure the pronunciation, has pled not
14 guilty.

15 MR. YARBOROUGH: Plumer, Your Honor.

16 THE COURT: What is it?

17 MR. YARBOROUGH: It's Plumer.

18 THE COURT: Plumer. Thank you. Has pled not guilty,
19 and as such certain rights attach to him that belong to each
20 and every person in this country who is charged with a
21 crime, and that is he is presumed to be innocent unless and
22 until the charging body, and that in this case is the State
23 of South Carolina, can prove to a jury beyond any reasonable
24 doubt each and every element of each offense. So please
25 keep those basic concepts in mind throughout the course of

1 courtroom.)

2 MS. WHITE: Your Honor, I don't know if there's any
3 Defense witnesses in the courtroom, but I would also ask
4 that they --

5 THE COURT: It applies across equally on both sides.
6 While we're here, after your closing -- or opening
7 statements what witnesses do you have? It's 10 until 12:00.

8 MS. WHITE: The first witness will be the victim and I
9 imagine he'll be lengthy.

10 THE COURT: Okay. So we'll make our opening
11 statements, we'll break for lunch and come back and crank it
12 up. Okay? Brief, non-argumentative. If they're ready.

13 THE BAILIFF: Yes, sir.

14 THE COURT: Thank you.

15 (Whereupon, the jury entered the courtroom at 11:49
16 a.m.)

17 THE BAILIFF: Mr. Tucker.

18 THE COURT: All right. Mr. Tucker, thank you for
19 agreeing to serve. Juror number 155. All right, ladies and
20 gentlemen.

21 MR. THOMAS: Thank you, Your Honor. May it please the
22 Court.

23 THE COURT: Yes, sir.

24 OPENING STATEMENT

25 BY MR. THOMAS: Ladies and gentlemen of the jury, I

1 want to go ahead and clear the air about one thing. Oshamar
2 Wells, the victim in this case, was sells drugs. He does a
3 lot of other things. He works. He raises his children. He
4 makes music, but he sells drugs. That's why we're here. So
5 you took an oath a few minutes ago to set aside whatever you
6 may think about his character and to judge this case based
7 on the facts that you hear from that witness stand from
8 people that testify and the evidence that's presented.

9 Ladies and gentlemen, whatever you may think about what Mr.
10 Wells got into on October 11th, 2015, the mischief that
11 Ontavious Plumer brought into Greenwood County is much
12 worse. He's here today charged with attempted murder, armed
13 robbery, and possession of a weapon during the commission of
14 a violent crime.

15 The facts that we're going to show you today are going
16 to show that Mr. Plumer and an accomplice drove to Greenwood
17 from Anderson. They met with Mr. Wells at the Mr. Chip down
18 here on South Main under the auspices of buying some drugs.
19 Some marijuana specifically. They meet Mr. Wells and go
20 back to his house, his cousin's house. His family is home.
21 Sit around, chat for a little while, sample the product and
22 make sure it's good. And then for reasons that we don't
23 know that Defendant right there, Mr. Plumer, pulled out a
24 handgun, pointed it at Mr. Wells, and started shooting him.
25 Pulls out a gun, shoots Mr. Wells. The accomplice, while

1 all this is happening, grabs the weed that's on the table
2 and takes off out the front door. Normally if I'm giving
3 you that scenario of facts we're here on an actual murder
4 charge. Luckily for Mr. Wells he's alive and he's here
5 today to testify. You're going to hear from him how when
6 Mr. Plumer pulled out a gun he ran back into the kitchen,
7 grabbed his mother's gun that was in the cabinet and
8 returned fire. The only reason Mr. Plumer went running out
9 of that house is he got shot, too. He went to the hospital.
10 Not the hospital that's two minutes up the road from where
11 this happened. He went to the hospital in Greenville. Got
12 his gunshot wound treated there.

13 Those are the facts that you're going to hear today and
14 that you're going to be asked to apply to the law that Judge
15 Miller is going to give you. The law he's going to explain
16 to you in great detail. But what we always tell jurors is
17 the biggest tool that you take back into that jury room in
18 deliberation is not what you've heard from the testimony
19 here or what you're going to have from the evidence, but
20 it's going to be your common sense. And when you're
21 applying the facts of the law use your common sense.
22 Attempted murder. Did he -- did Mr. Plumer attempt to kill
23 Mr. Wells, did he attempt to kill him with malice
24 aforethought. The Judge is going to tell you that malice
25 aforethought doesn't mean that he had planned to kill him

1 when he was driving down from Anderson. He didn't mean --
2 he didn't have to plan to kill him while he was sitting at
3 the table. But as long as when he pulled that gun out and
4 pointed it at Mr. Wells and pulled the trigger if he
5 intended for Mr. Wells to die, that's attempted murder.
6 Armed robbery. Did Mr. Plumer or his accomplice take and
7 carry away personal property of Mr. Wells. I told you to
8 set aside any preconceptions you might have about someone
9 who sells weed. Set aside about whether he can be legally
10 robbed of weed. The law says weed is a personal good and
11 you can have it stolen from you. And was he when he did all
12 that armed with a deadly weapon. You're going to have to
13 decide if a gun is a deadly weapon. I would submit to you
14 that it is one. That's for you to decide. Finally, he
15 started with possession of a weapon during the commission of
16 a violent crime. Again, common sense. Armed robbery,
17 attempted murder are violent crimes. Was he armed with a
18 gun when it happened.

19 That's the long and short of it, ladies and gentlemen.
20 You'll spend the next three or four days, Ms. White and I
21 are going to give you some evidence, some testimonies and
22 things to look at, some things to think about. But at the
23 end of the day, Wednesday, Thursday, whenever that is,
24 you're going to go back into that jury room and you're going
25 to take your common sense with you. When you've heard all

1 the evidence you're going to have to go back in there and
2 you're going to have to decide if you're firmly convinced
3 that Ontavious Plumer pulled out a gun, shot Mr. Wells, and
4 took his weed. It's as simple as that, ladies and
5 gentlemen. We thank you for your service and thank you for
6 being here. It's an important day for everybody. It's an
7 important day for Mr. Plumer. It's an important day for Mr.
8 Wells. And we just ask that you use your common sense and
9 that when you've heard everything you go back there and you
10 find Ontavious Plumer guilty as charged. Thank you.

11 OPENING STATEMENT

12 BY MR. YARBOROUGH: Ladies and gentlemen of the jury,
13 if it was that easy we wouldn't be here. What happened in
14 this case I believe that you will see pretty clearly in a
15 little while is that the State rushed to judgment. They --
16 there was a shooting. Something happened. And they rushed
17 to see what that judgment was. So they've taken the case
18 and they fit the facts to how they want to see them,
19 although they -- I think clearly you're going to see from
20 the evidence that comes from both the State and from us it
21 -- that's not exactly how it happened because it doesn't
22 make any sense.

23 Now, the State's going to call witnesses and they're
24 going to get up there and they're going to talk and they're
25 going to swear to tell the truth, and you're going to listen

1 to that evidence and I'm going to ask you on behalf of my
2 client, Mr. Plumer, who is standing up here -- Ontavious
3 Plumer. He's from Greenville. I'm going to ask you on
4 behalf of Mr. Plumer to listen to both sides. Listen to
5 both sides. That's why we've got a jury. That's why we
6 have a jury system. That's why we have the best system of
7 criminal justice in the world. It's because people like you
8 come and you're willing to serve and you're willing to
9 listen and you're willing to say, huh, that doesn't make any
10 sense. And I think over and over again during the course of
11 this trial you're going to say that doesn't make any sense.
12 Just like you just heard that this case is going to start
13 out -- the State's already saying that Mr. Wells was selling
14 marijuana that day. Mr. Wells was engaged in an act that
15 was illegal. Now, he wasn't engaged in that act with
16 Ontavious. Ontavious was not engaged in that marijuana
17 deal. You're going to see that. But you're going to see
18 and you're going to hear from the witness stand -- you can
19 sit down, Ontavious. You're going to hear from the witness
20 stand that Ontavious got shot. He got shot. And then
21 you're going to find out that Mr. Wells gave three, possibly
22 four, different versions of what happened before he finally
23 said it was Ontavious that shot him and finally brought him
24 into this picture. You're going to hear that. There's no
25 question about that. You're going to hear that there were

1 several, several versions of the facts. And the State
2 waited to pick the one version that they like. They rushed
3 to judgement. They had a theory of what happened when it
4 started. And so, it came to a point that they liked what
5 they heard and they said that's got to be the story. But
6 the great thing about this jury system is you're going to
7 have an opportunity to hear the other version of it. You're
8 going to have the opportunity to see that there are facts
9 that the State failed to look at and listen to that would
10 have pointed them in a different direction. A different
11 direction in this case. You're going to hear phone records.
12 You're going to hear where the gunshots were fired from.
13 You're going to hear all that. And at that point I think
14 you're going to sit there and you're going to say, hmm,
15 okay, it's the State's obligation to prove that Ontavious
16 Plumer was guilty of these charges -- these three charges
17 beyond a reasonable doubt. And I think at the close of the
18 testimony if you'll listen and you'll hear and you'll think
19 through the facts as they're presented and the things that
20 are presented to you, I think you'll see clearly Mr. Plumer
21 is not guilty of these three charges. He's not guilty of
22 attempted murder, he's not guilty of armed robbery, and he's
23 not guilty of possessing a firearm during the commission of
24 a violent crime. I think it will be clear when you're
25 through. All I ask you is for you to take your time and not

OSHAMAR WELLS-DIRECT EXAMINATION

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1 be like the State and rush to judgment and listen to the
2 facts, listen to both sides of the version, listen to the
3 law as the Judge charges you, and I think you'll return a
4 verdict of not guilty on all three counts. Thank you.

5 THE COURT: Okay. Mr. Foreman and ladies and gentlemen
6 of the jury, while you were out we discussed a little bit
7 about the logistics of the trial and we think that now is a
8 good time for us to break for lunch. I'll ask you all to be
9 back at 1:15. You don't know much about the case, but don't
10 talk about anything, don't do any independent research,
11 don't go visit some location that you may have heard about
12 or will hear about. You all have a nice lunch and we'll see
13 you at 1:15. Thank you. Mr. Willingham will show you out.

14 THE BAILIFF: Come this way, please.

15 (Whereupon, the jury exited the courtroom at 12:05
16 p.m.)

17 THE COURT: All right. The position of the State on
18 bond?

19 MS. WHITE: He's incarcerated, Your Honor.

20 THE COURT: Oh, is he? Okay. See you all at 1:15.

21 (Whereupon, a lunch recess was held from 12:05 p.m. to
22 1:25 p.m.)

23 (Whereupon, the jury entered the courtroom at 1:25
24 p.m.)

25 THE COURT: All right, ladies and gentlemen, welcome

OSHAMAR WELLS-DIRECT EXAMINATION

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1 back. I noticed you all are jockeying for positions in your
2 seats. There are no assigned seats except for the two
3 alternates and the foreperson. The rest of you all just be
4 comfortable wherever you're comfortable.

5 With that, we're ready to commence the trial. Ms.
6 White.

7 MS. WHITE: Thank you, Your Honor. The State calls
8 Oshamar Wells.

9 OSHAMAR WELLS, having been first
10 duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. WHITE:

13 Q Good afternoon.

14 A How you doing?

15 Q Can you tell the jury your name?

16 A Oshamar Wells.

17 Q And how do you spell Oshamar?

18 A O-s-h-a-m-a-r.

19 Q And Wells?

20 A W-e-l-l-s.

21 Q How old are you, Mr. Wells?

22 A Twenty-eight.

23 Q And where do you live?

24 A [REDACTED].

25 Q Is that here in Greenwood County?

OSHAMAR WELLS-DIRECT EXAMINATION

45

1 A Yeah, in Greenwood.

2 Q Turning our attention to the evening of October 11th,
3 2015. Do you remember that day?

4 A Yes, ma'am.

5 Q I guess starting at about 6:00 in the afternoon tell us
6 what were you doing on that day?

7 A Well, from about 6:00 that afternoon I was planning on
8 meeting two people to do a drug deal and we met up at
9 Mr. Chips and they followed me to my cousin's house to
10 proceed with what we were going to do.

11 Q When you say Mr. Chip's, where is that?

12 A That's right here on -- I guess it's South Main next to
13 Miss Ann's Chicken.

14 Q Okay. So just the convenience store right down here on
15 South Main?

16 A Uh-huh.

17 Q And one thing, can you answer yes or no, just because
18 Ms. Scott's trying to take down everything. She has to
19 make a record of everything we say, so --

20 A Okay.

21 Q -- make sure you say yes or no. And I'll remind you if
22 you forget. So do you recall about what time you met
23 at Mr. Chip's?

24 A Not the exact time, but it was around that time.

25 Q Why were you meeting at Mr. Chip's?

OSHAMAR WELLS-DIRECT EXAMINATION

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- 1 A They didn't -- they weren't from here and they didn't
2 know the area, so I was meeting them and letting them
3 follow me.
- 4 Q Okay. Did you know these guys before you met them at
5 Mr. Chip?
- 6 A No, ma'am. That's my first day meeting them.
- 7 Q And what kind of car were you driving that night?
- 8 A A black Mustang.
- 9 Q And when you met these guys at Mr. Chip what kind of a
10 car were they in?
- 11 A Black Mercedes.
- 12 Q And was it still daylight outside?
- 13 A Yes, but it was getting close to dark.
- 14 Q How long would you say you were at Mr. Chip?
- 15 A Not long. Maybe five, 10 minutes.
- 16 Q And where did you go from there?
- 17 A To my cousin's house.
- 18 Q And where does your cousin live?
- 19 A On the west side of town. I think [REDACTED],
20 or something like that.
- 21 Q Do you remember a house number?
- 22 A I think it's 128.
- 23 Q And is that in Greenwood County?
- 24 A Yes, ma'am.
- 25 Q When you went -- what's your cousin's name whose house

OSHAMAR WELLS-DIRECT EXAMINATION

47

1 you went to?

2 A Her name is Kema Moore.

3 Q Was anybody at that house when you got there?

4 A No, ma'am.

5 Q Why did you take these guys back to your cousin's house
6 instead of going to your house?

7 A It was more convenient. I be uptown a lot.

8 Q Would you frequently go to your cousin's house back
9 then?

10 A Oh, yeah, before.

11 Q Who lives at [REDACTED] with your cousin?

12 A Her three children.

13 Q How old are they?

14 A Her oldest son is 17, and her middle daughter is 12, if
15 I'm not mistaken, and her youngest son is eight.

16 Q But none of them were home that evening?

17 A No one was home.

18 Q When you went to [REDACTED] did they follow
19 you?

20 A Yes, ma'am.

21 (Whereupon, State's Exhibit No. 1 was marked for
22 identification.)

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

24 THE COURT: Yes.

25 Q I'm going to hand you what's been marked as State's

OSHAMAR WELLS-DIRECT EXAMINATION

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1 Exhibit 1. Do you recognize the vehicles in that picture?

2 A Yes, ma'am.

3 Q And what are those vehicles?

4 A My black Mustang and his black Mercedes.

5 Q And are those vehicles parked the same way they were
6 left when you all arrived at [REDACTED]?

7 A Yes, ma'am.

8 MS. WHITE: The State offers Exhibit 1 into evidence,
9 Your Honor.

10 MR. YARBOROUGH: Without objection.

11 THE COURT: All right. Without objection.

12 (Whereupon, State's Exhibit No. 1 was admitted into
13 evidence.)

14 Q Now, were they -- was their car parked -- how were you
15 all parked in the driveway?

16 A I don't understand the question.

17 Q Can you see the screen from over there?

18 A Uh-huh.

19 Q All right. Is this your Mustang first in the driveway?

20 A Yes, ma'am.

21 Q And the Mercedes is behind you?

22 A Yes, ma'am.

23 Q Were you -- were you sort of blocked in by that
24 Mercedes?

25 A Yes, ma'am. If I wanted to leave, I would need to --

OSHAMAR WELLS-DIRECT EXAMINATION

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1 need them to move their car to leave.

2 Q So you all get to [REDACTED] what did you all
3 do next?

4 A Well, when we arrived there, you know, we talked for a
5 minute and we smoked a couple of blunts to -- I guess I was
6 just letting them try it, the product or what not.

7 Q What was the deal supposed to be? How much were they
8 supposed to buy?

9 A I guess they each wanted a half a pound a piece, so it
10 was going to be a whole pound deal. But they was going to
11 split it into two halves.

12 Q And how much money would that have been worth?

13 A At the time maybe 36 -- 3,600.

14 Q Did you have -- you said you all smoked a couple of
15 blunts and were you all just -- what were you all doing
16 while you were smoking?

17 A We was just talking. Just chilling really while we
18 were smoking. Just talking.

19 Q Where were the drugs -- the rest of the drugs while you
20 all were doing that?

21 A They were right -- at first it was on the floor but
22 then I moved it to the -- on top of the table.

23 Q Okay. And how was that packaged up?

24 A Well, the two halves was separated into plastic bags of
25 their own and then I had them together in one plastic bag.

OSHAMAR WELLS-DIRECT EXAMINATION

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1 Q Like when you say a plastic bag, was it like a Ziploc
2 back, a shopping bag?

3 A A grocery bag.

4 (Whereupon, State's Exhibit No. 2 was marked for
5 identification.)

6 MS. WHITE: May I approach the witness again, Your
7 Honor?

8 THE COURT: Yes.

9 Q I'm going to hand you what's been marked as State's
10 Exhibit 2. Can you tell me what that is?

11 A This is a picture of the kitchen, of the table that we
12 were sitting at.

13 Q Now, was that picture taken that night?

14 A No.

15 Q But is that where the table was on the night in
16 question before anything took place?

17 A Yes.

18 MS. WHITE: State offers Exhibit 2 into evidence.

19 MR. YARBOROUGH: Without objection.

20 THE COURT: No objection.

21 (Whereupon, State's Exhibit No. 2 was admitted into
22 evidence.)

23 Q So you said this is the kitchen table in your cousin's
24 house?

25 A Yes, ma'am.

OSHAMAR WELLS-DIRECT EXAMINATION

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1 Q Where -- who was sitting at this seat right here?

2 A I was.

3 Q And do you know who was sitting here?

4 A Plumer.

5 Q And do you know who was sitting here?

6 A A guy -- the other guy named, I guess, Mel.

7 Q Did you know either one of them by name at that time?

8 A No. Well, I -- the other guy gave me a name but I
9 don't think it was his real name, whatever. The name he was
10 going by.

11 Q So you said -- and when you say Plumer are you
12 referring -- who are you referring to?

13 A Ontavious.

14 Q Now, you all are sitting at the kitchen table and
15 you've just smoked a couple of blunts. What happened after
16 that?

17 A Well, while we was -- actually while we was chilling,
18 you know, the blunts had went out almost and I was kind of
19 wondering, like, you know when they were going to pull out
20 the money. That's what I'm thinking in my head. But
21 instead of pulling out the money he just pull out a gun, and
22 instantly when he started pulling -- when he pulled out the
23 gun I went back and I tried to grab the gun out of the
24 cabinet. And when I started -- when I did that he started
25 shooting or what not. I think I was actually already

OSHAMAR WELLS-DIRECT EXAMINATION

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1 getting hit when I reached to grab the gun out of the
2 cabinet. And from them I just returned fire. And
3 everything happened so fast it's just kind of a blur from
4 then on.

5 Q Now, when you say he pulled out a gun, which -- which
6 person pulled out a gun?

7 A Plumer.

8 Q And the person who was shooting at you that night, is
9 he in the courtroom today?

10 A No. Oh, Plumer, yeah.

11 Q Do you see him? Can you identify him for me?

12 A Yes, ma'am.

13 Q Where is he?

14 A He's right there with the glasses on and whatnot.

15 Q You're referring to the gentleman in the suit?

16 A Yes, ma'am.

17 Q With the glasses, the kind of khaki suit?

18 A Uh-huh.

19 MS. WHITE: Your Honor, for the record, reflect he's
20 identified Mr. Plumer.

21 THE COURT: All right.

22 Q The other guy, what was he doing while this was going
23 on?

24 A He just got up and ran. He took the weed or what not
25 and ran.

OSHAMAR WELLS-DIRECT EXAMINATION

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1 Q So you said you grabbed a gun out of the cabinet.

2 Whose gun was that?

3 A It was my mother's gun.

4 Q How did you know it would be in the cabinet?

5 A My mother had just left not too long ago and I actually
6 seen her put it in there. She had the kids with her. That
7 was the reason why she left it in there.

8 MS. WHITE: Your Honor, can I get the witness to step
9 down because --

10 THE COURT: Sure.

11 (Whereupon, the witness stepped down from the witness
12 stand.)

13 Q Show me on this picture which cabinet the gun was in.

14 MS. WHITE: And for the record, this is State's Exhibit
15 2.

16 Q Which cabinet was the gun in?

17 A (Witness indicating on State's Exhibit No. 2.)

18 Q Now, you said you got hit. Where were you shot?

19 A Where was I standing when I...

20 Q Yes.

21 A Like approximately right here in front of this area.

22 Q Like sort of between the corner of the table and that
23 cabinet?

24 A Yes.

25 THE COURT: Keep your voice level up so we can hear

OSHAMAR WELLS-DIRECT EXAMINATION

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1 you.

2 MS. WHITE: And you can have a seat.

3 (Whereupon, the witness returned to the witness stand.)

4 Q Now, where on your body were you shot?

5 A My back, my butt, and in my legs.

6 Q Were you able -- once you were shot were you able to
7 run, to move around any?

8 A No. My leg had broken in the midst of me getting shot
9 and my shoulder popped out of place.

10 Q So did you pretty much drop? Drop right there?

11 A Yes, ma'am.

12 Q And you said you were returning fire?

13 A Yes, ma'am.

14 Q What was the Defendant doing?

15 A As I was returning fire he was returning fire as well
16 and stepping back out of the door.

17 Q Was he facing you kind of backing out?

18 A Yes, ma'am.

19 (Whereupon, State's Exhibit Nos. 3 through 6 was marked
20 for identification.)

21 MS. WHITE: May I approach the witness again, Your
22 Honor?

23 THE COURT: Uh-huh.

24 Q I'm going to hand you what's been marked for
25 identification as State's Exhibits 4 -- excuse me, 3 through

OSHAMAR WELLS-DIRECT EXAMINATION

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1 6. Do those pictures accurately depict the scene that night
2 and the scene where you were laying?

3 A Yes, ma'am.

4 MS. WHITE: The State offers Exhibits 3 through 6 into
5 evidence, Your Honor.

6 MR. YARBOROUGH: Without objection, Your Honor.

7 THE COURT: Okay.

8 (Whereupon, State's Exhibit Nos. 3 through 6 were
9 admitted into evidence.)

10 Q Looking at Exhibit -- Exhibit 4. Now, the little
11 number tags I assuming weren't there when you were laying
12 there, correct?

13 A Of course not.

14 Q Whose shirt is that?

15 A That's my shirt.

16 Q Okay. Why the -- did EMS cut that off of you?

17 A Yeah. They cut my pants and my shirt off.

18 Q And where were you laying in relation to that shirt?

19 A Like right in the area where the shirt -- actually I
20 think my head was that way, towards the right, and my legs
21 were towards the cabinet. I was laying right in the area.

22 Q Are those your keys right there?

23 A Yes, ma'am.

24 Q Now, what about the keys up here?

25 A That's the keys to the Mercedes.

OSHAMAR WELLS-DIRECT EXAMINATION

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1 Q And Exhibit 5, are those your pants?

2 A Yes, ma'am.

3 Q Were those sort of -- are those on the other side of
4 the dining room?

5 A Yes, ma'am. Well, I think that when EMS cut them off
6 they just -- maybe just tossed those.

7 Q And Exhibit 6, can you tell me what we're looking at
8 there?

9 A That's the angle of, I guess, me when I was on the
10 floor and I was shooting, returning fire at the Defendant.

11 Q So is this sort of like your point of view looked like?

12 A Yes, ma'am.

13 Q Now, when you were returning fire which of the guys
14 were you shooting at?

15 A Ontavious.

16 Q Why were you shooting at him?

17 A Because he was shooting at me.

18 Q Did the other guy have a gun that you were aware of?

19 A Not to my knowledge.

20 Q You said that they ran out the door. Sort of backed
21 out the door. Did you see which direction they ran off in?

22 A No. I was on the floor. I couldn't see no further.

23 Q What did you do after they left?

24 A I called my aunt and I called the ambulance, and I also
25 called my mom as well.

OSHAMAR WELLS-DIRECT EXAMINATION

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1 Q Now, when you went -- did EMS take you to the hospital?

2 A Uh-huh.

3 Q Is that a yes?

4 A Yes, ma'am. I'm sorry.

5 Q And I guess was law enforcement -- law enforcement, did
6 they talk to you any at the house before EMS took you?

7 A No.

8 Q Did they talk to you at the hospital?

9 A Yes. But it wasn't that same night. I think they came
10 the next morning.

11 Q So do you remember if anybody was in the hospital with
12 you that night from the police department?

13 A No, ma'am.

14 Q Now, you said -- how long were you ultimately in the
15 hospital?

16 A Approximately a week.

17 Q And were you in pain?

18 A Yes, of course.

19 Q When law enforcement first spoke with you did you tell
20 them what had happened at first?

21 A No, ma'am.

22 Q Do you remember why?

23 A Well, actually I was scared and my brain was scrambled
24 from what had just happened, and I really didn't know how to
25 handle the situation. I really didn't.

OSHAMAR WELLS-DIRECT EXAMINATION

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1 Q What were you scared of?

2 A I guess me getting in trouble. I didn't know how the
3 situation was going to happen because I know it was a drug
4 deal. So I didn't know what was going to happen really. I
5 was just scared of the outcome.

6 Q Is -- I guess you're familiar with the streets of
7 Greenwood, with what's called "the streets"; is that --

8 A Right.

9 Q Is cooperating with the police something that's frowned
10 on in the streets?

11 A Yes, ma'am.

12 Q So ultimately what made you decide to tell the police
13 what happened?

14 A Well, after, you know, I was thinking about it and, you
15 know, talking to the police they had made me a little bit
16 more comfortable with the situation. So I just felt like I
17 needed to tell the truth to make things -- just make things
18 easier for both of us.

19 Q Once you told the truth did the police show you -- show
20 you what's called a lineup?

21 A Yes, ma'am.

22 (Whereupon, State's Exhibit No. 8 was marked for
23 identification.)

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

25 THE COURT: Yes, ma'am.

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1 Q I'm going to hand you what's been marked for
2 identification as State's Exhibit 8. Is that the lineup
3 that the police showed you that day?

4 A Uh-huh.

5 Q Is that a yes?

6 A Yes, ma'am. Yes. I'm sorry.

7 Q It's easy to forget. Is -- did you -- well, let me
8 back up. When the police showed you that lineup did they
9 suggest who you should pick out in any way?

10 A No, ma'am.

11 Q Are all of the gentlemen who are pictured do they all
12 fairly similarly -- fairly similar looks?

13 A Yes, ma'am.

14 Q And were you able to pick the person who shot you out
15 of that lineup?

16 A Yes, ma'am.

17 Q And did you initial the person that you picked out?

18 A Yes, ma'am.

19 Q And which one did you initial?

20 A Number two out of the lineup.

21 Q And did you sign saying that you picked number two?

22 A Yes, ma'am.

23 MS. WHITE: The State offers Exhibit 8 into evidence at
24 this time, Your Honor.

25 MR. YARBOROUGH: Without objection.

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1 THE COURT: No objection.

2 (Whereupon, State's Exhibit No. 8 was admitted into
3 evidence.)

4 Q So on number 2 -- or, excuse me, on these pictures you
5 picked number 2 out as being the one who shot you?

6 A Yes, ma'am.

7 MS. WHITE: Begging the Court's indulgence.

8 Q When you pulled the gun out of the cabinet was it ready
9 to fire or was it in a holster? How was that in the
10 cabinet?

11 A No, it was in a holster in the cabinet. When I pulled
12 it out it -- I just kind of did it real quick and knocked
13 the holster off and cocked it back and had it ready to fire
14 or whatever.

15 Q Did it -- did it fire correctly the entire time you
16 were returning fire?

17 A No, ma'am. It jammed on down the line. I think maybe
18 after a couple shots. Not a couple. I got off five or six
19 or something like that.

20 Q And one more picture.

21 (Whereupon, State's Exhibit No. 7 was marked for
22 identification.)

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

24 THE COURT: Yes.

25 Q I'm handing you what's been marked for identification

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1 as State's Exhibit 7. Is that inside your cousin's living
2 room?

3 A Yes, ma'am.

4 Q And is that an accurate picture of how it was towards
5 the end of that evening?

6 A Yes, ma'am.

7 MS. WHITE: The State offers Exhibit 7 into evidence,
8 Your Honor.

9 MR. YARBOROUGH: Without objection.

10 THE COURT: Okay.

11 (Whereupon, State's Exhibit No. 7 was admitted in
12 evidence.)

13 Q Now, you can see in this picture -- if I can get the
14 glare off of it. First of all, over here, does your cousin
15 normally have the tables stacked on each other like that?

16 A Of course not.

17 Q And the chairs and table would have been shoved to the
18 side?

19 A No.

20 Q That's not how that normally is?

21 A No.

22 Q Do you know when that was done?

23 A I think that was done when EMS came in and they was
24 maybe moving stuff around to put me on the stretcher.

25 Q So they had to take you out on a stretcher -

OSHAMAR WELLS-CROSS EXAMINATION

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1 A Yes, ma'am.

2 Q -- and had to move that stuff to do that? Do you have
3 a criminal history, Mr. Wells?

4 A Somewhat. Yes, ma'am.

5 Q What's on your record?

6 A Some simple possessions and possession with intent to
7 distribute marijuana.

8 Q And when you say simple possession, is that marijuana?

9 A Yes, ma'am.

10 Q What type -- do you know what type of gun that you had
11 that night?

12 A It was a 40 cal.

13 Q Do you know the manufacturer or anything like that?

14 A I think it's a Taurus.

15 MS. WHITE: Please answer any questions Mr. Yarborough
16 has for you.

17 THE COURT: Cross.

18 CROSS-EXAMINATION

19 BY MR. YARBOROUGH:

20 Q Mr. Wells, you make money selling marijuana?

21 A Yes, sir. I have before.

22 Q That's what you do to kind of make your living?

23 A Not currently. But yes, I have before.

24 Q Back when this happened that's what you were doing to
25 earn money?

OSHAMAR WELLS-CROSS EXAMINATION

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1 A Yes, sir.

2 Q And you've been caught by the police before?

3 A Yes, sir.

4 Q And it's safe to say that on the night all this
5 happened you were worried about getting in trouble; isn't
6 that right?

7 A Yes, sir.

8 Q And when the police came to see you, you told them a
9 short guy and a tall guy robbed you, right?

10 A Yes, sir.

11 Q And that was the -- that was the first time you talked
12 to him, right?

13 A I don't know. I believe so, yeah. I guess so. I
14 don't know which order.

15 Q Well, you said the tall guy had dreads or something
16 like that?

17 A Uh-huh.

18 Q You know who that tall guy is, right?

19 A Do I know him or do I know of him?

20 Q Well, you've met him and you know of him?

21 A Yes.

22 Q And his name is Brownlee?

23 A Yes.

24 Q And you all are in the rap business together?

25 A Well, we don't rap together, but I do music and I heard

OSHAMAR WELLS-CROSS EXAMINATION

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1 he raps.

2 Q And there was a guy that set you up with Brownlee to do
3 this drug deal, right?

4 A Yes, sir.

5 Q And that guy's name was Jock?

6 A Yes, sir.

7 Q And what's his real name?

8 A Christopher Maggiacomo or something like that.

9 Q And Jock is one of these guys that goes out and helps
10 you set up drug deals?

11 A No, he's not someone who helps me set up drug deals.
12 Me and Jock had previously had some drug deals together, and
13 he lives out of town. So when this drug deal came upon he
14 was out of town. He would have been the middle man of the
15 situation but he was out of town and --

16 Q So he would have -- he would have been the middle man
17 but he was out of town, and so you decided to do it
18 yourself?

19 A Yeah.

20 Q And at that point you were -- you were really high,
21 right?

22 A was I was really high when?

23 Q When you set up this drug deal? You had been smoking
24 blunts?

25 A I mean, well, there's different levels. Like for

OSHAMAR WELLS-CROSS EXAMINATION

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1 someone who smokes as much as I do being high is normal to
2 me. So it's not like I was high and unable to handle the
3 situation, or any situation. Being high is normal to me.

4 Q You were high?

5 A Yes, if that's what you're asking.

6 Q You were high, and you were nervous?

7 A Was I nervous?

8 Q You were nervous, yeah.

9 A No.

10 Q Setting up the drug deal?

11 A No.

12 Q Didn't you tell the police that you put that gun up so
13 that you could use it during the drug deal?

14 A No, I didn't tell the police that.

15 Q At no time did you tell the police that you put that
16 gun up so that if something happened you could use it during
17 the drug deal?

18 A I may have said I put the gun up, yeah.

19 Q In fact, you told them that it was a gun and you didn't
20 want to get your family member in trouble and you put that
21 gun near the table so you could reach it during -- if the
22 guys came over there, right?

23 A I don't remember saying anything about a family member
24 in trouble.

25 Q Okay, but you remember telling them about putting the

OSHAMAR WELLS-CROSS EXAMINATION

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- 1 gun up?
- 2 A Uh-huh.
- 3 Q So the gun's close?
- 4 A Uh-huh.
- 5 Q You know where the gun is?
- 6 A Uh-huh.
- 7 Q Now, you told Ms. White that you were worried about --
- 8 or you were trapped in by this car, right? The picture
- 9 that's -- this Exhibit No. 1?
- 10 A Uh-huh.
- 11 Q Now, didn't you lead the people over there?
- 12 A Right.
- 13 Q Okay. So you led them over there. And that's your car
- 14 in the front, right?
- 15 A Uh-huh.
- 16 Q And the car behind that, that's their car, right?
- 17 A Correct.
- 18 Q So it's not like they trapped you in. You pulled up
- 19 there --
- 20 A No, no, no. I didn't -- I didn't say I was trapped. I
- 21 mean, I said if I needed to leave I would have needed them
- 22 to move their car out of the way in order for me to do so.
- 23 Q But you pulled up there?
- 24 A Uh-huh.
- 25 Q So -- for them to park?

OSHAMAR WELLS-CROSS EXAMINATION

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- 1 A Uh-huh.
- 2 Q Nothing unusual about that?
- 3 A Correct.
- 4 Q Now, you invited them into your house?
- 5 A Yes.
- 6 Q And you had been smoking?
- 7 A Yes.
- 8 Q And you rolled up another blunt, or you had a blunt
- 9 there to smoke then, right?
- 10 A Yes.
- 11 Q And you had some more marijuana out to get another
- 12 blunt going, right?
- 13 A If needed to be, yes.
- 14 Q And while they were smoking my client was about to
- 15 smoke a cigarette, right?
- 16 A I don't remember anything about smoking a cigarette.
- 17 Q You don't remember him about to smoke a cigarette and
- 18 you tell him you can't smoke in my aunt's house, you need to
- 19 step out on the porch?
- 20 A We were just smoking blunts in there. Why would I tell
- 21 him you can't smoke a cigarette in there?
- 22 Q I don't know. You said it.
- 23 A No, I didn't say that.
- 24 Q You didn't say it?
- 25 A No, sir.

OSHAMAR WELLS-CROSS EXAMINATION

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1 Q And Ontavious didn't step out on the porch to smoke a
2 cigarette?

3 A No, sir.

4 Q So if there was a cigarette out there and it's his, how
5 did it get there?

6 A He could have been smoking when he pulled up.

7 Q Okay. Now, you're in there smoking and you take some
8 -- some medication for pain, or you get some pain medicine?

9 A No, sir.

10 Q There were some pills in there. What were those pills?

11 A I don't know. I don't even know about no pills being
12 there.

13 Q So you're in there and you're talking to Ontavious and
14 you're talking to Brownlee and Brownlee is the guy setting
15 the drug deal up, right?

16 A Uh-huh.

17 Q And this gets to be about 7:30, 7:25?

18 A Approximately.

19 Q Okay. And at about that moment you get a text, right?

20 A Possibly.

21 Q Well, you did get a text.

22 A Okay. Well, I don't remember exactly whether I got a
23 text or not.

24 Q You weren't looking at your cell phone at that point,
25 and then got a text telling you not to do the deal? That

OSHAMAR WELLS-CROSS EXAMINATION

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1 those boys are acting crazy?

2 A Oh, no, no. I got that after the deal was already gone
3 and already happened. I was already shot when I got that
4 text.

5 Q You think you were already shot when you got that?

6 A I know I was already shot when I got that text.

7 Q How do you know you were already shot when you got that
8 text?

9 A How do I know I was already shot when I got that text?
10 Because I didn't get that text no time during we was sitting
11 right there at that table. I know I didn't get it.

12 Q You said you were sitting there at the table at 7:30
13 and the text came in at 7:23, right?

14 A Well, I know during that day I was texting my
15 girlfriend. But I didn't get no text from Christopher until
16 after I had got shot.

17 Q You didn't get a text from who?

18 A Christopher. That's the text -- that's who sent the
19 text. I didn't get no text from him until -- about those
20 guys acting crazy until after I got shot.

21 Q I'm talking about the text from the guy that set the
22 drug deal up, Osie (phonetic).

23 A Who?

24 Q The guy that set the drug deal up. Didn't he text you
25 -- he's the one that texted you about giving them your

OSHAMAR WELLS-CROSS EXAMINATION

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1 number, right?

2 A Jock?

3 Q Jock.

4 A Jock set the drug deal up, yes.

5 Q Okay. Jock set the drug deal up. And he texted you a
6 couple days before and he asked you to give --

7 A Was it okay for them to get my number?

8 Q Yes.

9 A Yes.

10 Q Okay. That happened. And you got a text from Jock at
11 7:23 that said -- at 7:23 he said, "Bro, don't mess with
12 that nigger, bro. He just texted me on some dumb telling me
13 not to tell you --"

14 MS. WHITE: Objection to all this hearsay, Your Honor.

15 Q Did you -- did you get the text?

16 THE COURT: Don't go into the content of it.

17 Q Well, do you remember what the text said?

18 A The text said something like what you just said and --
19 but I didn't get that text until after I was already shot.

20 MS. WHITE: Your Honor, I'm going to object to lack of
21 foundation.

22 MR. YARBOROUGH: I'm going to try to make a foundation.

23 THE COURT: All right. See where he goes.

24 Q Do you recognize this text?

25 A Uh-huh.

OSHAMAR WELLS-CROSS EXAMINATION

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1 THE COURT: You got to say yes or no, sir.

2 THE WITNESS: Yes, sir. I'm sorry.

3 Q And is that a text that you got?

4 A Yes.

5 Q And is that -- you recognized what time that that text
6 came in?

7 A Yes.

8 Q And what time did that text come in?

9 A What time did it come to me?

10 Q Yes.

11 A I didn't get that text -- I didn't see the text until
12 the next day.

13 Q Well, do you see what time it says on there?

14 A Yeah.

15 Q And you said that the drug deal went down at 7:30.

16 What time does the text say it came in?

17 A I didn't -- I didn't say the drug deal went down at
18 7:30. I said we -- the drug deal went down around 6:00.

19 Q Did I not just ask you a second ago that if you all
20 were smoking those blunts around 7:30?

21 A I didn't -- I didn't hear you say 7:30. I apologize.

22 Q So now is your testimony not what it said before?

23 A What do you mean?

24 Q I asked you if it was at 7:30.

25 A I never said anything about 7:30. If you said

OSHAMAR WELLS-CROSS EXAMINATION

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1 something about 7:30 I didn't -- I didn't acknowledge you
2 saying anything about 7:30. I remember you saying when we
3 sat down at the table and smoked a blunt and --

4 Q And I asked you if that was about 7:30.

5 A Oh, I don't remember it, no.

6 Q So have you changed your testimony now?

7 A No, no. No, sir.

8 Q So what time were you all sitting there smoking the
9 blunt?

10 A It had to be in between 6:00 and 7:00 if we got there
11 at 6:00. It don't take that long to smoke a blunt or two.

12 Q Okay. Now, why did you not tell the police that you
13 were involved in a drug deal when they came to see you on
14 the day of the shooting?

15 A Like I said, it was a lot going on. I was scared and
16 it was a lot -- it was the pressure. I was still in shock
17 with what happened the night before in all actuality.

18 Q And you were shocked, but you had pulled out a gun and
19 you had shot, right?

20 A Yes, sir.

21 Q And you had shot my client, right?

22 A In defense for my life. Yes, sir.

23 Q But you fired, what, five times?

24 A I don't know how many times I fired.

25 Q But if there were five bullets in there those were your

OSHAMAR WELLS-CROSS EXAMINATION

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1 bullets, right?

2 A There were more than five bullets in there.

3 Q But, I mean, they came from that pistol?

4 A I guess so.

5 Q So you were firing boom, boom, boom, boom, right?

6 A Uh-huh.

7 Q Now, you said that you were -- can you step down here,
8 please?

9 (Whereupon, the witness stepped down from the witness
10 stand.)

11 Q You said you were sitting at this table, right?

12 A Uh-huh.

13 Q Okay. Now, where were you sitting?

14 A At the head of the table.

15 Q You were sitting at the head of the table.

16 THE COURT: Keep your voice level up so we can hear
17 you.

18 THE WITNESS: Okay.

19 Q You were sitting at the head of the table right there,
20 right?

21 A Uh-huh.

22 Q And Brownlee was sitting where?

23 A On this side of the table.

24 Q And Ontavious was sitting where?

25 A Over there.

OSHAMAR WELLS-CROSS EXAMINATION

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1 Q He was sitting over there?

2 A Uh-huh.

3 Q And where was the gun?

4 A In this cabinet.

5 Q So you got the gun out of this cabinet?

6 A Uh-huh.

7 Q Right? And you fired at my client right there, right?

8 A After he was already firing at me. Yes, sir.

9 Q Now, wait a second. Why would he start firing at you?

10 MS. WHITE: Objection, calls for speculation.

11 Q But what was happening when he started to fire at you?

12 A Well, initially when he pulled out the gun --

13 THE COURT: Well, wait a minute. If you're going to
14 ask him -- if you need him down there for demonstrative
15 purposes.

16 MR. YARBOROUGH: I don't need him --

17 THE COURT: Come on back up so we can hear what you're
18 saying. And keep your voice level up. We're recording
19 everything.

20 THE WITNESS: Okay. I'm sorry, sir.

21 THE COURT: It's all right.

22 (Whereupon, the witness returned to the witness stand.)

23 A Now, what's your question, sir? I'm sorry.

24 Q If my client, Mr. Plumer, fired at you -- okay?

25 A Uh-huh.

OSHAMAR WELLS-CROSS EXAMINATION

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1 Q How did you have time to go into that cabinet that you
2 were just pointing at and get that gun?

3 A The table's right in front of the cabinet. I don't
4 understand the question.

5 Q So you're saying that where you're pointing to the jury
6 that Mr. Plumber was in that chair --

7 A Uh-huh.

8 Q Okay. He was in that chair.

9 A Uh-huh.

10 Q And you're saying he pulled out a gun and he started
11 firing at you and you somehow were able to get out of your
12 chair and reach up into this cabinet, which looks like it's
13 about five feet away, and you were able to --

14 MS. WHITE: Your Honor, objecting to what it looks like
15 to him distances.

16 Q How far is that chair from that cabinet?

17 A I don't know exactly. I don't know exactly exact
18 distance. But I know that I was already -- I got shot five
19 times. So in the midst of me grabbing the gun I was getting
20 shot. Your client got shot twice. He didn't get shot five
21 times. I did.

22 Q So what you're saying -- let's figure out -- let's talk
23 about what Ms. White just asked you. Okay?

24 A Okay.

25 Q Or was talking about. This cabinet is how far from

OSHAMAR WELLS-CROSS EXAMINATION

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1 that chair?

2 A I don't know the exact distance of how far the cabinet

3 --

4 Q Is it about --

5 A -- is from the chair.

6 Q Is it about this far?

7 A I don't -- I don't know the exact distance. I don't
8 know the exact distance, sir. I know -- I know that if I
9 stand up it's arm reach. It's arm reach distance. If you
10 stand up -- if you look at the diameter or whatever I'm
11 sitting at, it's on the head of the chair, if you stand up
12 it's arm reach. The cabinet's arm reach. I don't know the
13 distance. I don't know. But I know that it's arm reach.

14 Q Can you step back down here again, please.

15 (Whereupon, the witness stepped down from the witness
16 stand.)

17 Q Reach your arm up.

18 A Uh-huh.

19 Q Now, there's the chair, right? Everybody see?

20 A This the chair I was sitting in.

21 Q That's the chair you were sitting in. There's the
22 cabinet right there, right?

23 A Uh-huh.

24 Q Okay. Now, there's the chair that Mr. Plumer was in,
25 right?

OSHAMAR WELLS-CROSS EXAMINATION

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1 A Uh-huh.

2 Q And you're telling me, and you want to tell this jury,
3 that Plumer is sitting there shooting the gun at you and you
4 reach up and grab the gun out of there, get it out of the
5 cabinet, bring it back down and fire two times, while he
6 fires five times at you?

7 A I don't know exact -- the exact amount of times he or I
8 fired, but that's pretty much what happened.

9 Q Doesn't it make sense that you reached up and got that
10 gun out of that cabinet --

11 MS. WHITE: Objection, Your Honor.

12 THE COURT: Are you done? Come back and have a seat.

13 (Whereupon, the witness returned to the witness stand.)

14 Q Did you not reach up into that cabinet and bring that
15 gun down after you got this text?

16 A No. No. Like I said, I didn't see that text until the
17 next day.

18 Q Remember talking to the police, right?

19 A Uh-huh.

20 Q First you told him you didn't know who was involved,
21 right?

22 A Correct.

23 Q And you told him you weren't sure who was involved,
24 right? That's the second time you talked to him, right?

25 A I don't know exactly which time. I think it correlates

OSHAMAR WELLS-CROSS EXAMINATION

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1 with the first time. It's the same thing.

2 Q Now, the third time they came -- they did the gunshot
3 residue test on your hands, right?

4 A I don't know.

5 Q Do you remember them coming in and testing your hands?

6 A No, I don't remember. No, I don't.

7 Q You don't recall that being the case that they came in
8 and tested your hands when you talked to them?

9 A I think they -- I think they tested my hand when I was
10 asleep. So I don't -- I don't remember them testing my
11 hands. No, I don't.

12 Q You don't -- you don't recall them questioning you
13 about what happened that day?

14 A Which day?

15 Q The day of the shooting.

16 A I'm talking about which day are you asking me about.

17 Q In day one.

18 A They didn't ask me day one.

19 Q Day two.

20 A Okay.

21 Q They were questioning you. They didn't believe you,
22 right?

23 A Correct.

24 Q And day three they still didn't believe you, right?

25 A I'm assuming.

OSHAMAR WELLS-CROSS EXAMINATION

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1 Q And you were getting scared, right?

2 A Was I getting scared of what?

3 Q You were getting scared of getting charged with
4 shooting Mr. Plumer.

5 A No, sir.

6 Q No, sir?

7 A No.

8 Q Well, you lied to the police the first time?

9 A Uh-huh.

10 Q You lied to them the second time?

11 A Uh-huh.

12 Q You lied to them the third time?

13 A No -- go ahead.

14 Q And the fourth time you told them that Mr. Plumer shot
15 you, right?

16 A I don't know exactly how many times we talked before I
17 told them. I don't -- I wasn't counting.

18 Q But would four times sound reasonable?

19 A I can't give you an exact number. I know they came to
20 talk to me once or twice before then -- before I actually
21 told the truth.

22 Q So they talked to you --

23 A Maybe three times.

24 Q -- three or four times before you actually told the
25 truth?

OSHAMAR WELLS-CROSS EXAMINATION

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- 1 A About two times before I told the truth.
- 2 Q And that's when you were scared they were going to
- 3 charge you because he had been shot, right?
- 4 A What do you mean?
- 5 Q Because you didn't know he had been shot before that,
- 6 right?
- 7 A No, I didn't.
- 8 Q Right. And that made you nervous.
- 9 A Well, what made me nervous? That I shot him?
- 10 Q Yes. You shot him and you were scared you were going
- 11 to get charged.
- 12 A That was initially. That was from the beginning. I
- 13 was scared then when it first happened.
- 14 Q And you were scared then and you had to come up with a
- 15 story to tell the police.
- 16 A Okay.
- 17 Q Okay. So you had to come up with a plan. You knew you
- 18 were there selling dope, right?
- 19 A Uh-huh.
- 20 Q You knew you had fired a gun two times, right -- for
- 21 five times, right?
- 22 A Or however many times.
- 23 Q However, many times. Five times, six times, you had
- 24 fired the gun, right?
- 25 A Uh-huh.

OSHAMAR WELLS-CROSS EXAMINATION

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1 Q And you had planned before you got there that the gun
2 was right up there so you could get to it when this drug
3 deal was going on?

4 A No. Well, to protect myself.

5 Q And you planned it and you put the gun there to protect
6 yourself before the drug deal ever happened, and you told
7 the police that?

8 A Okay.

9 Q Right?

10 A Uh-huh.

11 Q And it's on tape, right?

12 A Uh-huh.

13 Q And did she play it for you?

14 A Uh-huh.

15 Q And Mr. Plumer didn't set any of this up, right? This
16 whole thing was done with your buddy, Brownlee?

17 A He's not my buddy. I don't -- that was my first time
18 meeting him, Brownlee.

19 Q But now you know him real well?

20 A No, I don't know him real well. He's still not my
21 buddy. I haven't talked to Brownlee since that day.

22 Q You gave the police a statement on October the 13th,
23 2015, right, about the lineup that they showed you?

24 A Uh-huh.

25 Q And when you originally gave the police this statement

OSHAMAR WELLS-CROSS EXAMINATION

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1 what you told them about Mr. Plumer was, "He came to my
2 aunt's house and tried to shoot me." Right? That's what you
3 originally wrote right there, right?

4 A I didn't write that.

5 Q That's what the police wrote for you?

6 A Yeah, I think so, because I was a little incapacitated
7 at the time.

8 Q So you were incapacitated and said tried to shoot me --

9 A No, he got that scratched out. He said --

10 Q But he scratched it out, but --

11 A -- he shot me.

12 Q Yeah, but originally it was tried to shoot me because
13 that's what you told them, right?

14 A I can't remember exactly.

15 Q That's exactly right, because it was Mr. Brownlee that
16 shot you, wasn't it?

17 MS. WHITE: Objection, Your Honor.

18 THE COURT: Wait, wait, wait. What's the objection?

19 MS. WHITE: Your Honor -- withdrawn.

20 Q It was Mr. Brownlee that shot you.

21 A No, it wasn't, sir.

22 Q Do you know if Mr. Brownlee's mother knows your mother?

23 A I don't know. My mother don't know Mr. Brownlee's
24 mother, so...

25 Q There's been no interaction between the two that you're

OSHAMAR WELLS-CROSS EXAMINATION

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1 aware of?

2 A No, sir.

3 Q I want to ask you if you -- do you recognize --

4 MS. WHITE: Can I see what he's showing to the witness?

5 THE COURT: Sure.

6 Q Do you recognize this caption on the --

7 MS. WHITE: Your Honor, we have a matter of law.

8 THE COURT: All right. Let's take a short recess.

9 It's probably a good time. Don't discuss the case. We'll
10 get right back with you.

11 (Whereupon, the jury exited the courtroom at 1:25 p.m.)

12 THE COURT: Okay. What's the issue?

13 MS. WHITE: Your Honor, the State filed a reciprocal
14 Rule 5 requesting any documents that the Defense intended to
15 use. This is -- frankly, I'm not really sure what it is.
16 It looks like it's from -- I don't know what it is, but it's
17 clearly a document that has not been provided to me pursuant
18 to my reciprocal Rule 5.

19 MR. YARBOROUGH: Your Honor, I received this on late
20 Friday afternoon, I think, at 12 -- 1, 27, 17 (PHONETIC). I
21 was not sure what he was going to testify to and I was just
22 going to ask him if he recognizes the text.

23 THE COURT: What is it?

24 MR. YARBOROUGH: It's a text that I believe that he
25 sent. May I approach? I'm just going to ask him a couple

OSHAMAR WELLS-CROSS EXAMINATION

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1 of statements about it. It's their witness. I wasn't --

2 THE COURT: If this is impeachment..

3 MS. WHITE: Your Honor, my concern --

4 THE COURT: I don't know. I mean, I'm not sure what it
5 is.

6 MS. WHITE: My concern is that we're going down a
7 rabbit hole. I believe this is someone by the name of
8 Marcus Woods who we have phone calls from the jail.

9 Attempting -

10 THE COURT: Proffer what you're going to ask him.
11 Let's see what it is.

12 PROFFER

13 Q Do you know who that Oggie Popo Woods (PHONETIC) is?

14 A No. I know of him, uh-huh.

15 Q Okay. Do you recognize this as an email that you --

16 THE COURT: Hang on. Stop.

17 Whereupon, the Judge confers with the Bailiff off the
18 record.

19 THE COURT: He wants to talk to the judge?

20 THE BAILIFF: Yes, sir.

21 THE COURT: Tell him to write a note. All right. Go
22 ahead.

23 Q Can I show you this and do you recognize this as a text
24 you sent to him?

25 A Can I see it, please?

OSHAMAR WELLS-CROSS EXAMINATION

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1 Q Sure.

2 A No, I don't recognize it.

3 Q What? I'm sorry.

4 A No, I don't recognize it.

5 Q You do not recognize this as a text you sent?

6 A No. I don't even have his number.

7 THE COURT: That's the end of that.

8 MR. YARBOROUGH: Okay.

9 THE COURT: Let's see if he has his note ready. The
10 note reads, "A juror knows the Jock guy." That would be
11 Christopher Maggiamo.

12 MS. WHITE: We went over that twice.

13 MR. YARBOROUGH: Your Honor, do you want to ask him?
14 Do you want to talk to him yourself and see if it'll affect
15 his testimony.

16 MS. WHITE: Yeah, see if that's --

17 MR. YARBOROUGH: We'll be happy to leave it to the
18 Judge's discretion.

19 THE COURT: Sir, if I could ask you to just step down.

20 (Whereupon, the witness stepped down from the witness
21 stand.)

22 THE COURT: Ask the juror to come -- whoever it is to
23 come out and let me just ask them about it.

24 How are you doing?

25 JUROR: Good. How about you?

OSHAMAR WELLS-CROSS EXAMINATION

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1 THE COURT: I'm fine. So you know this guy, Christopher
2 Maggiomo?

3 JUROR: Yeah. I think so. If I'm not mistaken. For
4 real. I think I worked with him. Jock, is what we called
5 him. I didn't know that was his name and they were like,
6 call him Jock. I worked with him for four months. He's got
7 a baby now.

8 THE COURT: How did you -

9 JUROR: And he's -- according to my boyfriend -- my
10 boyfriend he knew him before he started working at the
11 Huddle House. He went to school with him.

12 THE COURT: The Huddle House is where you work?

13 JUROR: Uh-huh. I'm a server over there. I've been
14 working over there going on 3 years October 8th.

15 THE COURT: If this is the same guy, would that impair
16 your ability to be fair and impartial?

17 JUROR: Yeah, 'cause he's got a baby now.

18 THE COURT: Well, he's not -- he's a witness.

19 JUROR: He's a witness?

20 THE COURT: Yes. So I'm asking -- he's not charged in
21 this offense, okay? So I just need to know would you give
22 -- if you know him, if it's the same guy, which we don't
23 even know, would you give his testimony more credibility or
24 less credibility?

25 JUROR: Kinda. I worked with him for a really long

OSHAMAR WELLS-CROSS EXAMINATION

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1 time. Like, I worked with him for four months and he was my
2 lead cook on second.

3 THE COURT: Don't mention this to anybody in there.
4 We'll get right back to you. What's your juror number?

5 JUROR: Eleven.

6 THE COURT: And your name?

7 JUROR: Velvet Blackmon.

8 THE COURT: Okay, Ms. Blackmon. If you'll go back we'll
9 be with you in a second.

10 (Whereupon, the juror returned to the jury room.)

11 THE COURT: Who is this guy, Maggiaomo? Does he work
12 at the Huddle House?

13 MS. WHITE: No, he lives in Columbia. But I was
14 listening to her. He does have a baby, absolutely.

15 MR. McCLINTON: He was living around here for a while.

16 THE COURT: For the record, your name?

17 MR. McCLINTON: Wesley McClinton. Yes, sir. I'm
18 sorry.

19 THE COURT: I'm afraid we may have to cut her loose.
20 She said it would impact her impartiality, so...

21 MR. YARBOROUGH: Your Honor, I'm going to leave it to
22 your discretion.

23 THE COURT: All right. I think it's probably the wise
24 thing to do. Bring her out. Tell her to bring her stuff
25 with her.

OSHAMAR WELLS-CROSS EXAMINATION

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1 (Whereupon, Ms. Blackmon enters the courtroom.)

2 THE COURT: Listen, just out of an abundance of caution
3 we're going to --

4 MS. BLACKMON: I'm not going to talk about anything
5 that happened in this courtroom at all.

6 THE COURT: Okay. Well, you have to call back after
7 6:00 tonight and find out what's going on.

8 MS. BLACKMON: Yeah, that number that they gave me?

9 THE COURT: Yeah. All right. Thank you.

10 THE BAILIFF: Come this way, ma'am.

11 (Whereupon, Ms. Blackmon, Juror No. 11, was released.)

12 THE COURT: I think the chair is probably still warm.

13 (Whereupon, the witness returned to the witness stand.)

14 THE COURT: Anything else before we bring them back?

15 MS. WHITE: No, sir.

16 (Whereupon, the jury entered the courtroom at 2:25
17 p.m.)

18 THE COURT: Welcome back, ladies and gentlemen. I
19 guess all of you may have heard that your fellow juror
20 apparently recognized that she knew one of the potential
21 witnesses. And so, out of an abundance of caution, I have
22 released her from this case. And that means, Mr. Daniels,
23 you got a raise. A promotion, not a raise.

24 All right, continue.

25 MR. YARBOROUGH: Thank you, Your Honor.

OSHAMAR WELLS-CROSS EXAMINATION

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1 Q Okay. Now, Mr. Wells, you were taken to the hospital
2 after this, right?

3 A Yes.

4 Q And when you were in the hospital Detective McClinton
5 came in to see you; is that right?

6 A Yes.

7 Q And he asked you what happened that night, right?

8 A Uh-huh.

9 Q And he asked you did you know who did this, right?

10 A Uh-huh.

11 Q And you said that you didn't, right?

12 A Uh-huh.

13 Q And you told him that two guys ran in the back door and
14 tried to rob you, right?

15 A Uh-huh.

16 Q Okay. And --

17 THE COURT: You have to say yes or not.

18 A Yes. I'm sorry. Yes..

19 Q And that was right after this happened?

20 A It wasn't right after it happened. It was the next
21 day, I guess.

22 Q Okay. But you were in the hospital?

23 A Correct.

24 Q And you had had a little bit of time to think about it?

25 A Well, no not really. On the night it happened I was

OSHAMAR WELLS-CROSS EXAMINATION

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1 sleeping, stuff like that, and they came the next morning.

2 Q They came the next morning and they asked you what
3 happened and you said two guys ran in the back door and
4 tried to rob you?

5 A Uh-huh.

6 Q And that wasn't true?

7 A No.

8 Q And you were worried that somebody would have seen you
9 meeting these guys at the gas station, right?

10 A No. No. Why would I be worried about that?

11 Q Well, because you had told the police that two guys had
12 run in and robbed you.

13 A Uh-huh.

14 Q And that was a lie?

15 A Uh-huh.

16 Q And you knew you had lied?

17 A Uh-huh.

18 Q And you were freaking out because something bad was
19 going to happen to you for lying, right?

20 A I guess so, maybe. I don't know.

21 Q That's fair. And you knew that they had you dead to
22 rights for selling marijuana?

23 A They wasn't charging me with selling marijuana.

24 Q What do you mean they weren't charging you with selling
25 marijuana?

OSHAMAR WELLS-CROSS EXAMINATION

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1 A They didn't charge me with selling marijuana. They
2 wasn't --

3 Q But you were worried they were charging you with
4 selling marijuana?

5 A I was initially had -- I had some thoughts that they
6 was going to charge me, but when they came they didn't try
7 to charge me.

8 Q And you had been convicted of that before?

9 A Correct.

10 Q So you were worried about what would happen?

11 A Uh-huh.

12 Q Okay. And so, you told them -- you made up this story
13 about these two guys running in the back door and robbing
14 you?

15 A Uh-huh.

16 Q And that was a lie?

17 A Uh-huh.

18 THE COURT: Yes or no.

19 THE WITNESS: Yes. I'm sorry, sir. Yes.

20 Q And the police came back to see you a little while
21 later, right?

22 A I guess, yes.

23 Q And it was -- it was again Detective McClinton?

24 A Yes.

25 Q And he was wearing a body cam, a recorder? He was

OSHAMAR WELLS-CROSS EXAMINATION

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1 telling you he was recording the statement?

2 A He told me he was recording it, yes.

3 Q He told you he was recording the statement. And you
4 told him a story about it was a tall guy and a short guy,
5 right?

6 A Yes.

7 Q And at that point he started pushing you a little bit,
8 right?

9 A I can't remember, sir.

10 Q He said, you know, this ain't adding up, right?

11 A Uh-huh.

12 Q That's what he told you?

13 A Uh-huh.

14 Q Because all of a sudden he knew that you had fired --

15 MS. WHITE: Objection to what Detective McClinton may
16 have known, and --

17 THE COURT: All right.

18 MS. WHITE: -- also objection to what he may have said.

19 Q Do you remember the conversation?

20 A Vaguely.

21 Q Have you listened to the tape recorded conversation of
22 the statement?

23 A Have I listened to it?

24 Q Yes.

25 A Yes.

OSHAMAR WELLS-CROSS EXAMINATION

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- 1 Q You listened to it with Ms. White?
- 2 A Yes.
- 3 Q And do you recall what was on the statement that was
- 4 recorded?
- 5 A Yes.
- 6 Q And what did you say?
- 7 A I can't repeat it word for word, but I don't know.
- 8 Q But your hands were tied because you hadn't told them
- 9 before that you had shot a gun, right?
- 10 A I didn't tell them -- well, I don't -- I can't
- 11 remember.
- 12 Q You hadn't before him before you had shot a gun?
- 13 A Okay. I can't remember.
- 14 Q You didn't tell them the first time you had shot a gun,
- 15 right?
- 16 A I can't remember. I don't -- I don't -- I can't
- 17 remember exactly when did I tell them that I shot.
- 18 Q Do you recall the -- does the tape that you listened
- 19 to, does it fairly and accurately reflect what you said?
- 20 A Uh-huh.
- 21 Q And on that tape does it say that you shot a gun?
- 22 A On the tape? I don't remember -- right now I don't
- 23 remember what the tape said. But I don't know. It maybe
- 24 --
- 25 Q You can't recall?

OSHAMAR WELLS-CROSS EXAMINATION

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1 A Maybe if the tape was played again for me, but I don't
2 know. I don't know as of right now. Maybe I think it said
3 something in the tape about --

4 Q It's your statement.

5 A Uh-huh.

6 THE COURT: Let him finish his answer before you ask
7 your next question.

8 A All right. Maybe it said something in the tape about
9 me having a gun, but I don't know exactly when I told him I
10 had a gun or exactly when I shot it. I don't remember.
11 Now, I know that I told them that I had a gun, or that I did
12 shot. I know I told them I did, but I don't know exactly
13 when.

14 Q Would you agree with me the first thing you told them
15 was that two black males entered from the back door and
16 asked you to give it up?

17 A Uh-huh.

18 Q Is that the first thing you told them?

19 A Yes, I think so, if I'm not mistaken.

20 Q So you didn't tell them you had a gun that time?

21 A Like I just said, I can't -- I didn't -- can't remember
22 if I told them that I had a gun or not that time. I don't
23 remember exactly when I told them that I had a gun.

24 Q Do you remember telling them you thought you got robbed
25 because you're a rap artist and you had money?

OSHAMAR WELLS-CROSS EXAMINATION

95

- 1 A Yes.
- 2 Q That didn't have anything to do with a marijuana deal
- 3 that you were doing right?
- 4 A Correct.
- 5 Q So that was a lie?
- 6 A Uh-huh.
- 7 Q The first part was a lie and the second part was a lie?
- 8 A Uh-huh.
- 9 Q So you lied to them in the beginning?
- 10 A Uh-huh.
- 11 Q And they came back to you and they -- they asked you if
- 12 there was anything else that you could recall, right?
- 13 A I'm guessing yes. I don't know.
- 14 Q And you said, "I don't remember anything else. I can't
- 15 recall."
- 16 A I don't remember exactly what I told them. But yes, I
- 17 guess.
- 18 Q Do you recall telling them that you'd been shot three
- 19 times?
- 20 A I got shot five times. So no, I don't remember telling
- 21 them I got shot three times, no.
- 22 Q So you didn't tell them three and you got shot five; is
- 23 that right?
- 24 A Uh-huh.
- 25 Q And you didn't tell them you had a gun in the cabinet,

OSHAMAR WELLS-CROSS EXAMINATION

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1 right?

2 A I did tell them that.

3 Q You didn't tell them that the first time?

4 A Oh, no.

5 Q You didn't tell them?

6 A Huh-uh.

7 Q If you didn't tell them that the first time, did you
8 tell them after -- after they did the gunshot residue test
9 on you?

10 A I don't -- like I told you before, I don't know when
11 they did the -- I think I was asleep when they did the GSR.
12 It's -- GSR stands for gunshot residue. I don't know when
13 they did it. I think I was asleep when they did it, so I
14 didn't -- I didn't even know they did one on me until after
15 I left the hospital, I think. I don't even know when I
16 found that out. I didn't know they did one on me.

17 Q You didn't -- you didn't know they did one on you?
18 They didn't -- you didn't recall them saying to you this
19 will get us to the bottom of this?

20 A No, sir. I don't remember that. I was heavily
21 medicated when I was in the hospital.

22 Q Maybe the first day you were heavily medicated. The --
23 after that were you still medicated?

24 A Yes, sir. I was heavily medicated for at least the
25 first five days. It was the last two days where they was

OSHAMAR WELLS-CROSS EXAMINATION

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1 weaning me off the medication because I was going home.

2 Q And the police kept on coming to talk to you while you
3 were there?

4 A Yes, sir.

5 Q And they kept asking you questions?

6 A Uh-huh.

7 Q And you kept telling them that you didn't know what had
8 happened?

9 A Initially.

10 Q And you told them that -- you continued to tell them
11 that this -- these guys had busted in the back of your
12 house, right?

13 A Uh-huh.

14 Q And that was all a lie, right?

15 A Correct.

16 Q And that was a lie because you were dealing marijuana,
17 right?

18 A Correct.

19 Q And you told them Mr. Plumer started shooting at your
20 first, right?

21 A Correct.

22 Q But that was a lie, too, wasn't it?

23 A That's true, sir.

24 Q You didn't reach up and get that gun and bring it out
25 and pull it out?

OSHAMAR WELLS-CROSS EXAMINATION

98

1 A I was already shot when I -- when I grabbed the gun. I
2 was already shot. He had already started shooting.

3 Q But you had planned on having that gun there. You told
4 us that, right?

5 A Uh-huh.

6 Q And you didn't get it out?

7 A If he hadn't -- if he hadn't pulled his gun out on me
8 first I would have never pulled the gun out. I'm not a
9 violent person, sir. I don't go around trying to start
10 anything or do anything, try to rob anybody or anything.
11 It's not my forte.

12 Q But you certainly planned on having that gun there,
13 right?

14 A I will protect myself under any -- under any
15 circumstances.

16 Q And so, you put that gun there and you got it there
17 because you were engaged in a marijuana deal and you wanted
18 the gun for protection?

19 A Sir, I believe anybody should have a firearm, whether
20 you selling drugs or not. It's one of our rights given to
21 us by the Constitution. We have the right to bear arms. So
22 I think everybody should --

23 Q You have the right to bear arms?

24 A -- exercise that right.

25 THE COURT: Let him finish his question -- his answer.

OSHAMAR WELLS-CROSS EXAMINATION

99

1 A I think everybody should exercise their right.

2 Q You have the right to bear arms?

3 A Do I have the right?

4 Q Right.

5 A Yes, sir.

6 Q You're right to bear arms wasn't taken away from you
7 when you were convicted of selling drugs?

8 A Yes, sir.

9 Q They were. So you didn't have the right to have a gun?

10 A That's not my gun, sir.

11 Q But you were using it. You put it there, right?

12 A Uh-huh.

13 Q You put it there. So it was in your control, right?

14 A Well, not really in my control. But uh-huh.

15 Q What do you mean it wasn't in your control? It was --
16 you knew where it was.

17 A It wasn't in my control because I didn't have --

18 THE COURT: We're not going to plow that row again.

19 Let's move on to some new territory.

20 Q Do you remember telling the police that the other guy,
21 Brownlee, produced a firearm?

22 A No, sir.

23 Q You don't remember that?

24 A I didn't tell the police that.

25 Q So if they said that, that's not true?

OSHAMAR WELLS-CROSS EXAMINATION

100

1 A I never told the police that.

2 Q Now, when you all were in there rolling up -- when you
3 were rolling the dope smoking the blunts, right?

4 A Uh-huh.

5 Q Mr. Plumer had come in there and he was sitting at the
6 table, right, in that chair you showed me, right?

7 A Uh-huh.

8 Q And he put his keys on the table and he put his
9 telephone on the table, right?

10 A Yes, sir, I guess. Uh-huh.

11 Q Well, they --

12 A Yes, sir.

13 Q They were in your house, right?

14 A Correct.

15 Q And there's no question about that?

16 A Correct.

17 Q Those --

18 MR. YARBOROUGH: May I approach the witness?

19 Q That item 20 in the corner back there, that's the keys
20 to the Mercedes?

21 A Yes.

22 Q Okay. That's the keys to the Mercedes back there and
23 they were -- they were on the table?

24 A Uh-huh.

25 Q And is that his phone? Is that 9, is that his phone?

OSHAMAR WELLS-CROSS EXAMINATION

101

- 1 I'm not --
- 2 A That's not a phone. That's a holster.
- 3 Q That's a holster?
- 4 A Uh-huh.
- 5 Q That's your holster?
- 6 A That's the holster that the gun was in, sir. Yes.
- 7 Q So that's the holster that the gun was in. Was the --
- 8 was the holster locked?
- 9 A Is the holster lock?
- 10 Q Did it have a snap on the top of it?
- 11 A It's not a locked holster, no.
- 12 Q It's not a locked holster. So the gun was in the
- 13 holster and you had pulled the gun out of the holster --
- 14 A Uh-huh.
- 15 Q -- to shoot it?
- 16 A Yes, sir.
- 17 Q You're saying all this took place while Mr. Plumer is
- 18 sitting there shooting at you?
- 19 A Yes, sir.
- 20 Q You weren't trying to get out of the way of the bullets?
- 21 A It was my way of getting out of the way of the bullets.
- 22 Where was I going to run? He's point blank range. I mean,
- 23 I reached back to defend myself.
- 24 Q And you're saying you had been hit before that
- 25 happened?

OSHAMAR WELLS-CROSS EXAMINATION

102

1 A Uh-huh. When I stood up and reached back he started
2 firing. Before I grabbed the gun I got hit already.

3 Q Well, wait a second. You stood up to grab the gun and
4 you're saying he started firing?

5 A He had already had his gun out. He pulled his gun out
6 first and that's when I stood up to reach back to grab the
7 gun.

8 Q And you were able to reach with one hand and pull the
9 holster off with the other?

10 A I didn't say one hand. What do you mean? I reached --
11 yes, I reached with one hand and --

12 Q Reached up?

13 A Uh-huh.

14 Q Got the gun?

15 A Uh-huh.

16 Q Opened the cabinet?

17 A Uh-huh.

18 Q Came down?

19 A Uh-huh.

20 Q Took the holster out?

21 MS. WHITE: Your Honor, we've been over this numerous
22 times at this point.

23 THE COURT: Move to some new material.

24 Q Would you agree with me that all your interactions in
25 setting up this drug deal were with Mr. Brownlee?

OSHAMAR WELLS-REDIRECT EXAMINATION

103

1 A Uh-huh.

2 Q Or with --

3 A Initially Jock and then it was passed on to Brownlee.

4 Q Right. And it didn't have anything to do with Mr.
5 Plumer?

6 A No. I didn't know -- I knew that Brownlee was bringing
7 someone with him, but I didn't know that it would be -- it
8 was going to be Plumer.

9 Q And you fully admit that you've made numerous different
10 statements in this case?

11 A Yes, sir.

12 MR. YARBOROUGH: One second, Your Honor. I don't have
13 anything further, Your Honor.

14 THE COURT: Redirect?

15 MS. WHITE: Very briefly, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. WHITE:

18 Q Very briefly, Mr. Wells. Where were you shot again?

19 A My back, my butt, and both of my legs.

20 Q So your back, you said?

21 A Uh-huh.

22 Q And your butt?

23 A Uh-huh.

24 Q Did you -- when you first talk to the police, Mr.

25 Yarborough kept asking about Brownlee, Brownlee. Did you

OSHAMAR WELLS-REDIRECT EXAMINATION

104

1 know anyone named Brownlee -

2 A No.

3 Q -- as Brownlee at the time?

4 A No.

5 Q Do you even know anybody as Brownlee now?

6 A No, ma'am.

7 Q Were you able to pick the other guy out of a lineup?

8 A No, ma'am.

9 MS. WHITE: Thank you, Mr. Wells.

10 THE COURT: Thank you. You can step down.

11 (Whereupon, the witness stepped down from the witness
12 stand.)

13 THE COURT: Call your next witness.

14 MR. THOMAS: The State calls Wenona Wells.

15 THE COURT: Ladies and gentlemen, we've got to take a
16 short recess. Please don't discuss the case. We'll get
17 back with you in just a minute.

18 (Whereupon, the jury exited the courtroom at 2:45 p.m.)

19 (Whereupon, a recess was held from 2:45 p.m. to 3:00
20 p.m.)

21 THE COURT: Ready to go?

22 MR. THOMAS: Yeah, we're ready, Your Honor.

23 (Whereupon, the jury entered the courtroom at 3:00
24 p.m.)

25 THE COURT: Call your next witness.

WENONA WELLS-DIRECT EXAMINATION

105

1 MR. THOMAS: The state calls Wenona Wells.

2 WENONA WELLS, having first been
3 duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. THOMAS:

6 Q Good afternoon, Ms. Wells.

7 A Good afternoon.

8 Q Could you go ahead and spell your first name for Ms.
9 Scott so she can get it in the record.

10 A W-e-n-o-n-a.

11 Q And, Ms. Wells, how old are you?

12 A Forty-seven years old.

13 Q And how -- what's your relationship with Oshamar Wells?

14 A Oshamar is my son.

15 Q And you remember the night of October 11th, 2015?

16 A Yes.

17 Q What were you doing that night?

18 A I was at -- coming from my niece children's dad house
19 picking them up.

20 Q And what did you end up doing? Did you get a call from
21 Mr. Wells?

22 A Yes. He told me he had been hurt and where he was.

23 Q And where did you go when you got that call?

24 A [REDACTED]. [REDACTED].

25 Q And whose house was that?

WENONA WELLS-DIRECT EXAMINATION

106

- 1 A My niece, Takema Moore.
- 2 Q And when you got there what did you?
- 3 A When I got there I told the children just come behind
- 4 me. I had two of them with me. I told them to come behind
- 5 me, because he had told me he had been hurt. And when I
- 6 walked to the back porch I told them stay behind me and I
- 7 walked inside. When I walked inside I saw him laying on the
- 8 floor. And I walked to him, then my grandson walked, and he
- 9 picked up the gun and he gave me the gun. He said,
- 10 "Grandma, look," and I put it in my purse.
- 11 Q Let me show you what's been marked as State's No. 3.
- 12 A Okay.
- 13 Q Is that where Mr. Wells was laying?
- 14 A Yes, sir.
- 15 Q And what was his condition when you got there?
- 16 A He wasn't hardly talking. He couldn't stand up. He
- 17 couldn't do anything.
- 18 Q Was he bleeding?
- 19 A Yes, he was bleeding. He had multiple wounds in his
- 20 body bleeding.
- 21 Q And you said one of your grandchildren found the gun?
- 22 A Yes, sir. He picked it up. And the reason why I put
- 23 it in my purse, because I know about a year ago before that
- 24 one of my niece had been killed by a gun that a seven-year-
- 25 old had, so I didn't want no more issues to happen like

WENONA WELLS-DIRECT EXAMINATION

107

1 that, as well as so much was going on.

2 (Whereupon, State's Exhibit No. 10 was marked for
3 identification.)

4 Q I'm going to hand you what's been marked for
5 identification at this time as State's Exhibit 10. Do you
6 recognize that?

7 A Yes.

8 Q What is that a picture of?

9 A The gun. A gun.

10 Q Is that the -- is that your gun?

11 A Yes.

12 Q Who bought that gun?

13 A I did. Wenona Wells.

14 Q Is that a true and accurate depiction of what that gun
15 looked like?

16 A Yes.

17 MR. THOMAS: Your Honor, the State would move at this
18 time No. 10 into evidence.

19 MR. YARBOROUGH: Without objection.

20 (Whereupon, State's Exhibit No. 10 was admitted into
21 evidence.)

22 Q And you -- what did you do after you picked --

23 THE COURT: I'm going to have to interrupt your
24 examination. Let me see the lawyers up here.

25 (Whereupon, a sidebar was held.)

WENONA WELLS-DIRECT EXAMINATION

108

1 THE COURT: All right. Let me excuse everyone back to
2 the jury room with the exception of Ms. Hackett.

3 (Whereupon, the jury exited the courtroom at 2:56 p.m.)

4 (Whereupon, the Court confers with Juror off the record
5 and then returned to the jury room.)

6 THE COURT: She knows -- she recognizes Ms. Wells from
7 the Head Start Program. She is apparently -- you must be --
8 do you know her?

9 THE WITNESS: I don't know her personally, but I've
10 seen her.

11 THE COURT: She informs me that she wouldn't give this
12 witness any more credibility than anybody else and that she
13 can be fair and impartial. So at this time I'm going to
14 allow her to continue. Okay?

15 MR. YARBOROUGH: Sounds good.

16 MS. WHITE: Yes, sir.

17 THE COURT: Okay. Bring them on.

18 (Whereupon, the jury entered the courtroom at 2:57
19 p.m.)

20 THE COURT: Mr. Daniels, it's good to see you jumping
21 up there on the front row. Let me just caution you all that
22 it's not unusual that jurors may have a distant
23 acquaintanceship with witnesses and people involved in
24 lawsuits. But just remember that you all have taken an oath
25 -- because I don't -- there's a long list of witnesses. But

WENONA WELLS-DIRECT EXAMINATION

109

1 you all have taken an oath to be fair and impartial. And if
2 it comes into play that you can't do that because of your
3 acquaintanceship with someone, let us know. But otherwise,
4 you judge everybody, their truthfulness and untruthfulness
5 and believability just as you would as if you didn't know
6 them. But if it impacts your impartiality, please let us
7 know, because we want a fair trial. That's what we want.
8 Thank you all. Okay, go ahead.

9 MR. THOMAS: Thank you, Your Honor.

10 Q Ms. Wells, I'm going to hand you what's been premarked
11 as State's Exhibit 20. I just want you to look in there and
12 tell me if you recognize what's in that box.

13 A Yes.

14 Q What is that?

15 A It's a Taurus 40 cal.

16 Q Is that your handgun?

17 A Yes.

18 Q And that's the same handgun we just looked at in
19 State's Exhibit No. 10?

20 A Yes, sir.

21 Q What did you do with that handgun when you took it out
22 of that house?

23 A I put it in my trunk. In my purse and put it in my
24 trunk.

25 Q And how long did it stay there?

WENONA WELLS-DIRECT EXAMINATION

110

1 A I think about a day, because when they told me to bring
2 it I brought it.

3 Q And who told you to bring it?

4 A Oshamar.

5 Q And where did you take it?

6 A To McClinton.

7 Q I'm going to hand you what's been premarked as State's
8 Exhibit No. 9. Does that look familiar to you?

9 A Oh, yes.

10 Q And what's that a picture of?

11 A A gun. The way I sent it.

12 Q You said that was a couple days later?

13 A Yes.

14 Q And how was the gun -- how did you turn it over to
15 them? Did you have it in bags, did you hand it to them?
16 Was it in that box? It wasn't in that box, as it?

17 A It was in a bag.

18 Q It was in a bag. And that's what's represented in
19 State's Exhibit No. 9?

20 A Yes.

21 MR. THOMAS: Your Honor, at this time I'd move State's
22 Exhibit No. 9 into evidence.

23 THE COURT: Any objection?

24 MR. YARBOROUGH: No, sir, Your Honor.

25 THE COURT: Okay.

WENONA WELLS-CROSS EXAMINATION

111

1 (Whereupon, State's Exhibit No. 9 was admitted into
2 evidence.)

3 Q And that's what it looked like when you gave it to
4 Detective McClinton?

5 A Yes, sir.

6 Q Did you take anything else from the house that night?

7 A No, sir. Took nothing else.

8 MR. THOMAS: Thank you, Ms. Wells. I'm going to let
9 you answer any questions --

10 THE WITNESS: Okay.

11 MR. THOMAS: -- Mr. Yarborough has.

12 CROSS-EXAMINATION

13 BY MR. YARBOROUGH:

14 Q Ms. Wells, you've gotten to know Mr. Brownlee's mother?

15 A No, sir.

16 Q You haven't had any contact with her since this
17 happened?

18 A No, sir. I don't even know her. I never seen her.

19 Like I say, I don't know her.

20 Q You don't know her at all?

21 A Not at all.

22 Q And you have not had any conversations with her about
23 this case?

24 A No, sir. No conversation at all.

25 Q Now, you picked up some other stuff out of the house

WENONA WELLS-CROSS EXAMINATION

112

1 that day, too, didn't you?

2 A No, sir.

3 Q You picked up the marijuana that was in the house?

4 A No, sir. I wouldn't have did that.

5 Q You didn't clean up the marijuana that was in there?

6 A No, sir. I wouldn't have.

7 Q You didn't take two half pounds of marijuana out of
8 there?

9 A No, sir. I wouldn't have.

10 Q You didn't want your son to get in trouble, right?

11 A Well, either way I don't want my son to get in trouble,
12 but I wouldn't have did that.

13 Q You knew he wasn't supposed to have a gun, right?

14 A Right. He didn't have one. I left the gun there by
15 mistake.

16 Q But you told him where the gun was?

17 A No. He must have saw me put it there.

18 Q He must have seen you put it there?

19 A Yes.

20 Q Now, are you supposed to have a gun?

21 A Yes.

22 Q And so, you got this gun and you didn't tell your son
23 where that gun was?

24 A No, sir.

25 Q Where did you put the gun?

WENONA WELLS-CROSS EXAMINATION

113

1 A In the cabinet.

2 Q In the cabinet. So he -- somehow or another he knew
3 the gun was in the cabinet?

4 A Well, I think because he's -- often we're together. He
5 know that I have the gun, and he know I put it somewhere
6 because I have kids around me often. And that's anybody
7 that around me know where I put it, because I don't want no
8 kids get a hold to it.

9 Q So you put it up there?

10 A Yes, sir.

11 Q Now, did you drive away that -- his car the next day?

12 A Yes, sir. It's my car.

13 Q That's your car that was in the parking lot?

14 A Yes, sir.

15 Q And the bullets and stuff that were in that car were
16 your bullets or they were his bullets?

17 A Between me and my uncle.

18 Q Between you and your uncle?

19 A Uh-huh.

20 Q You all had a bunch of rounds of bullets in there?

21 A Yes, sir. I can't remember exactly the amount, but we
22 do. He had some and I had some. Like we go target
23 shooting.

24 Q You all go target shooting?

25 A Uh-huh.

WENONA WELLS-CROSS EXAMINATION

114

- 1 Q And you're saying that this gun here --
- 2 A Yes, sir.
- 3 Q -- is your gun?
- 4 A Yes, sir.
- 5 Q And you're saying that you used this gun for target
- 6 shooting?
- 7 A Yes, and protection. If anybody come in my house at
- 8 the time I have to protect myself.
- 9 Q Did you know your son was dealing marijuana out of that
- 10 house?
- 11 A No, sir. And I hate it. I don't like drugs at all.
- 12 Q Who cleaned up the drugs that were on the counter?
- 13 A I'm not sure.
- 14 Q But you didn't?
- 15 A I did not. I didn't clean up any drugs. I didn't take
- 16 any drugs. I don't touch drugs at all, sir.
- 17 Q But somebody -- when you got there somebody had been
- 18 smoking marijuana in the house.
- 19 A I smelled it.
- 20 Q You smelled it. And it was a strong odor of marijuana?
- 21 A Yes, sir.
- 22 Q And you did not notice the leaves and -- the marijuana
- 23 leaves around on the floor?
- 24 A To be honest, it was the most least important thing.
- 25 My most important was to make sure my son was okay.

WENONA WELLS-CROSS EXAMINATION

115

1 Q And did your son at that time tell you that two guys
2 had run in trying to rob him?

3 A No, he didn't go into detail on that. He just said
4 somebody hurt him. He wouldn't talk to me.

5 Q You weren't saying, what happened, what happened?

6 A No. I was, you know, focused on trying to get him to
7 the hospital and get him taken care of.

8 Q And getting the gun out of the house?

9 A Well, the gun -- like I say, I really didn't think he
10 had used it or anything. But my grandson picked it up. He
11 gave it to me. And to make sure the kids was safe, yes,
12 sir, I did.

13 Q And that gun had been shot five or six times?

14 A If it was, I didn't really look at it. I was at the
15 hospital mostly with my son after that.

16 Q Now, you originally said that you turned the gun over
17 that next day --

18 A Yes.

19 Q -- but that's not exactly right?

20 A It was the day -- next day or two. And the reason why,
21 because that was not my focus, to be honest.

22 Q Could it have been three days later? Could it have
23 been the 14th?

24 A No, it couldn't. No, it couldn't be that. Because it
25 was like the very next day I was at the hospital the whole

WENONA WELLS-CROSS EXAMINATION

116

1 day, and then the day after I believe it was.

2 Q So if the -- if the picture -- this picture says the
3 14th on it, that's just the wrong date?

4 A No, it's the right day. It's just that I wasn't
5 focused on it. I'm not really sure exactly how many days
6 later was it. If it was one or two or --

7 Q And that would have been three days, right?

8 A Yes, sir. It would have been.

9 Q What happened to all those bullets?

10 A The police took them out.

11 Q They got your bullets?

12 A Yes. Everything that was in the car, they got it.

13 Q And they -- do you know how many bullets were out
14 there?

15 A No. Like I said, between me and my uncle I'm not sure
16 exactly how many. It's kind of hard to keep up with the
17 count of them target shooting. I don't really count each
18 one, or if he doing it, however.

19 Q And you didn't tell him where to put that gun?

20 A Told my son? No, sir.

21 Q And so, if he said something different than that,
22 that's wrong, right?

23 A If he said I told him where to put it.

24 Q No. He said he put the gun up there.

25 MR. THOMAS: Objection, Your Honor. He's -

WENONA WELLS-REDIRECT EXAMINATION

117

1 THE COURT: Sustained. You don't pit witnesses. You
2 can argue it in your closing argument, but you ask questions
3 and get the answer.

4 Q You're sure you put that gun up there?

5 A Yes. Now, if he moved it that's one thing. But I
6 always put it in the same place. And if he moved it, you
7 know, for whatever reason, I don't know, but...

8 MR. YARBOROUGH: I don't have any further questions.
9 Thank you, Your Honor.

10 THE COURT: Any redirect?

11 MR. THOMAS: Briefly.

12 REDIRECT EXAMINATION

13 BY MR. THOMAS:

14 Q Ms. Well, these pictures I showed you, 9 and 10 --

15 A Uh-huh.

16 Q -- you didn't take those pictures, did you?

17 A Did I take those pictures?

18 Q Did you take these pictures?

19 A No. I didn't take any pictures.

20 Q So you don't know what date that picture was taken?

21 A Huh-uh. No.

22 Q And let's clarify this. There were some -- there were
23 some ammunition in a box in your car?

24 A Yes, sir.

25 Q And the police seized that?

KERRY COOPER-DIRECT EXAMINATION

118

1 A Yes, they got it.

2 Q Did that ammunition go in that gun or was it a
3 different type of ammunition?

4 A Different ones.

5 Q But that was your ammunition?

6 A Yes. Between me and my uncle.

7 MR. THOMAS: Thank you, Ms. Wells.

8 THE WITNESS: You're welcome.

9 THE COURT: Thank you. You can step down.

10 (Whereupon, the witness stepped down from the witness
11 stand.)

12 THE COURT: Next witness.

13 MR. THOMAS: Kerry Cooper.

14 KERRY COOPER, having been first
15 duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. THOMAS:

18 Q Agent Cooper, could you spell your name for the record.

19 A K-e-r-r-y, C-o-o-p-e-r.

20 Q And where do you work?

21 A I am currently employed with the South Carolina Law
22 Enforcement Division.

23 Q And how long have you been there?

24 A Since June 2nd, so approximately seven months.

25 Q And before that where did you work?

KERRY COOPER-DIRECT EXAMINATION

119

1 A The City of Greenwood Police Department.

2 Q So you were working on October -- in October of 2015?

3 A That's correct.

4 Q What did you do -- what was your title at that time?

5 A I was a uniform patrol officer. I worked the beat.

6 The uniform patrol.

7 Q And what does that involve generally?

8 A That involves property checks, responding to calls for
9 service, traffic law enforcement.

10 Q And were you working on October 11th, 2015?

11 A Yes, sir. I was.

12 Q And that was night shift?

13 A That's correct.

14 Q Were you dispatched to [REDACTED] for any
15 reason?

16 A Yes, sir. I was. In reference to a shots fired call.

17 Q And you are -- how long had you worked patrol before
18 that at that time? How long had you been working on that
19 shift?

20 A That would be approximately two and a half years.

21 Q So you were familiar with Greenwood and where things
22 are?

23 A Yes, sir.

24 Q I'm going to show you what's been premarked as State's
25 Exhibit 13. Are you familiar with what that is?

KERRY COOPER-DIRECT EXAMINATION

120

1 A Yes, sir.

2 Q What is that?

3 A This is a topographical depiction of the [REDACTED]

4 and [REDACTED] area.

5 Q So that shows the street sort of in that neighborhood?

6 A Yes, sir.

7 Q And that's -- to your knowledge of topography, that's a
8 true and accurate representation of what the neighborhood
9 looks like?

10 A It is.

11 MR. THOMAS: Your Honor, at this time I'd move State's
12 No. 13 into evidence.

13 MR. YARBOROUGH: No objection.

14 THE COURT: All right.

15 (Whereupon, State's Exhibit No. 13 was admitted into
16 evidence.)

17 Q So this is a map of that area?

18 A It is.

19 Q What's this little part outlined in red here?

20 A That is the incident location. The corner of [REDACTED]

21 [REDACTED] and [REDACTED].

22 Q And just for the record, what county is that in?

23 A Greenwood County.

24 Q So you arrived at that location. Is that a residence?
25 Is that an apartment building? What is that?

KERRY COOPER-DIRECT EXAMINATION

121

1 A That is a single family dwelling. It's a house.

2 Q I show you what's been premarked as State's Exhibit 14.

3 Does that look familiar to you?

4 A Yes, sir.

5 Q What is that a picture of?

6 A That is a picture of [REDACTED]. The
7 incident location. The house that I responded to.

8 Q And that's what it looked like the night you responded?

9 A Yes, sir.

10 MR. THOMAS: At this time, Your Honor, I'd move State's
11 14 into evidence.

12 MR. YARBOROUGH: No objection.

13 THE COURT: Okay.

14 (Whereupon, State's Exhibit No. 14 was admitted into
15 evidence.)

16 Q That's the incident location?

17 A That's correct.

18 Q When you got there were you there alone or were there
19 other units with you?

20 A My Lieutenant, Matt Caughman was the vehicle right
21 behind me going through [REDACTED] as I arrived on
22 scene.

23 Q And when you got there what did you do?

24 A When I got there I spoke with a young gentleman that
25 was somewhat pacing in front of the -- that edifice and

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1 identified himself as a family member of Mr. Wells and
2 indicated to me that the victim, Mr. Wells, was inside the
3 residence. So I then entered the residence.

4 Q And when you entered the residence what did you
5 observe?

6 A When I entered the residence my initial observation
7 were -- was damage to the door. The glass door. From what
8 -- from my training and experience is gunshots defects. I
9 then observed the residence to be in disarray. There were
10 shell casings, for lack of a better term, all over the
11 place. And I located Mr. Wells laying in the kitchen floor
12 by the kitchen table.

13 Q I'm showing you what's been premarked as State's
14 Exhibit 11. Does that look familiar?

15 A This is -- yes, sir. This is the kitchen of [REDACTED]
16 [REDACTED].

17 Q And that's what it looked like the night you went in?

18 A No, sir. That is not exactly -- that table has been
19 moved to the left.

20 Q Did it look like this before you left though?

21 A Yes, it did, sir.

22 MR. THOMAS: Your Honor, at this time I'd move State's
23 Exhibit 11 into evidence.

24 MR. YARBOROUGH: No objection, Your Honor.

25 THE COURT: Okay.

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1 (Whereupon, State's Exhibit No. 11 was admitted into
2 evidence.)

3 Q And where is this when you walk in the front door?

4 A That is your view of the kitchen as you walk through
5 the front door of the house.

6 Q And where was Mr. Wells at?

7 A Mr. Wells was -- if you can picture that table centered
8 in the kitchen, he was to the far side of that table.

9 Q This might be easier. Is that kind of where the table
10 was?

11 A That is correct. He was to the far side of the table
12 as you look from this view point.

13 Q And where was he at?

14 A He was laying in the floor.

15 Q So about right there?

16 A Yes, sir.

17 Q And what did you notice about him when you walked in
18 and saw him?

19 A I noticed -- I noticed him to be in pain and with
20 anguish on his face. I spoke to him. I asked him about
21 injuries to his person. He indicated to me that he had, in
22 deed, been shot. He was certain that he had been hit in his
23 lower extremities. But I did observe blood in his lower
24 back area, as he was laying, in the inside of his shirt.

25 Q Did he give you a description of what had happened or

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1 who to look for? Did he say anything to you?

2 A Yes, sir. When I initially spoke to Mr. Wells to
3 obtain a description, or to be able to get something to give
4 to the other officers on patrol to possibly get in the area
5 and identify potential suspects, I was given that it was two
6 black males and that one was wearing a white tee shirt. I
7 got no other specifics. Mr. Wells was in an immense amount
8 of pain. So, and at that time EMS was arriving, and his --
9 his well-being was the main concern in my head at that
10 point.

11 Q And when EMS came in they moved that table over?

12 A Yes, sir. That's correct. When they began to render
13 aid to Mr. Wells, because he -- we were -- at one point we
14 were going to check him for potential exit wounds to where
15 we could dress them or render him aid until EMS got there.
16 But when I went to roll Mr. Wells over he indicated that
17 when he moved he had severe pain. So I decided it was best
18 not to do so.

19 Q And after EMS did you do anything else as far as right
20 then and there or did you turn the scene over?

21 A What we did then at that time, we took measures to
22 secure the scene and contact the investigation division for
23 Greenwood City Police Department.

24 Q Were there any vehicles at the house when you got
25 there?

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1 A Yes, sir. There were several -- several vehicles.

2 Q And did you run the tags on all of those?

3 A I did. I ran tags on all of them that were inside of
4 that crime scene tape that we placed.

5 Q I show you what's been marked as State's Exhibit 12.
6 What's that a picture of?

7 A This is a picture of the rear side of a Mercedes Benz
8 with the South Carolina tag [REDACTED].

9 Q And was that vehicle on scene when you got there?

10 A Yes, sir.

11 Q That's one of the plates that you ran?

12 A Yes, that's one of the plates that I ran.

13 MR. THOMAS: Your Honor, I'd move State's 12 into
14 evidence.

15 MR. YARBOROUGH: No objection.

16 THE COURT: Okay.

17 (Whereupon, State's Exhibit No. 12 was admitted into
18 evidence.)

19 Q And that's just the license plate you ran?

20 A Yes, sir.

21 Q Do you remember what that came back to?

22 A No, sir. I do not recall.

23 Q Did you -- you said there were bullet defects
24 everywhere. Did you come to find out that there was a
25 bullet defect anywhere else?

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1 A Yes, sir. During the initial investigation, while the
2 crime scene was secured, we canvassed the area. I spoke to
3 a neighbor that night and asked that if she noticed any
4 defects because of the time of night. And humans aren't
5 generally equipped naturally with being able to see in the
6 dark. So I advised her that when she had -- or if she had
7 noticed any defects or damage to her property from the
8 incident to contact us. Several days later she contacted me
9 to report damage that was consistent with bullet defects.
10 And initially when I responded she was cleaning that
11 particular room. She didn't locate the projectile. But a
12 short period of time after I left to speak with her
13 initially she called me back. I then I recovered a
14 projectile, collected with a pen and bag, secured it.

15 Q And what was that address? The neighbor's house? Or
16 better yet, just where was it at on this map in relation to
17 --

18 A On [REDACTED], if you are standing at the
19 northern most portion of that outlined area and you look
20 directly north across [REDACTED], it is the house on
21 that corner. The opposite corner of.

22 Q So right there?

23 A That's correct.

24 Q I show you what's been premarked as State's Exhibit 15,
25 16, 17 and 18, and ask if those look familiar to you. And

KERRY COOPER-DIRECT EXAMINATION

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1 just what's -- what's the first one?

2 A The first one is establishing the scene. The location
3 of where these pictures are taken from. It's [REDACTED]
4 [REDACTED]. It is the front of the residence.

5 Q And the second picture?

6 A Is the external defect to the residence.

7 Q And the third?

8 A The third picture is the entry into the residence
9 through the drywall and into the table leg by the
10 projectile.

11 Q Is that all of them or is there one more?

12 A And then there's one that's just a much closer view of
13 the entry into the residence and the table leg.

14 Q Did you take all these pictures?

15 A Yes.

16 Q Are they true and accurate representations of what you
17 saw that night?

18 A Yes, sir.

19 MR. THOMAS: Your Honor, at this time I'd move 15, 16,
20 17 and 18 into evidence.

21 MR. YARBOROUGH: No objection.

22 THE COURT: Okay.

23 (Whereupon, State's Exhibit Nos. 15, 16, 17 and 18 were
24 admitted into evidence.)

25 Q So what are we looking at in State's 15 again?

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1 A That is the front of the residence where the projectile
2 is located, [REDACTED].

3 Q And 16?

4 A That is a picture external -- of the external of the
5 residence at [REDACTED] with the bullet defect.

6 Q And 17?

7 A That is the entry -- that is a picture from inside that
8 particular house with the entry through the drywall into the
9 table leg.

10 Q And is that right there?

11 A That is correct.

12 Q And then 18? Just a closeup of that?

13 A That is the up close -- that's correct. It's the up
14 close shot of that particular defect.

15 Q You said you collected that bullet?

16 A I did.

17 Q I'm going to show you what's premarked for
18 identification as State's 19. Do you recognize that?

19 A I do.

20 Q What is -- what's in that bag? What's that smaller
21 white paper thing?

22 A This is the initial evidence envelope that I use to
23 collect the projectile.

24 Q And you put it in that bag?

25 A That is correct.

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1 Q And then what did you do with that?

2 A I submitted it to evidence per the departmental policy.

3 Q Thank you.

4 A Yes, sir.

5 Q When you went in the residence at 128 was there
6 anything you noticed about the smell in there?

7 A Yes, sir. The smell that immediately hit my sense was
8 the smell of unburnt marijuana.

9 Q And when you looked around did you notice any marijuana
10 laying around?

11 A Yes, sir. As I recall, there were several -- there
12 were several observations or shake or loose marijuana
13 throughout the area. And there was also, as I recall, a
14 hand rolled cigarette.

15 Q What time did you get dispatched to this location?

16 A I would have to refer to my notes to give you that
17 information.

18 Q If I were to show you your incident report would that
19 refresh your recollection?

20 A It would.

21 Q Just take a look at that, and after you've refreshed
22 your recollection just let me know what time you got
23 dispatched.

24 A I was dispatched to [REDACTED] at
25 approximately 7:40 p.m.

KERRY COOPER-CROSS EXAMINATION

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1 MR. THOMAS: Thank you, Agent Cooper. I'm going to let
2 you answer any questions Mr. Yarborough has.

3 THE WITNESS: Yes, sir.

4 CROSS-EXAMINATION

5 BY MR. YARBOROUGH:

6 Q Deputy, right?

7 A No, sir. Agent.

8 Q Agent. Agent, you were working for Greenwood at the
9 time?

10 A Of the incident. Yes, sir.

11 Q Now you're working for SLED?

12 A That's correct.

13 Q And you went to the incident location and you were
14 dispatched over there at 7:40?

15 A That's correct, sir.

16 Q And when you got there, there was marijuana shake, or
17 marijuana in the house?

18 A I noticed the scent and then I observed amongst the
19 fray. Yes, sir.

20 Q You said unsmelled marijuana, but did you mean smelled
21 -- or smoked marijuana?

22 A No, sir. The smell of unburnt marijuana.

23 Q Right. But did you see where people had been smoking
24 marijuana in there?

25 A No, sir. I didn't. I noticed an unlit rolled

KERRY COOPER-CROSS EXAMINATION

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1 cigarette, but I didn't observe any smell of burnt
2 marijuana. It was unburnt marijuana, to my recollection.

3 Q Okay. So could you see any bags of marijuana?

4 A No, sir.

5 Q So if you were smelling that much marijuana, there had
6 been a good bit of marijuana in there?

7 A From my training and experience, yes, sir.

8 Q And did you find this -- this firearm that's been
9 previously admitted as -- or the picture that had been
10 previously taken, Exhibit No. 10? Have you seen that
11 picture before?

12 A No, sir.

13 Q And did you see this firearm inside the residence?

14 A No, sir.

15 Q And did you look around to see what else was in the
16 residence?

17 A A protective sweep was made and initial view of
18 anything of evidentiary value was made. As far as a
19 thorough search, no, we did not at that particular time
20 because my true concern was first and foremost Mr. Wells'
21 health and well-being. And secondly, to secure the scene.

22 Q Did you -- did you ask about any firearms being in
23 there?

24 A I did. I did ask were there any firearms to Mr. Wells.

25 Q And were there?

KERRY COOPER-CROSS EXAMINATION

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1 A Mr. Wells indicated to me no, and I did not locate any
2 on the scene.

3 Q And does this -- let me show you what's been previously
4 marked as State's Exhibit No. 4. Do you recognize that
5 scene?

6 A I do.

7 Q What does that appear to be?

8 A That is the shirt that was cut off of Mr. Wells, and
9 there's a holster.

10 Q There's a holster there?

11 A Yes, sir.

12 Q Did you find a gun that was -- that belonged to that
13 holster in there?

14 A No, sir.

15 Q And did you recognize those keys in the corner?

16 A I did.

17 Q And were those Mercedes keys?

18 A They were.

19 Q And that was to the Mercedes that was parked outside?

20 A That is an assumption I could make. Yes, sir.

21 Q Well, there was a Mercedes outside --

22 A And there were Mercedes keys inside the residence.

23 Q Right.

24 A Yes, sir.

25 Q So you didn't check it, but you were guessing those

KERRY COOPER-CROSS EXAMINATION

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1 were the keys?

2 A Yes, sir.

3 Q Did you see a cell phone in there sitting on the table
4 anywhere? Do you remember finding a cell phone?

5 A I don't recall seeing a cell phone.

6 Q What is all that piled up on top of that shirt? I
7 didn't know if that was the cell phone or --

8 A Where are you referring to pile?

9 Q Right there.

10 A That -- that is a design on the tee shirt, sir.

11 Q Oh, that's the design on the tee shirt. Okay. So what
12 -- 4 is the holster and two sets of keys. One the Mercedes
13 and then the -- I guess the -- I guess I was pointing at the
14 wrong thing before. You said that was a design. I think
15 those are keys.

16 A Oh, yes, sir. There is -- beside the shirt in between
17 there and the item marker there is a set of keys.

18 Q There's another set of keys?

19 A There's another set of keys. That's correct.

20 Q And do you know whose keys those were?

21 A No, sir.

22 Q And did you move around -- were you the -- let me show
23 you Exhibit No. 7. And there's a -- you see the table
24 stacked on top of the other one?

25 A Yes, sir.

KERRY COOPER-CROSS EXAMINATION

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1 Q Did you do that?

2 A No, sir. I did not move that table.

3 Q You didn't move that table. So somebody moved that
4 table. Is that the way it looked when you got there?

5 A I do not recall that particular table.

6 Q Well, if there was a table sitting on top of another
7 table would you have recalled it?

8 A It is a possibility. But my initial entry and concern
9 is the victim. So sometimes officers do look past what is
10 there initially and they go directly to their victim to
11 render first aid.

12 Q When you were rendering first aid to Mr. Wells were you
13 communicating with him?

14 A Yes, sir.

15 Q And did you ask him what happened?

16 A I did.

17 Q And what did he say?

18 A He indicated to me verbally that he looked -- someone
19 tried to rob him.

20 Q Somebody tried to rob him.

21 A Is the reason for the -- as the reason for the
22 incident.

23 Q Did you ask him if he recognized him?

24 A Yes, sir.

25 Q And what did he say?

KERRY COOPER-CROSS EXAMINATION

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1 A No.

2 Q Did he say anything about doing a drug deal?

3 A No, sir.

4 Q Did he say anything about his mom taking the gun out of
5 the place?

6 A No, sir.

7 Q Did you notice that there were a lot of spent shells on
8 the floor?

9 A Yes, sir. I did notice that.

10 Q And did you know what -- you identified this shell
11 previously, I think.

12 A Yes, sir. I identified that projectile previously.

13 Q And this is a projectile that was found outside the
14 home? Outside the house; is that correct?

15 A Which house are you referring to, sir?

16 Q Well, it was outside of the -- you went to the incident
17 location. This projectile was not found in the incident
18 location?

19 A That projectile was not recovered at the incident
20 location.

21 Q Right. And so, the incident location that that
22 projectile was found in, and I know you -- this is the map
23 that you used as Exhibit No. 13.

24 A Yes, sir.

25 Q That -- that was found where?

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- 1 A That was found directly across -- north across [REDACTED]
2 [REDACTED]. This house here, [REDACTED].
3 Q At [REDACTED]?
4 A Yes, sir.
5 Q And so, this is [REDACTED]; is that
6 correct?
7 A Yes, sir. That's correct.
8 Q And [REDACTED] is across the street from
9 there?
10 A Yes, sir.
11 Q This picture was from that other house. Did you take
12 that picture?
13 A Yes, sir. [REDACTED].
14 Q That's the place across the street?
15 A Correction. [REDACTED]. That's correct.
16 Q I'm sorry. Maybe I confused you or you confused me.
17 A I confused myself, sir.
18 Q That's okay. I'm not -- let's try again. That --
19 A That is a picture --
20 Q That's a picture.
21 A -- of the inside of the residence located at [REDACTED]
22 [REDACTED] where the projectile was located in that room.
23 And that is a picture of the defect. A midrange picture of
24 the defect.
25 Q Very good. And I wasn't sure. But where -- where were

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1 -- now, this is Exhibit No. 4 which is the pictures you
2 previously identified of the keys.

3 A Yes, sir.

4 Q Now, this is picture number 2 which is the inside of
5 the house with the -- with the table.

6 A Yes, sir.

7 Q Where were those keys found in relation to that table?

8 A I cannot testify to that, sir.

9 Q You don't know?

10 A No, sir. At the time that EMS arrived and rendered
11 aid, which is when I'm --- what I'm assuming, they used
12 trauma shears to remove Mr. Wells' clothing, and possibly
13 items from his clothing. I was not inside the residence at
14 that particular time.

15 Q So they -- you don't know how those keys -- those two
16 sets of keys and the shirt, or whatever that was cut off of
17 Mr. Wells, you don't know how those got there?

18 A Other than the shirt being removed from Mr. Wells, no,
19 sir.

20 MR. YARBOROUGH: Thank you. I don't have any further
21 questions.

22 THE WITNESS: Yes, sir.

23 MR. THOMAS: No redirect.

24 THE COURT: All right. Thank you. You can step down.

25 (Whereupon, the witness stepped down from the witness

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1 stand.)

2 THE COURT: Next witness.

3 MS. WHITE: The State calls Andrew Reese.

4 ANDREW REESE, having first been
5 duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MS. WHITE:

8 Q If you could tell us your name.

9 A I'm Andrew Hunt Reese.

10 Q How do you spell Reese?

11 A R-e-e-s-e.

12 Q And where are you employed, Deputy Reese?

13 A Greenville County Sheriff's Office.

14 Q Were you working at the Greenville County Sheriff's
15 Office back on October 11th of 2015?

16 A Yes, ma'am.

17 Q Did you get called to the Greenville Memorial Hospital
18 in reference to a gunshot victim?

19 A Yes, ma'am.

20 Q And who was that gunshot victim?

21 A Ontavious Plumer, I believe is how you pronounce the
22 name.

23 Q And what was your dispatch time for that?

24 A I received the call to respond at 10:07 p.m.

25 Q And where is Greenville Memorial Hospital located?

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1 Where in Greenville is that?

2 A 701 Grove Road. It's just off of White Horse Road, if
3 you're familiar, near the 85 interstate.

4 Q Do you know approximately how far that is from
5 Greenwood drive time?

6 A I mean, I came through there earlier. I'd say some,
7 I'd say, 30 miles. Maybe 45 minutes.

8 Q Now, do you -- do you recall if the gunshot victim
9 placed the call or if it was the hospital that placed the
10 call?

11 A The hospital. They have to call us anytime they have a
12 gunshot victim.

13 Q And once you were dispatched what did you do?

14 A I responded to the scene. I had a trainee with me that
15 night and we responded to the emergency room. We met with
16 Ontavious in the emergency room. He told us he had been
17 shot on a road named Coolbrook Road, which is in Greenville
18 County.

19 Q Now, was Mr. Plumer -- was he in custody at the time?

20 A No.

21 Q Did he ever end up in custody of the Greenville
22 Sheriff's Office out of this?

23 A Not through me.

24 Q So other than being treated in the hospital was he free
25 to not speak with you --

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1 A Sure.

2 Q -- or to leave?

3 A Sure. Yes, ma'am.

4 Q So you said he said he'd been shot on Coolbrook Road?

5 A That's correct.

6 Q What were the circumstances that he described?

7 A He left a friend's house at Fleetwood Manor, which is
8 an apartment complex located at 25 Fleetwood Drive also in
9 Greenville. He was walking down the road. Don't know where
10 he was going. Say that he heard a guy come up behind him
11 and start yelling for A.J. He said he didn't know an A.J.
12 but he turned around and told the guy he's not A.J. and the
13 guy started shooting at him and he took off running when he
14 got hit in the leg.

15 Q Did he say who brought him to the hospital?

16 A No. He flagged down a random civilian, according to
17 him. Nobody was there when we got there. Security hadn't
18 stopped anybody.

19 Q After getting that statement from him what did you do?

20 A Well, we always try to find the crime scene location.
21 On the roadway sometimes it's hard. But I sent one of my
22 guys out to that area to look for shell casings. After we
23 finished speaking with Mr. Plumer we left the hospital, and
24 I also went out there and my trainee and I walked up and
25 down the road looking for shell casings. It's not a very

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1 long road. We couldn't find any. Mr. Plumer told me that
2 while he was running he dropped his cell phone. A black and
3 silver LG phone. I contacted my dispatch and had them ping
4 the phone. And they couldn't ping the exact location, but
5 the last ping it had was somewhere a mile away from a tower
6 located on South Old Piedmont Road.

7 Q Is that anywhere close to where he said he was?

8 A I mean, it's, as the crow flies, maybe three or four
9 miles I don't know the exact distance.

10 Q So did you locate his cell phone in this area?

11 A No. Located no blood, no shell casings, and that was
12 as far as we could get with the investigation.

13 Q Did -- while you were at the hospital with Mr. Plumer
14 did he ever mention having fired a gun that night?

15 A No, ma'am.

16 Q Did you -- did you personally perform any GSR testing
17 on him?

18 A No, ma'am.

19 Q Did you bag his hands?

20 A No, ma'am.

21 Q Do you know if anyone at the hospital was preventing
22 him from washing his hands?

23 A Not to my knowledge. I mean, he was -- we had no
24 reason to believe he had been in any kind of shooting -- or
25 been a suspect of a shooting, yet along where it occurred

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1 it. So we didn't -- we treated him simply as a victim.

2 Q Was investigations called in?

3 A Not at the time. I mean, there was no reason to.

4 There was no immediate need to call an investigator out,
5 which is the only reason we would at that time of night. I
6 completed the original incident report and then sent it to
7 our criminal investigations division for followup.

8 Q So you basically responded to the hospital, took his
9 statement, and then you all left to investigate --

10 A Correct.

11 Q -- the alleged --

12 A I took a verbal statement. I didn't get a written
13 statement. I gave him a victim's form and left. And then
14 just checked back later on with the nurse to make sure his
15 health hadn't declined to the point where he was deceased,
16 because that would change our investigation a little bit.

17 Q So from an evidence preservation standpoint you all had
18 no reason to station a deputy in the room or to make sure
19 that any evidence was being preserved?

20 A That's correct.

21 Q And did you all -- did you all do that?

22 A No.

23 Q Did you have anybody?

24 A No.

25 Q Were you there when, I guess, either -- I'm sorry. I

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1 don't work with Greenville, but Investigator or Deputy
2 Spurgeon was there?
3 A No. He's a forensics officer. And I called him out --
4 we call him out for anything like that just to photograph
5 it. And he responded after I left and took possession of
6 the victim's clothing that the medical staff at the hospital
7 had.

8 MS. WHITE: Begging the Court's indulgence.

9 (Whereupon, State's Exhibit No. 21 and 22 were marked
10 for identification.)

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

12 THE COURT: Yes.

13 Q I'm going to hand you what's been marked as State's
14 Exhibit 21 and 22.

15 Q Did you observe Mr. Plumer's injuries that night?

16 A I did.

17 Q Are those pictures of a wider angle and then a closeup
18 of his gunshot wound?

19 A They are.

20 Q Is that an accurate depiction of that wound that night?

21 A Yes, ma'am.

22 MS. WHITE: The State offers Exhibits 21 and 22 into
23 evidence.

24 MR. YARBOROUGH: No objection.

25 THE COURT: No objection.

ANDREW REESE-CROSS EXAMINATION

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1 (Whereupon, State's Exhibit Nos. 21 and 22 were
2 admitted into evidence.)

3 Q And can you tell looking at State's 22, can you tell us
4 where that is on his leg?

5 A Around the kneecap, it appears.

6 Q Do you recall if it was on the outside or the inside?

7 A No, ma'am.

8 MS. WHITE: Thank you, Deputy Reese. Please answer any
9 questions Mr. Yarborough may have.

10 CROSS-EXAMINATION

11 BY MR. YARBOROUGH:

12 Q How are you doing?

13 A Good. How are you, sir?

14 Q Good. You talked to Mr. Plumer at the hospital?

15 A That is correct.

16 Q And you were doing your investigation having been
17 called out by the hospital?

18 A Correct.

19 Q And you took -- did you take these pictures?

20 A No. Spurgeon, I think is how you pronounce his name,
21 he is an officer for the Greenville County Forensics.

22 Q And so, Deputy Spurgeon, he came out there with you or
23 did you call him out there?

24 A I called him out. After -- well, he came out after I
25 came. I called him when I got there, but he didn't arrive

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1 until after I had already left the location.

2 Q And -- but those were two -- did you look at the shots
3 to Mr. Plumer's legs?

4 A The injury?

5 Q Yes.

6 A Yes, sir.

7 Q Well, they were gunshot wounds, right?

8 A I mean, that's what it appeared to be, but...

9 Q So it appeared that he had been -- it appeared that he
10 had been shot twice?

11 A It appeared that he had been shot. I only know there
12 was holes there. I mean, I don't know how many went where,
13 how many times he got hit.

14 Q You just -- you went out there because there was a --
15 you were called out there for gunshot wounds, and that's
16 your normal investigation?

17 A That's correct.

18 Q And then you called Deputy Spurgeon, who is with
19 investigations, and he showed up and did -- took these
20 pictures and did the gunshot residue and formalized his
21 investigation?

22 A I don't know there was gunshot residue. Anything with
23 that done.

24 Q If Deputy Spurgeon did it, Deputy Spurgeon did it?

25 A Sure.

WILLIAM KAY-DIRECT EXAMINATION

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1 Q And that would be protocol or --

2 A They're a different agency than us, so I don't know
3 what their protocol is.

4 Q Your protocol is to go show up, check out and followup?

5 A That's correct.

6 Q And that's what you did?

7 A That's correct.

8 MR. YARBOROUGH: Thank you.

9 THE COURT: Thank you. You may step down.

10 THE WITNESS: Thank you, Your Honor.

11 (Whereupon, the witness stepped down from the witness
12 stand.)

13 MR. THOMAS: The State calls William Kay.

14 WILLIAM KAY, having first been duly
15 sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. THOMAS:

18 Q Detective Kay, if you could introduce yourself to the
19 jury.

20 A I'm William Kay, Greenwood Police Department.

21 Q And how's that last name spelled, K-a-y?

22 A K-a-y.

23 Q And how long have you worked for Greenwood?

24 A May will be 10 years.

25 Q And what's your current job?

WILLIAM KAY-DIRECT EXAMINATION

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1 A I'm an investigator.

2 Q How long have you been an investigator?

3 A For about three years.

4 Q And before that what did you do?

5 A Before that I was in the warrant office.

6 Q You were working in investigations in October of 2015?

7 A Yes, sir.

8 Q How did you come to be involved in the case we're here
9 on today?

10 A When we came back to work following the case I heard
11 Detective McClinton talking about it and he was going to the
12 hospital to speak with the victim, so I just rode with him
13 down there.

14 Q And when you got there this was on October 12th?

15 A I believe.

16 Q It would have been the day after the shooting happened
17 at night?

18 A Right.

19 Q What -- who did -- who did you speak to when you got
20 there?

21 A I spoke with the victim along with Detective McClinton.
22 I just kind of assisted him.

23 Q And during that conversation basically what did he tell
24 you had happened?

25 A He told us that he was meeting two guys to sell them a

WILLIAM KAY-DIRECT EXAMINATION

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1 quantity of marijuana and that they ended up trying to rob
2 him, and during the robbery he reached for a gun to defense
3 himself and they began shooting and he returned fire.

4 Q Well, let's -- that was his first statement or his
5 second statement?

6 A That was his second statement.

7 Q What did he tell you the first time?

8 A The first time was something along the lines of he was
9 sitting at the kitchen table and two random guys came in the
10 front door and tried to rob him, and that they ended up
11 shooting him when he didn't have anything.

12 Q And did you or somebody else confront him with sort of
13 the absurdity of that story?

14 A Yes, sir.

15 Q Who else talked to him besides you and Mr. McClinton?

16 A The day at the hospital?

17 Q Uh-huh.

18 A I believe at some point his father came in and spoke
19 with him. I really can't remember if anybody else came in
20 that particular day.

21 Q And after that you all got the second statement from
22 him?

23 A Yes, sir.

24 Q And that was the one that you just told us about he
25 identified the people -- or the drug deal gone bad really?

WILLIAM KAY-DIRECT EXAMINATION

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- 1 A Yes, sir.
- 2 Q Had you developed a suspect at that time?
- 3 A I believe we had.
- 4 Q And who was that suspect?
- 5 A Ontavious Plumer.
- 6 Q Did you get a lineup with his picture in it?
- 7 A Yes, sir. We did.
- 8 Q How did you know about doing that?
- 9 A I believe we got it from SLED or either Anderson
- 10 County.
- 11 Q And did you prepare that or did SLED, or did somebody
- 12 else do that?
- 13 A Detective McClinton would have prepared the lineup, I
- 14 believe.
- 15 Q But you were there when it was showed to --
- 16 A Yes, sir. I was.
- 17 Q And did you suggest to Mr. Wells how to pick out
- 18 someone in the lineup? Give him any idea of who it could
- 19 have been?
- 20 A No, sir.
- 21 Q I show you State's Exhibit 8. Is that the lineup you
- 22 all showed him?
- 23 A Yes, sir. It is.
- 24 Q Did he hesitate at all to pick somebody up out of
- 25 there?

WILLIAM KAY-CROSS EXAMINATION

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1 A No, sir. I don't believe he did.

2 Q Did you all threaten or coerce him in any way to pick
3 out number two on that lineup?

4 A No, sir.

5 Q Did you show him the second lineup?

6 A Did we show him the second one that day?

7 Q Yes.

8 A Yes, sir. We did.

9 Q Was he able to pick anybody out of that one?

10 A No, sir. He wasn't.

11 MR. THOMAS: Thank you, Detective Kay. I'll let you
12 answer any questions Mr. Yarborough has.

13 THE WITNESS: Thank you.

14 CROSS-EXAMINATION

15 BY MR. YARBOROUGH:

16 Q So you were there when this lineup was done?

17 A Yes, sir. I was.

18 Q And when this lineup was done, I mean, at that point
19 you all knew that Ontavious' car was there, right?

20 A We knew a car that did belong to one of his family
21 members was there. Yes, sir.

22 Q And his -- the keys were there?

23 A I believe so.

24 Q And did you investigate the crime scene?

25 A No, sir. I did not go to the crime scene.

WILLIAM KAY-CROSS EXAMINATION

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1 Q You just did this?

2 A I just did that. Yes, sir.

3 Q Were you the one that changed this where it said,

4 "Tried to shoot me," to "Shot me."?

5 A Yes, sir. I did.

6 Q You changed that?

7 A I wrote out this top part --

8 Q Right.

9 A -- as what he was telling me. Yes, sir.

10 Q And at that point he was telling you he tried to shoot

11 you? That Ontavious tried to shoot him because the other

12 guy had a gun, right? He was telling you all that --

13 MR. THOMAS: Objection, Your Honor. That's not within

14 his knowledge.

15 MR. YARBOROUGH: Well, he was there, Judge.

16 Q Did you ask him about the other guy's --

17 THE COURT: You can ask him what he knew personally.

18 Don't go into hearsay.

19 Q Were you personally discussing with him the other

20 person that was there?

21 A We did ask him about the other person as well.

22 Q And the other person having a gun?

23 A I believe we asked him that.

24 Q And you put together a lineup with Mr. Brownley's

25 picture in it?

WILLIAM KAY-CROSS EXAMINATION

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1 A We showed him one that we -- we had somebody else put
2 it together, is what I believe SLED done it as well.

3 Q And at that point your investigation showed that two
4 people had guns, right?

5 A That I don't know. You know, like I said, I didn't go
6 to the crime scene. I just was kind of with him when this
7 happened.

8 Q And you were -- you all were talking to Wells about
9 what happened?

10 A Right.

11 Q Were you there when they did the gunshot residue test
12 on Mr. Wells?

13 A No, sir. I wasn't.

14 Q And do you know who did that?

15 A No, sir. I don't.

16 Q So you don't know if this was the second time Mr. Wells
17 had been interviewed or the third or fourth time, right?

18 A I don't -- I don't know anything about the case that
19 happened on the date of the incident. I didn't get involved
20 until the following day. So I don't know anything from the
21 first day.

22 Q Well, this is dated October the 13th.

23 A Okay.

24 Q That's the date of this lineup.

25 A Right.

WILLIAM KAY-CROSS EXAMINATION

153

1 Q Okay. So the shooting took place on October the 11th,
2 right?

3 A Right.

4 Q I mean, you want to look at it to --

5 A You're right.

6 Q So that was the -- that wasn't the next day. It was
7 two days later.

8 A Right.

9 Q And did you all have a body cam going taping what Mr.
10 Wells said?

11 A We didn't have a body cam.

12 Q You had a tape recorder?

13 A I'm not sure if Detective McClinton had it on at this
14 particular time. It was on for some of the -- some of it.

15 Q And that tape would fairly and accurately reflect what
16 happened when you were there?

17 A Right.

18 Q It was -- I mean, at least part of the time it was on,
19 right?

20 A Correct.

21 Q And this isn't your -- Detective McClinton is the guy
22 doing the investigation?

23 A Correct.

24 Q And so, you were tagging along to help?

25 A That's right.

WESLEY MCCLINTON-DIRECT EXAMINATION

154

1 Q So that's what you know about this?

2 A Yes, sir.

3 MR. YARBOROUGH: Thank you.

4 THE COURT: All right. Thanks. You can step down.

5 (Whereupon, the witness stepped down from the witness
6 stand.)

7 THE COURT: Next witness.

8 MS. WHITE: May we approach, Your Honor?

9 THE COURT: All right.

10 (Whereupon, a sidebar was held.)

11 THE COURT: We're going to take a short break. Don't
12 discuss the case. We'll get back with you in a few minutes.
13 Thank you.

14 (Whereupon, the jury exited the courtroom at 4:01 a.m.)

15 THE COURT: We'll be at ease for five or 10 minutes.

16 (Whereupon, a recess was held from 4:01 p.m. to 4:10
17 p.m.)

18 (Whereupon, the jury entered the courtroom at 4:10
19 p.m.)

20 THE COURT: Call your next witness.

21 MR. THOMAS: The State calls Wesley McClinton to the
22 stand.

23 WESLEY MCCLINTON, having first been
24 duly sworn, testified as follows:

25 DIRECT EXAMINATION

WESLEY MCCLINTON-DIRECT EXAMINATION

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1 BY MR. THOMAS:

2 Q Detective McClinton, if you could spell your last name
3 for the record.

4 A M-c-c-l-i-n-t-o-n.

5 Q And where do you work?

6 A Greenwood City Police Department.

7 Q How long have you worked there?

8 A July will be six years. I think that's about right.

9 Q And what's your current job there?

10 A I'm investigation. I'm a detective.

11 Q How long have you been in investigations?

12 A Approximately two years. Going on two years. Yes,
13 sir.

14 Q And before that what did you do for Greenwood?

15 A I was on patrol. Uniform patrol answering service
16 calls.

17 Q And before you worked for the police department what
18 did you do?

19 A Previously I was in the military. I'm still in the
20 military with the United States Army, 17 years going now.

21 Q And you were working investigations in October of 2015?

22 A Yes, sir.

23 Q And did you get called out to [REDACTED] on
24 that night?

25 A Yes, sir. I did.

WESLEY MCCLINTON-DIRECT EXAMINATION

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1 Q Who contacted you to come out there?

2 A I believe it was Detective Dixon. He's my lieutenant.

3 Q And I'm showing you State's Exhibit 14. That is [REDACTED]

4 [REDACTED]?

5 A Yes, sir. It is.

6 Q What county is that in?

7 A It's in Greenwood County.

8 Q And when you got there who was there?

9 A Probably half the shift. I know Officer Cooper was
10 there, Lieutenant Caughman was there, I believe Officer
11 Durkin was there, and probably several more officers. They
12 had the whole scene secured and there were quite a few
13 people out in the roadway that they were having to keep
14 back.

15 Q Was the victim there when you got there or had he --

16 A No, sir. No, sir.

17 Q Had he already been taken to the hospital?

18 A Yes, sir. It's my understanding the victim had been
19 taken to the hospital and was receiving treatment when we
20 got called in.

21 Q And were there any cars there when you arrived?

22 A Yes, sir. There were -- there was a black Mustang in
23 the back and a black Mercedes in the back as well. There
24 was one vehicle on the side -- to the right side of the
25 house, which wraps around. And I believe it was a Camry, or

WESLEY MCCLINTON-DIRECT EXAMINATION

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1 it was a four door sedan. I want to say it was a dark
2 color, maybe a Camry or Corolla.

3 Q Is this -- I'm showing you State's No. 1. Is that the
4 two cars that were in the driveway?

5 A Yes, sir. That is.

6 Q And showing you State's No. 12. Is that the Mercedes
7 Benz?

8 A Yes, sir. It is.

9 Q When you got there and you went in the house what did
10 you observe?

11 A The whole living room was just destroyed. Bullet holes
12 -- what I believed to be bullet holes at the time were
13 everywhere. It looked like it was a huge shootout in the
14 living room, all throughout the house from what -- what you
15 could see from when you walked in the house was the
16 livingroom and the kitchen. There was a hallway to the
17 right. Couldn't see the -- anything down the hallway. But
18 the two areas I previously mentioned, they looked to be
19 holes everywhere. Clothes were in the kitchen floor that at
20 the time I assumed came off the victim, and a small amount
21 of blood where I assumed he would be lying at.

22 Q I'm showing you State's Exhibit 11. What's that a view
23 of?

24 A That's a few of the kitchen from the living room.

25 Q And in relation to that picture where was the victim?

WESLEY MCCLINTON-DIRECT EXAMINATION

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1 A To the left of that chair was backed up against -- to
2 our right and left of the chair is backed up against the
3 countertop.

4 Q So about right there?

5 A Yes, sir. On our side of the room.

6 MR. THOMAS: And that's State's Exhibit 3, for the
7 record.

8 Q The victim wasn't there when you got there though?

9 A No, sir.

10 Q But that's -- so that's exactly what you saw when you
11 got there?

12 A Amongst other things. Yes, sir.

13 Q What did you do as far as investigation at that point?

14 A When I got there our forensic technician was already on
15 scene and she was already starting to process the area for
16 evidence. So we kind of backed out to give her her space
17 because it's kind of a cramped situation there with
18 furniture being everywhere. So we backed out and I started
19 questioning people that was around the neighborhood. I got
20 the brief lowdown from the officers that arrived on scene
21 initially and I started making it all the way around to
22 different residences trying to see who heard something or
23 saw anything.

24 Q Did you develop any good leads from that initial
25 canvas?

WESLEY MCCLINTON-DIRECT EXAMINATION

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1 A Not really. No, sir. Several people said they heard
2 gunshots, several people said they didn't hear gunshots in
3 the same location with the ones that heard them.

4 Q This tag on the Mercedes Benz, did you run that through
5 the DMV or did shift do that?

6 A Shift did it, but I believe I also ran it as well once
7 I got there. Yes, sir.

8 Q And who did that come back being registered to?

9 A It was a Mr. Walter Plumer.

10 Q Were you able to determine where Mr. Plumer lived?

11 A Yes, sir. By the records on DMV showed he lived --
12 showed the area he lived. Yes, sir. His address.

13 Q Where did he live?

14 A I don't recall the exact address.

15 Q Was it in Greenwood County?

16 A No, sir.

17 Q What county was it in?

18 A I believe it was Abbeville County.

19 Q Did you follow up on that --

20 A Yes, sir.

21 Q -- lead?

22 A Yes, sir. The next day. Well, that was the 11th. The
23 12th. Yes, sir. On the 12th Detective Dixon and I went to
24 Mr. Walter Plumer's residence to speak with him about why
25 his vehicle was still at the scene.

WESLEY MCCLINTON-DIRECT EXAMINATION

160

1 Q And when you got there was anybody else there?

2 A As soon as we pulled up -- we actually pulled up to the
3 wrong house. We pulled up to the house right beside Mr.
4 Plumer's. He just happened to be in between those two
5 houses in his truck, and Anderson -- I think it was Anderson
6 County was pulling up -- their county deputies were pulling
7 up to speak with him about the vehicle as well. But besides
8 that, it was just Detective Dixon and I, two Anderson County
9 deputies and Mr. Plumer.

10 Q Were you able to determine what the Anderson County
11 deputies call was? Why they were dispatched there?

12 A Yes, sir. We spoke to them and they said that Mr.
13 Plumer --

14 MR. YARBOROUGH: Objection. Hearsay, Your Honor.

15 Q Don't tell me what they said.

16 A I'm sorry.

17 THE COURT: You can testify what you did as a result of
18 the conversation.

19 Q Right. What did you do when you -- after you spoke to
20 them?

21 A Returned to speak to Mr. Plumer.

22 Q And based on your conversations with Mr. Plumer did you
23 determine who was driving that car that night?

24 A Yes, sir. I did.

25 Q Was Mr. Plumer driving that car?

WESLEY MCCLINTON-DIRECT EXAMINATION

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1 A Not Mr. Walter Plumer.

2 Q That's correct. Not Mr. Walter Plumer. Did he give
3 you a statement to that effect?

4 A Saying that he was driving or he knew who was?

5 Q Did he just give you a statement?

6 A Mr. Plumer did give me a statement. Yes, sir.

7 Q What did you do after you got done talking with Mr.
8 Plumer?

9 A I don't rightly recall what we did directly after
10 talking to him.

11 Q Let me ask you this. Did you ever go to the hospital?

12 A Yes, sir.

13 Q And when did you go to the hospital the first time?

14 A The 12th was the first time that I went to the
15 hospital.

16 Q And when you went there who did you see?

17 A I spoke with Mr. Wells.

18 Q And what was Mr. Wells' statement to you at that point
19 about what happened?

20 A Mr. Wells said that two guys had came into his
21 residence, or the residence he was at and tried to rob him.
22 Told him to give it up. He said he didn't have anything.
23 They started shooting at him.

24 Q What was your take on that story, I guess?

25 A I didn't believe it at all.

WESLEY MCCLINTON-DIRECT EXAMINATION

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1 Q And did you confront him with that?

2 A Yes, sir. Of course.

3 Q Did you get a chance to talk to him again that day or
4 did you come back later?

5 A Actually on the 12th talked to him early that morning.

6 And then after we went and met with Mr. Plumer and gained

7 new information, then me and Detective Kay that was just up

8 here, we went back and talked to Mr. Wells again and

9 questioned him as to why he gave this story when -- we

10 didn't really know what was going on, but we didn't believe

11 what he was telling us.

12 Q And at that point what did Mr. Wells tell you?

13 A Mr. Wells, I want to say that he went a little bit

14 further into detail on it. But still we didn't feel as

15 though he had come up with the whole truth. He was hesitant

16 to tell us the whole truth.

17 Q And did you talk to him again?

18 A Yes, sir. We talked to him again. Before he left the

19 second time Mr. Wells' father had arrived. And I believe he

20 lived in Georgia. And he talked to us outside and he said

21 let me talk to him for a little bit and I'll get him right

22 and he'll tell you the truth, I promise you, before I leave.

23 So we did talk to Mr. Wells again after his father had left

24 and it was a whole different story then.

25 Q And what was that story?

WESLEY MCCLINTON-DIRECT EXAMINATION

163

1 A The story was a drug deal was set up. He had met the
2 two individuals at Mr. Chip. They followed him to the house
3 on [REDACTED]. They were sitting at the table
4 smoking marijuana and talking about the marijuana. He
5 produced the marijuana and looked to who he said was Mr.
6 Plumer to get the money and instead of pulling out the money
7 Mr. Plumer pulled out a handgun and began firing at him.

8 Q And you had already -- had you already developed Mr.
9 Plumer as a suspect at that time?

10 A Yes, sir.

11 Q Did you have a photo lineup prepared by SLED?

12 A Yes, sir.

13 Q That's No. 8. State's Exhibit 8. SLED prepared that?

14 A Yes, sir. We didn't have any photos of Mr. Plumer, or
15 being that he had earrings in photos that we did have, we
16 didn't have enough to properly get some identical people.
17 Well, people that was similar in character.

18 Q And Detective Kay and you showed that lineup to Mr.
19 Plumer?

20 A Yes, sir. We did.

21 Q Or, I'm sorry, Mr. Wells. Did he at that time identify
22 a suspect in that lineup?

23 A Yes, sir. He did.

24 Q Did you suggest to him who to pick out?

25 A Absolutely not.

WESLEY MCCLINTON-DIRECT EXAMINATION

164

- 1 Q Did Detective Kay suggest to him who to pick out?
- 2 A No, sir. We wouldn't do that.
- 3 Q Did he do that of his own free will without being
- 4 pressured or threatened?
- 5 A Absolutely. Yes, sir.
- 6 Q And he circled it, initialed it?
- 7 A Yes, sir. He did.
- 8 Q Did he hesitate at all?
- 9 A No, sir. He did not.
- 10 Q Did he seem sure of his --
- 11 A When he saw that lineup Mr. Wells seemed like he knew
- 12 exactly who it was that shot him. Yes, sir.
- 13 Q And you showed him the second lineup?
- 14 A Yes, sir.
- 15 Q Was he able to identify anybody in the second lineup?
- 16 A No, sir.
- 17 Q You -- at that time did Mr. Wells tell you that he
- 18 fired a gun?
- 19 A Yes, sir. He did.
- 20 Q What -- based on your investigation what happened to
- 21 that gun after it was fired?
- 22 A His mother removed it from the house.
- 23 Q I'm going to show you what's been already admitted into
- 24 evidence as State's No. 9. Is that the gun you received
- 25 from Ms. Wells?

WESLEY MCCLINTON-CROSS EXAMINATION

165

1 A Yes, sir. And that's how I received it from her.

2 Q It was in that bag like that?

3 A Yes, sir. It was.

4 Q I'm going to show you what's been marked for
5 identification only at this time as State's 20. Can you
6 open that box up and tell me if you recognize that?

7 A Yes, sir. That's the gun I receive from Ms. Wells.

8 Q And what did you do with that gun after you received
9 it?

10 A After I received it I photographed it and placed it
11 into evidence per policy.

12 Q And as far as the photographs go, do you remember what
13 date you took those?

14 A No, sir. I don't. I took those photographs, and it
15 could have been a day or two later, maybe a week later
16 before I attach them to our system to where they would have
17 printed off like that.

18 Q So the date that's on the bottom of this --

19 A That date is not accurate. No, sir.

20 Q Not the date you got it necessarily?

21 A No, sir. We don't take it with a camera hooked to our
22 computer. We have to input them into that system. So
23 whatever day I took them, it wouldn't have shown up until I
24 put them in our system.

25 Q In Mr. Wells' initial statement that he gave to you,

WESLEY MCCLINTON-CROSS EXAMINATION

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1 story that turned out not to be true, did he give you a
2 description of the two people that were in the house?

3 A The description Mr. Wells gave to me each time was a
4 tall black male with long dreads and I think he said a short
5 chubby black male with short cut -- low cut hair.

6 Q And as far as the first statement he gave you did he --
7 which one did he say was shooting?

8 A The short chubby one with the low cut hair.

9 Q And did he ever tell you that the one with the dreads
10 had a gun?

11 A No, sir. No, sir.

12 MR. THOMAS: The Court's indulgence. Thank you,
13 Detective. I'll let you answer any questions Mr. Yarborough
14 has.

15 THE WITNESS: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. YARBOROUGH:

18 Q Did you prepare the affidavit for the arrest warrants?

19 A I don't believe so.

20 Q Do you recognize this?

21 A Yes, sir.

22 Q Did you prepare that?

23 A That looks like my signature, but I don't remember
24 preparing it. It's possible. I'm not sure.

25 Q Can you look on there and look at that and see what it

WESLEY MCCLINTON-CROSS EXAMINATION

167

1 says about the other guy having a gun?

2 A Yes, sir. I see what you're talking about. Yes, sir.

3 Q What's it say?

4 A The entire thing?

5 Q No. Just the part about the other guy having a gun.

6 A It says, "Was advised that he produced the marijuana
7 and asked Plumer for the money at which time Wells believed
8 that Plumer was reaching for the money and instead Plumer
9 and the other male subject produced handguns and commenced
10 shooting him striking him numerous times." Is that what
11 you're referring to?

12 Q Does that refresh your recollection that at that point
13 Mr. Wells told you that the other guy had the gun -- had a
14 gun?

15 A It doesn't refresh it. Obviously if I did type that,
16 and that's what I do at the time, I don't remember him
17 saying that. Yes, sir.

18 Q So now you recollect him saying that the other guy had
19 a gun?

20 A I still don't remember him saying that, but obviously I
21 heard that at one time or I wouldn't have put it in there,
22 if I did type that.

23 Q And you found Mr. Plumer's keys there, right?

24 A I believe so. Yes, sir.

25 Q Well, you put that in the affidavit?

WESLEY MCCLINTON-CROSS EXAMINATION

168

- 1 A Yes, sir.
- 2 Q And you found Mr. Plumer's telephone?
- 3 A No, sir. No, sir. It was found that that was not his
- 4 telephone.
- 5 Q The cell phone located in the kitchen wasn't his?
- 6 A It did not belong to Mr. Plumer. No, sir. At the time
- 7 we thought it was his. Yes, sir.
- 8 Q So it says that Plumer's keys to the vehicle along with
- 9 his cell phone were located in the kitchen.
- 10 A Okay.
- 11 Q And you're saying that's wrong?
- 12 A I'm saying at the time that's what we believed to be
- 13 right.
- 14 Q Where's that phone?
- 15 A That phone belonged to a resident of that house that
- 16 lived there.
- 17 Q Where is that phone that --
- 18 A It was returned to the owner of it.
- 19 Q Do you have something showing that?
- 20 A Yes, sir.
- 21 Q Where is it? You don't have it with you. You can get
- 22 it.
- 23 A Okay.
- 24 Q How many times did you tape record Mr. Wells and his
- 25 statements?

WESLEY MCCLINTON-CROSS EXAMINATION

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- 1 A I believe it was three.
- 2 Q Do you have those with you?
- 3 A No, sir. Not on my person.
- 4 Q Wouldn't those be good evidence instead of trying to
- 5 rely on your memory from a year and a half ago --
- 6 A Right.
- 7 Q -- wouldn't it be better to have those statements in
- 8 here today?
- 9 A I assume so.
- 10 Q Right. Because you've worked a lot of cases in the
- 11 last couple of years?
- 12 A I have. Yes, sir.
- 13 Q And it's hard to remember everything?
- 14 A That's -- yes, sir. It is.
- 15 Q Sure. Just like that statement about the other guy
- 16 shooting. You can forget stuff.
- 17 A Yes, sir.
- 18 Q But you've got those -- you've got those tapes and you
- 19 can play them today, right?
- 20 A I don't have the recorder on my person. No, sir.
- 21 Q But would it help to reflect some of the things that he
- 22 said? Mr. Wells?
- 23 A Sure.
- 24 Q Let's try to -- let's go through -- the first time you
- 25 interviewed him he said that two guys busted in the house

WESLEY MCCLINTON-CROSS EXAMINATION

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1 and tried to rob him?

2 A I believe so. Yes, sir.

3 Q They said give it up?

4 A Yes, sir.

5 Q And you knew from your investigation of the crime scene
6 at that point that that was a lie?

7 A I didn't know it was a lie. I didn't believe that that
8 was the entire story.

9 Q Right. Well, you didn't know it was the entire story
10 because you knew that multiple gunshots had been fired in
11 that house?

12 A I knew there were multiple, what appeared to be gunshot
13 holes in the wall and shell casings on the floor. Yes, sir.

14 Q Right. And those shell casings were from different --
15 different guns?

16 A I don't know that. I know there was more than one type
17 of shell casing. I couldn't tell you what kind of gun they
18 were from.

19 Q But let's go back to the third day that you interviewed
20 him, okay, and you're taped and you go to Mr. Wells and you
21 go, "I'm going to do a gunshot residue exam on you."

22 A No, sir. I never did a gunshot residue on Mr. Wells.

23 Q Who did the gunshot residue on Mr. Wells?

24 A Undoubtedly one of the responding officers the night of
25 the incident.

WESLEY MCCLINTON-CROSS EXAMINATION

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1 Q And did they do that at the hospital?

2 A Yes, sir. That would have been done. It would have
3 been done in the ER as soon as the victim was taken inside.
4 I did not do that.

5 Q And did you -- you had those results and you knew he
6 had fired a gun at that point, right?

7 A No, sir.

8 Q But you knew things didn't add up?

9 A I didn't believe that Mr. Wells' statement was the
10 entire truth. At the time Mr. Wells was a victim. We
11 didn't suspect Mr. Wells of doing anything besides possibly
12 selling drugs.

13 Q Okay. But he hadn't told you he sold any drugs, right?

14 A No, sir. The house smelled of marijuana. There was
15 obviously drugs -- marijuana involved.

16 Q But the house smelling of marijuana doesn't mean that
17 he was selling drugs. That means somebody was smoking
18 marijuana.

19 A I know Mr. Wells has sold drugs in the past. Yes, sir.

20 Q So you knew him to be a drug dealer?

21 A I knew Mr. Wells had sold marijuana in the past.

22 Q Well, that's a drug dealer, right?

23 A Not in all states. No, sir.

24 Q And so, you took a statement from him the first night
25 there, right?

WESLEY MCCLINTON-CROSS EXAMINATION

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1 A No, sir. No, sir. I didn't speak to Mr. Wells on the
2 night of the incident. I didn't speak to Mr. Wells. He was
3 in the hospital and he was in surgery. No detectives that I
4 know spoke to Mr. Wells on the night of the incident.

5 Q Well, the guy that you said did the residue test --

6 A Wouldn't have been a detective. No, sir.

7 Q He wouldn't have been -- he would have just been a
8 police officer?

9 A A patrol officer. Yes, sir.

10 Q And he did the gunshot residue exam, and you're the
11 chief investigator in this case and you have that with you?

12 A No, sir. I don't. And I didn't say that --

13 Q You don't have the gunshot residue?

14 A -- any particular person did that. I said that's what
15 I would have done if I would have been the one responding to
16 the ER. Most of the time when there's a gunshot incident,
17 whoever responds to the ER when the patient's in triage, or
18 whatever's going on, they have the hands bagged up and they
19 would be the one to take the GSR. That's when it's done.
20 When they're in triage prior to going into surgery, if
21 that's the situation.

22 Q You're the chief investigator in this case. Who took
23 the gunshot residue of Mr. Wells?

24 A I believe it was Officer Durkin, but I'm not sure.

25 Q And do you have that with you today?

WESLEY MCCLINTON-CROSS EXAMINATION

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1 A No, sir. I don't have it.

2 Q But did you get the test performed?

3 A Did I get the test performed?

4 Q Yes.

5 A They -- once it's done, whatever officer does it, he
6 places into evidence. That way there's a chain of evidence,
7 change of custody and it's sent to SLED to be done. I
8 didn't personally send it to SLED to be done. But I'm
9 assuming that that officer did seeing how they got results
10 back from SLED, from what I understand.

11 Q And they showed that he had fired the gun, right?

12 A (No verbal response.)

13 Q So you knew at that point that Mr. Wells was firing
14 that gun?

15 A This is -- this is -- as soon as you send it to SLED,
16 the GSR, you don't get it back the next day. It could take
17 --

18 Q How long does it take?

19 A Whenever they -- SLED processes everybody's cases in
20 South Carolina. Yours -- ours is not priority. So when
21 something is sent from Greenwood it might be two or three
22 weeks. It may be a month. We've got DNA stuff that comes
23 back nine to 10 months later.

24 Q So it could be months later?

25 A When I spoke with Mr. Wells the first three initial

WESLEY MCCLINTON-CROSS EXAMINATION

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1 times I had no clue that he had fired a handgun, or any gun.

2 Q But you didn't believe his story?

3 A I figured that there were more to the story.

4 Q And when did you come up with the idea that -- or when
5 did you, through your investigation, realize that Mr. Wells
6 had fired a firearm?

7 A When he told me he did.

8 Q And that was the fourth time that you --

9 A That was the third time I interviewed him.

10 Q That was the third time you interviewed him?

11 A Yes, sir. It was.

12 Q So -- but he had been interviewed one more time before
13 that?

14 A We took -- I'm going explain this.

15 Q Okay.

16 A Mr. Wells got shot at nighttime. The next morning he's
17 recovering from surgery. We go to get a police statement --
18 anybody who's had surgery before knows that you're not
19 really -- really giving a full detailed statement the day
20 after surgery. So you're going to go talk to the guy and
21 see can you tell us a little bit about what happened last
22 night. Do you know any details about it that would help us
23 to start this investigation. The man was not ready to do
24 that. We took a brief statement from him. Obviously we
25 didn't believe him because there's holes all in the house,

WESLEY MCCLINTON-CROSS EXAMINATION

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1 there's debris everywhere. There's more to the story. We
2 come back later on after talking to Mr. Plumer, asked Mr.
3 Wells about it again. His father's there this time. His
4 father says to the detectives, let me talk to him. He will
5 tell you the truth. We come back later on and we get what
6 we believe to be the truth from Mr. Wells.

7 Q Okay. So that was the fourth time you had talked to
8 him?

9 A That's the third time.

10 Q The third time. So -- but -- and you sent his father
11 in there one time to get him to --

12 A His father approached us outside as we were leaving.
13 Yes, sir.

14 Q But you let him go in there and talk to him?

15 A His father was there when we got there. After
16 listening to what he was telling us his father said -- once
17 we left, we walked in the hall and his father follows out
18 and he said, "Detectives, let me talk to my son. Come back
19 in a little bit." I think actually he told me he would call
20 me when I needed to come back up there. He said, "Come back
21 in a little bit. He will tell you the truth."

22 Q And is that all on tape?

23 A That his father said?

24 Q Yeah.

25 A I doubt that. Yes, sir.

WESLEY MCCLINTON-CROSS EXAMINATION

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1 Q But everything that Mr. Wells said is on tape?

2 A Pretty much. Yes, sir.

3 Q Did you listen to those tapes recently?

4 A Not -- briefly.

5 Q Briefly.

6 A Yes, sir.

7 Q Do you have them with you today?

8 A I don't have any of the evidence on my person. No,
9 sir.

10 Q Where was -- where were the keys found in -- to the
11 car? Did you find those?

12 A Which keys? There were two sets there.

13 Q The two sets, yeah. Did you take those into evidence?

14 A No, sir. Like I told you before, when we got there
15 Sergeant Griffin, the evidence technician, she was already
16 photographing. We walked in and asked her did she need any
17 help. She said no. We walked out and began speaking with
18 the people in the neighborhood. She would have photographed
19 and collected everything in the house.

20 Q And she would have -- she's the one that put these
21 numbers down, 21?

22 A Yes, sir.

23 Q And did you see that the keys to the Mercedes were in
24 the house?

25 A Yes, sir. Yes, sir.

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- 1 Q And did you see that there was a holster for the
2 firearm in the house?
- 3 A I believe there was a holster laying near that shirt.
4 Yes, sir.
- 5 Q And that holster was to the gun that Mr. Wells had?
- 6 A There's no way I would have known whose holster that
7 was, sir.
- 8 Q Well, did you ask him?
- 9 A He wasn't there at the time.
- 10 Q Okay. Well, did you ask him later on?
- 11 A Yes, sir.
- 12 Q And then what did he say?
- 13 A He said that was his holster.
- 14 Q He said that was his holster?
- 15 A That holster went with that gun that he used.
- 16 Q That was the holster that went to the gun that you had?
- 17 A That I had?
- 18 Q Well, that you got, right?
- 19 A Yes, sir.
- 20 Q That's it right there?
- 21 A Yes, sir.
- 22 Q And that gun went into that holster?
- 23 A That gun came out of that holster.
- 24 Q Okay. That gun came out of that holster. And that gun
25 was fired at the scene of the shooting?

WESLEY MCCLINTON-CROSS EXAMINATION

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1 A Yes, sir.

2 Q Multiple times?

3 A From my understanding.

4 Q Well, I mean, you're the case officer. How many times
5 was it fired?

6 MR. THOMAS: Your Honor, I mean, he doesn't have a
7 basis of knowledge for this. Objection.

8 THE COURT: He can answer the best of his knowledge.

9 A This handgun was fired multiple times inside of that
10 house. I don't know the specific bullet count or how many
11 fired out or how many jammed up. I know there were two
12 different type of rounds that were found inside the house.
13 Shell casings. I don't know exactly how many times this gun
14 was fired.

15 Q And are you aware of the fact that Mr. Brownlee was in
16 the house?

17 MR. THOMAS: Objection, Your Honor. Again, no basis of
18 personal knowledge.

19 THE COURT: He's the chief case officer. I'm going to
20 let him answer the question. Go ahead.

21 A Mr. Brownlee's name was brought up during our
22 investigation as a possible suspect and matched similar to
23 the description as far as being a tall black male with long
24 dreads. And we provided Mr. Wells with the lineup that we
25 received from SLED. He was unable to pick out Mr. Brownlee.

WESLEY MCCLINTON-CROSS EXAMINATION

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1 So to us, that kind of closes out probable cause for
2 charging Mr. Brownlee for the crime.

3 Q And did you participate in getting the gunshot residue
4 test done for Mr. Plumer?

5 A No, sir.

6 Q And did you ever ask Greenville County for that?

7 A It was only to several days -- I want to say four or
8 five days maybe that we found out. It may have been later
9 than that. Detective Kay, who was up here earlier,
10 contacted Greenville and asked if they had anybody going to
11 the hospital with gunshot wounds, just in case. They came
12 back and said they did but it was not related to Greenwood
13 as far as we knew, until we realized who the victim was.
14 And that's when -- that's when we gathered Mr. Plumer had
15 gone to Greenville instead of Greenwood.

16 Q Had gone to Greenville Hospital?

17 A For treatment. Yes, sir.

18 Q Right. And that was fair, because you knew he had been
19 shot, right?

20 A No, sir. I didn't know Mr. Plumer had been shot until
21 they told us. I didn't have anything to do with his GSR.
22 No, sir.

23 Q And you didn't know that Mr. Plumer had been shot
24 because Mr. Wells didn't tell you that he had shot anybody?

25 A Mr. Wells said he fired this gun at the guy that was

1 shooting at him, who he identified as Mr. Plumer, as Mr.
2 Plumer was going out of the house shooting. He said he
3 returned fire as Mr. Plumer was firing at him.

4 Q And you've got all this on tape?

5 A This is -- this is the statement that he was giving me.
6 That he returned fire. He shot back at the guy that was
7 shooting him.

8 Q You have it on tape?

9 A I don't have any evidence on me at this time.

10 Q Would it refresh your recollection if I got those tapes
11 for you?

12 A Sure. Yes, sir.

13 MR. YARBOROUGH: Your Honor, can we approach for a
14 second.

15 (Whereupon, a sidebar was held.)

16 THE COURT: Mr. Foreman, ladies and gentlemen, we're
17 going to break for the evening. Got some legal issues we
18 need to talk about. You know, I told you sometimes we have
19 to discuss things out of your presence. This is one of
20 those times. Based on the time of day, it's probably a good
21 time to -- although I hate to break an examination of a
22 witness in half, we're going to do that.

23 Remember what I told you about not talking about this
24 case. And I promise you that you whoever you see tonight
25 that you're close to is going to want to know. It's human

1 nature. And you have to say no, because what they say to
2 you might impact your state of mind. Those people aren't up
3 here watching the examination, listening to the testimony.
4 So just say no. When it's all said and done you can talk
5 about it all you want. But do not talk about it.

6 The other thing you have to remember is not to go visit
7 the scene, don't go look anything up in a book. Does
8 anybody read books anymore? Do not get in the internet.
9 Okay? And for goodness sake, don't get on some social
10 media. No Tweets. Okay? No Facebook. That's happened
11 before. You got to through the whole case out and start
12 over. So don't do it. Okay? Have I been stern enough with
13 you? Take it seriously. These are your rights you're
14 protecting as well.

15 So you all have a pleasant evening and let's plan on
16 starting back at 10:00 in the morning. Okay? You all have
17 a nice night. Thank you.

18 THE BAILIFF: Leave your notebooks --

19 THE COURT: Yeah, you got to leave your pads and all
20 that here. We'll protect them and no one's going to look at
21 them. If you've got to get your stuff, you all go ahead and
22 get your stuff out of the jury room.

23 (Whereupon, the jury was released for the day at 4:48
24 p.m.)

25 THE COURT: All right. We had a bench conference at

1 Mr. Yarborough's request. Anything you want to put on the
2 record, Mr. Yarborough?

3 MR. YARBOROUGH: Yes, sir, Your Honor. Your Honor, I
4 would like to be able to play the tape recorded conversation
5 where this investigator is interviewing Mr. Wells. I've
6 asked this investigator numerous questions about how that
7 investigation -- or how that line of questioning went. His
8 recollection is not what I think is on these tapes. I think
9 the tapes are the best evidence of what's on there.
10 Specifically, Your Honor, I asked him if he asked Mr. Wells
11 about the gunshot residue exam. He said I didn't know
12 anything about it at that point and it is specifically on
13 this tape, and I think it's extremely important to our case.
14 Because I think that's what --

15 THE COURT: Well, what you said up here was that he
16 questioned him and talked about the gunshot residue showing
17 whether or not he's lying. It was an interrogation
18 technique, I presume. You never asked that question. If
19 you want to impeach this witness' credibility you've got to
20 ask the specific question that you think you can show he is
21 misstating something in another source. So at this point
22 these tapes are not admissible. How are they admissible?

23 MR. YARBOROUGH: Your Honor, if -- once I ask him the
24 question, if he says he said that -- I was under the
25 assumption that when I asked him if he asked Mr. Wells about

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1 the gunshot residue he said I didn't ask him about it
2 because it wasn't done. I specifically recall him asking
3 him on the tape that -- that's why he started changing his
4 story.

5 THE COURT: Who changed his story?

6 MR. YARBOROUGH: Wells. He says he didn't pressure him
7 at all and I'm saying he did, and I'd like to use those
8 tapes to show that, Your Honor, if I'm not being clear.

9 THE COURT: I don't think you ever asked him if he was
10 pressuring him. That might be your impression. If you
11 asked things that you think that this witness can be
12 impeached with on those tapes, and that would be specific
13 statements made in this courtroom which he said something
14 different in another setting, then you have to be cued up
15 and ready to go with that. We're not just going to
16 willy-nilly play the tapes of the interviews.

17 MR. YARBOROUGH: Right. I'll be -- I'll be ready to go
18 if --

19 THE COURT: Well, why don't you ask the question that
20 you wanted to -- that you say you can impeach him with.

21 Q Detective, when you went back on the third or fourth
22 time to interview Mr. Wells, did you say to him, "I know
23 you're not telling the truth. There's more to this story."

24 A Can I explain something related to this?

25 Q I just asked you a simple --

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1 THE COURT: Well, hang on. Just yes or no and then you
2 can explain your answer.

3 A Can you repeat the question again, please.

4 Q Did you tell him the third or fourth time you went to
5 see him that there's more to this story than what you're
6 telling us?

7 A Yes, sir. If -- yes, sir.

8 Q Okay.

9 THE COURT: And you can explain your answer.

10 A If I thought there was more to the story and I was
11 trying to get him to tell me more than what he wanted to
12 tell me, that's what I would have said.

13 Q And you were -- you were using aggressive techniques to
14 get him to change his story; isn't that correct?

15 A I will use almost any legal technique to get the truth
16 from the victim.

17 Q And some of those techniques were aggressive?

18 A Possibly. Yes, sir.

19 Q Right. And you said to him -- you said to him, "Now,
20 the gunshot residue test is going to come back and it's
21 going to show you fired a gun."

22 A If I mentioned gunshot residue to Mr. Wells it was a
23 ploy. At the time I didn't know that Mr. Wells -- I never
24 knew when I talked to him for a fact that he had had a GSR
25 test done on him. I assumed that that had been done because

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1 that is our protocol. If I felt like Mr. Wells was not
2 telling me the whole truth, and I felt like at the time that
3 he was a suspect in the case and that he possibly could have
4 been the shooter, which I didn't 100 percent at the time, I
5 would have said, "Hey, if you're not telling me the truth,
6 it's going to come back in this GSR."

7 Q And that's what you said?

8 A And if that's what I said that was a technique. I
9 didn't know that the GSR had been done. I assumed it had
10 been done.

11 THE COURT: How are you going to impeach him with
12 what's on the tape?

13 MR. YARBOROUGH: Judge, he just -- he --

14 MR. THOMAS: He just admitted to saying --

15 MR. YARBOROUGH: He just admitted to saying what he did
16 not admit to saying a little while ago. And -- perhaps I
17 didn't ask the question perfectly, Judge. If that's the
18 case, I'll stand corrected. But that's what I thought I
19 asked him. If he asked him about GSR and he said, "I didn't
20 know the thing had been done." And the tape clearly says
21 that he's asking him about it. He says he didn't know it
22 had been done, say he didn't know it had been done.

23 THE COURT: You can go into the same questioning that
24 you just went into here, and if he changes his answer
25 tomorrow then you can impeach him with the testimony he had

1 today. But you're not going to just willy-nilly play the
2 taped interviews. He hasn't -- you're going to have to find
3 -- cue up exactly what you think he has said in the -- on
4 the tapes that is different from what he's testified to
5 today. He has acknowledged that, yes, it was a ploy if he
6 talked about it. He made an assumption when he's in
7 interrogation that they took the GSR from the victim. But
8 he did not know, and he has said that numerous times, and he
9 did not have the results. So if you have something you
10 think you can impeach him with, have it cued tomorrow and
11 ready to go.

12 MR. YARBOROUGH: Yes, sir.

13 THE COURT: We're not just going to wait around and
14 play these tapes.

15 MR. YARBOROUGH: I wasn't about to.

16 MS. WHITE: Judge, on the -- I brought this up at the
17 bench conference also. Mr. Yarborough has pretty much
18 openly stated to this jury that we should have played the
19 tapes that would have been inadmissible for the State under
20 any stretch of the imagination. I'm asking for a curative
21 instruction, or at the very least that Mr. Yarborough be
22 prohibited from saying in closing that we should somehow
23 have played hours worth of interviews with the victim that
24 we are never allowed to play just in our case in chief
25 willy-nilly.

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1 THE COURT: Okay. Well, we'll cross that bridge when
2 we come to it. But be careful where you go Mr. Yarborough.

3 MR. YARBOROUGH: Yes, sir. Thank you, Your Honor.

4 THE COURT: All right. We're going to crank up at
5 10:00. Detective, you may stand down. We won't make you
6 stay here all right. However, you cannot talk about your
7 testimony with anybody and we'll see you in the morning.

8 THE WITNESS: You have a good night.

9 (Whereupon, the witness steps down from the witness
10 stand.)

11 (Whereupon, the proceeding was adjourned at 5:00 p.m.)

12 TRIAL DAY 2-02/07/2017

13 THE COURT: Anything before we bring the jury back?

14 MS. WHITE: No, sir.

15 THE COURT: Come on back to the hot seat.

16 (Whereupon, witness, Wesley McClinton, returns to the
17 witness stand.)

18 (Whereupon, the jury entered the courtroom at 10:00
19 a.m.)

20 THE COURT: I trust everyone had a good evening, and we
21 are ready to resume the examination.

22 CROSS-EXAMINATION RESUMED

23 BY MR. YARBOROUGH:

24 Q Detective, I think when we left off we were -- we were
25 talking about your conversations with Mr. Wells.

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1 A Yes, sir.

2 Q And we were talking about the third conversation you
3 had with him.

4 A Okay.

5 Q Do you remember that conversation?

6 A Yes, sir. Somewhat. Yes, sir.

7 Q And do you remember discussing with him that you had a
8 problem with the story he had told you?

9 A Right. Yes, sir.

10 Q And you told him that you knew that gunshot -- the
11 gunshot residue test had been done?

12 A Right.

13 Q And you told him that that would show whether or not he
14 had fired a gun?

15 A Yes, sir. That's what the gunshot residue does. Yes,
16 sir.

17 Q And you told him that you felt like things weren't
18 adding up?

19 A Yes, sir. I told Mr. Wells I felt like there was more
20 to the story, and that if he had fired a gun and the gunshot
21 residue test was conducted then we would find out the truth
22 in the end. Yes, sir.

23 Q And at that point did he change his story?

24 A No, sir. Actually it was the second -- it was the
25 second interview, or the second time I spoke with Mr. Wells.

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1 I labeled it as part two. So part two was prior to him
2 coming out with the whole story. Part two is when he
3 continued to give a little bit here and a little bit there,
4 but not the entire story. And we advised him that, you
5 know, if they did gunshot residue test we're going to find
6 out in the end, so it's best that you be honest with us now.
7 That's prior to him telling the truth.

8 Q And you talked to him about there were a bunch of
9 bullets in the back of his car?

10 A Yes, sir.

11 Q And those bullets were similar to the bullets that were
12 fired inside the house?

13 A They were some of the same caliber bullets. They were
14 9 millimeter and 40 caliber and different hunting rounds
15 actually.

16 Q Right.

17 A Yes, sir.

18 Q But the 9 millimeter is not a hunting round?

19 A Some people use it to hunt.

20 Q But what matched -- at that point did you have the
21 firearm that was in the house?

22 A No, sir. No, sir. Not at that time.

23 Q But nobody had given you that firearm?

24 A No, sir. Not yet.

25 Q And what type of bullets does the gun that's been put

WESLEY MCCLINTON-CROSS EXAMINATION

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1 into evidence fire?

2 A Forty caliber bullets.

3 Q And that gun, the 40 caliber bullets, is not
4 necessarily a hunting gun?

5 A There's many different uses for it. I'm not sure --
6 Ms. Wells stated that she used it for target practice and
7 self-defense, so I don't know if she uses it to hunt with as
8 well.

9 Q Well, at that point you also told him that the holster
10 had been found on the floor in the -- in the house?

11 A I told Mr. Wells that a holster had been recovered,
12 yes, sir, inside the house. I didn't know to what, but
13 there was a holster found.

14 Q And that holster was near where his body was found?

15 A Yes, sir. It was.

16 Q And so, at that point in your mind something's wrong
17 with the story he's telling you?

18 A With the different shell casings, the different
19 directions that the holes we found in the residence, it
20 didn't seem like two people came in shooting in one
21 direction because there were holes going back the other
22 direction.

23 Q And so, you knew that wasn't consistent with the story
24 that he had told you at that point?

25 A Yes, sir. It didn't line up at that time with what he

WESLEY MCCLINTON-CROSS EXAMINATION

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1 said. Yes, sir.

2 Q And so, you left and started furthering your
3 investigation at that point?

4 A Yes, sir.

5 Q And at some point I think you said you met either his
6 mother or his father out in the hall. Is that --

7 A Yes, sir. We had spoken with Ms. Wells and Oshamar's
8 father. I can't recall his name. But he came from Atlanta
9 and we spoke to him in the hall. Detective Kay and I.

10 Q Okay. And when you spoke to Ms. Wells were you
11 concerned about the ammunition and stuff that was found in
12 the back of the car?

13 A At the time I wasn't a hundred percent concerned with
14 the ammunition. I was more concerned with finding out who
15 shot Mr. Wells.

16 Q Okay. But you had gone down -- and based on what Mr.
17 Wells had told you, you had gone down to Walmart and looked
18 to see who bought those firearms -- or bought those bullets?

19 A I advised Mr. Wells -- I told him that we have you on
20 camera buying rounds at Walmart. That was a ploy to get Mr.
21 Wells to admit buying the firearm rounds.

22 Q So that wasn't true?

23 A No, sir. We never got surveillance footage from
24 Walmart.

25 Q I didn't realize that. So that wasn't true. That was

WESLEY MCCLINTON-CROSS EXAMINATION

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1 a ploy to get Mr. Wells --

2 A To see if he -- to see if Mr. Wells would admit to,

3 "Yes, I bought these rounds." To try to get him to be more
4 honest and open with us.

5 Q And that's because you didn't feel like he was being
6 honest?

7 A That's because I wanted to figure out the whole truth
8 of it and I wanted to make him think that we knew more than
9 what he thought we knew and make him feel more comfortable
10 telling us the whole truth.

11 Q And he was getting nervous?

12 A Since I've worked this case I've never seen Mr. Wells
13 get nervous one time. He's more composed than most people I
14 interview. He rarely gets nervous or upset.

15 Q So he wasn't concerned about the fact that his story
16 wasn't adding up?

17 MR. THOMAS: Objection, Your Honor. It calls for
18 speculation.

19 MR. YARBOROUGH: I'll ask it a different way.

20 Q Based on your questioning, was he changing his story or
21 was he waiting and thinking?

22 A Based on my questioning and on my experience
23 interviewing people, it's almost as much as 90 percent of
24 the people that we interview you begin to get -- the first
25 interview you'll get a little bit, and then once they feel

WESLEY MCCLINTON-CROSS EXAMINATION

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1 more comfortable you'll start getting more. We've
2 interviewed people six and eight times before. So they get
3 comfortable with you and they'll start telling you the whole
4 truth once they realize that they're really not the suspect
5 in the incident and you're actually looking out for their
6 well-being.

7 Q So at that point you were looking out for his
8 well-being?

9 A At that point, Mr. Wells from day one has been the
10 victim.

11 Q Now, I asked you about the telephone that you found in
12 the house.

13 A Yes, sir.

14 Q Okay. Now, are you -- you familiar with these two
15 pictures?

16 MR. YARBOROUGH: May I approach, Your Honor?

17 THE COURT: Uh-huh.

18 A Yes, sir. That was on top of a freezer. Yes, sir.

19 Q Those are pictures of what?

20 A A cell phone with headphones.

21 Q Okay. And they're marked as Exhibit 18?

22 A That's what it appears to be. Yes, sir.

23 Q Did you mark those?

24 A No, sir.

25 Q So who would have marked those?

WESLEY MCCLINTON-REDIRECT EXAMINATION

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1 A The evidence technician, Sergeant Griffin.

2 Q And did you find these inside the house? Did you find
3 this inside the house?

4 A I didn't find any of the evidence, because as I
5 previously stated, when we got there the evidence
6 technician, Kenya Griffin, was already on scene. We backed
7 down and started canvassing the area. Once she got her
8 pictures and did all the stuff that she does, then we went
9 back and continued to conduct the canvas and started looking
10 through the house.

11 Q How many -- how many rounds did you find fired in that
12 house?

13 A I couldn't tell you that answer. There were a lot of
14 shell casings and a lot of holes in the house. I don't
15 remember an exact amount.

16 Q And how many times did the gun that Mr. Wells have get
17 fired in there?

18 A I couldn't tell you that answer either. I don't have
19 that paperwork with me.

20 Q But you didn't look at that or you just -- you don't
21 have the paperwork?

22 A Did I look at what?

23 Q The number of rounds he fired.

24 A In the -- in the SLED report it tells you which rounds
25 are fired from which handgun and which ones are fired from

WESLEY MCCLINTON-REDIRECT EXAMINATION

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1 Mr. Wells' handgun.. I don't -- I don't remember the
2 numbers. I've seen the report.

3 Q Right.

4 A I don't -- I don't remember the numbers. I couldn't
5 tell you. They do a lot of technical terms that I don't
6 really understand when they test them.

7 MR. YARBOROUGH: Just one second, Your Honor. I don't
8 have any further questions of this witness right now.

9 THE COURT: All right.

10 REDIRECT EXAMINATION

11 BY MR. THOMAS:

12 Q Detective McClinton, the first thing I want to do is
13 followup on something you just said. You said you did not
14 collect any evidence from the house?

15 A Not inside of the house.

16 Q Did you collect any evidence from outside of the house?

17 A Yes, sir.

18 Q What did you collect from outside of the house?

19 A I collected a blood droplet, what we thought would be a
20 blood droplet, on the sidewalk as you're leaving the house.
21 There's a front step, and probably five feet in front of the
22 front step on the way toward the roadway there's a drop of
23 blood. Once Detective Kay and I went back and we spoke to
24 Mr. Wells again and got the true story, Mr. Wells advised us
25 that he did shoot back, and that as soon as Mr. Plumer was

WESLEY MCCLINTON-REDIRECT EXAMINATION

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1 shooting at him he was shooting back, and he thinks that the
2 only reason that Mr. Plumer stopped shooting was because he
3 got shot. So then we went back to see if there was any
4 blood leading out of the residence. We found a drop of
5 blood on the sidewalk right in front of the house. So we
6 collected that with a sterile buccal swab.

7 Q Let me show you what's been premarked as State's
8 Exhibit No. 23 and ask you if you recognize that.

9 A Yes, sir.

10 Q And what is that?

11 A That's where I input the buccal swab and the cardboard
12 box that goes into evidence. That was on the 12th.

13 Q And that's the buccal swab you collected from the front
14 steps?

15 A Yes, sir.

16 Q I'm showing you what's been premarked as State's
17 Exhibit 24 and 25. Do you recognize those?

18 A Yes, sir.

19 Q What's that a photo of?

20 A Blood droplets right off the wooden porch where it
21 turns into the sidewalk leading out of the house.

22 Q And is that a true and accurate depiction of what you
23 saw there?

24 A Yes, sir.

25 MR. THOMAS: Your Honor, at this time I'd move 24 and

WESLEY MCCLINTON-REDIRECT EXAMINATION

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1 25 into evidence.

2 THE COURT: Any objection?

3 MR. YARBOROUGH: No objection, Your Honor.

4 (Whereupon, State's Exhibit Nos. 24 and 25 were
5 admitted into evidence.)

6 Q And this is 24. What are we looking at there?

7 A To the right side of the photograph, I'm going to say
8 up under the dark colored leaf, there is -- it looks like
9 three little small blood droplets. Yes, sir.

10 Q And on 25, is this just a closeup of that?

11 A It's a closeup. Yes, sir. There it is.

12 Q Right there?

13 A Yes, sir.

14 Q And when did you collect these swabs again?

15 A That was on the 12th. The day after the shooting. And
16 I believe it was in the afternoon after we had spoke to Mr.
17 Wells again and he could confirmed the real story and we
18 knew that there's a possibility of another victim -- or
19 another person shot. So we went back to see if there's any
20 evidence leading out of the residence.

21 Q And I just want us to go back through and make sure
22 that this is clear. I'm not sure it was from
23 cross-examination. But you -- when's the first time you
24 interviewed Mr. Wells?

25 A That was on the 12th.

WESLEY MCCLINTON-REDIRECT EXAMINATION

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1 Q And then when is -- and that's the story -- he gave you
2 that story about two guys robbed him and he didn't know who
3 it was?

4 A On the 12th Detective Kay and I went that morning and
5 spoke to Mr. Wells initially. And I couldn't tell you what
6 time it was. It was probably 9:00, 9:30. Mr. Wells gave us
7 the first story, which about two guys coming into the
8 residence and shooting at him. We talked to him again a
9 little bit after that. He started to give us a little bit
10 more of it. We left there. We did another investigation in
11 Anderson with Mr. Plumer, and came back and talked to Mr.
12 Wells again, after his father had talked to him, and I guess
13 he had a heart to heart with him and he gave us the whole
14 truth. That's when we went back out to the house because we
15 figured we probably missed something or there was something
16 there we needed to find.

17 THE COURT: Hang on one second. Okay.

18 Q And that was -- you spoke to Mr. Wells the second -- or
19 on the 13th? That's when you got that story that you think
20 is based on your investigation?

21 A Yes, sir.

22 Q I'm going to show you what's been premarked as State's
23 Exhibit 26. Do you recognize that?

24 A Yes, sir.

25 Q And what is that?

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1 A That's a cell phone with some pink headphones in it.

2 Attached to it.

3 Q And that's the cell phone that Mr. Yarborough has been
4 talking to you about?

5 A Yes, sir.

6 Q And that's a true and accurate picture of --

7 A Yes, sir.

8 Q -- what it looked like?

9 MR. THOMAS: Your Honor, I'd move State's 26 into
10 evidence.

11 MR. YARBOROUGH: Without objection.

12 THE COURT: No objection.

13 (Whereupon, State's Exhibit No. 26 was admitted into
14 evidence.)

15 Q What did you do with that cell phone?

16 A Once we took it out -- it wasn't related to the
17 incident at all, returned it to the owner who lives there.
18 I believe his name is D.J. Couldn't tell you his whole
19 name. But he lives at the residence. And I guess he had
20 left his cell phone on the freezer near the back door. We
21 thought it was tied to the incident somehow. Found it
22 wasn't and returned it to the owner.

23 Q And when did that happen? When did you find out it
24 wasn't related to the incident?

25 A I couldn't tell you 100 percent. I'm not -- I'm not

WESLEY MCCLINTON-RECROSS EXAMINATION

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1 sure. It was shortly after that.

2 Q But this was in no way, shape or form related to it?

3 A That has nothing to do -- that's -- I think his name is
4 D.J. Anty. I'm really not 100 percent sure. But that has
5 nothing to do with the crime at all.

6 Q And you've been working in Greenwood for how long?

7 A Six years with the police department, I think, in July.

8 Q And you've known Mr. Wells how long?

9 A Mr. Wells, I've known him quite a while. Not
10 personally, but knew of him.

11 Q And when you went and interviewed him in the hospital
12 on the 13th did you suggest to him in any way who the
13 culprit in this case was?

14 A No, sir. Absolutely not.

15 Q Did you even have any knowledge -- well, strike that
16 question. Did you have any reason to tell him who the
17 culprit would have been?

18 A No, sir. No, sir.

19 Q You didn't suggest to him who to pick out of that
20 lineup?

21 A No, sir. I wouldn't do that.

22 Q He did that all on his own?

23 A Yes, sir. 100 percent.

24 Q You didn't threaten him or promise him any leniency or
25 --

WESLEY MCCLINTON-RECROSS EXAMINATION

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1 A Absolutely no. No, sir. Absolutely not. I was just
2 happy that he was cooperating with me when he did.

3 Q And when you were talking to him about the rounds that
4 were found in the car, were those -- I want to clarify.
5 What kind of ammunition was found in his mother's car -- his
6 car?

7 A I don't know the brand of ammunition. There's a ton of
8 different brands of ammunition. I know there's some 40
9 caliber rounds, some 9 millimeter rounds, and I want to say
10 there's some 30 ought 6 hunting rounds. But I don't know if
11 it was Federal or who made the rounds. But it was probably
12 the same stuff I would find in my own truck.

13 MR. THOMAS: Thank you, Detective McClinton.

14 THE WITNESS: Yes, sir.

15 MR. YARBOROUGH: Briefly.

16 RECROSS-EXAMINATION

17 BY MR. YARBOROUGH:

18 Q You did tell him -- you did tell Wells that his story
19 wasn't adding up?

20 THE COURT: We've been down that road.

21 MR. YARBOROUGH: Your Honor, he's --

22 THE COURT: Just don't repeat any examination. We've
23 been through that several times.

24 Q When you signed the affidavit for an arrest warrant for
25 Mr. Plumer, you said in that affidavit that you found Mr.

WESLEY MCCLINTON-RECROSS EXAMINATION

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1 Plumer's phone at the location; is that correct?

2 A Let me clarify that, if I can. That affidavit, we
3 spoke about it yesterday. Just to make sure we're on the
4 same page. I did not type that affidavit. The signature
5 was unreadable. I found out that Lieutenant Dixon actually
6 typed that affidavit, who was my supervisor. He typed that
7 affidavit based on what knowledge we were giving him, and
8 that's what knowledge we had at the time.

9 Q But you signed the affidavit?

10 A No, sir. I did not. No, sir. That was not --

11 Q That's not your signature on it?

12 A No, sir. It's not. No, sir. Lieutenant Dixon's
13 signature.

14 Q But that was information that you had provided to
15 Lieutenant Dixon?

16 A We gave Lieutenant Dixon the information that we knew
17 at the time as our case would go on, to where when he typed
18 the affidavit he based on the probable cause for the arrest
19 that we had gathered, Detective Kay and I, at the time.

20 Lieutenant Dixon never interviewed -- make sure I'm right
21 here. I don't think Lieutenant Dixon ever interviewed Mr.
22 Wells or Ms. Wells. So anything that he had typed, he was
23 typing it based on what we knew at that very moment.

24 Q And what -- what he typed based on the information you
25 gave him was that Mr. Plumer's phone was found at the

WESLEY MCCLINTON-RECROSS EXAMINATION

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1 location?

2 A If that's what Lieutenant Dixon typed. I can't -- I
3 can't speak on that. I don't --

4 Q You read it yesterday?

5 A I read the line that you wanted me to read yesterday.
6 Yes, sir.

7 Q Okay. And that's what it said.

8 A I didn't read anything about a phone yesterday. I read
9 about two gentlemen -- two suspects having a gun yesterday.

10 MR. YARBOROUGH: One moment, Your Honor. May I
11 approach, Your Honor?

12 THE COURT: Uh-huh.

13 Q Yesterday I showed you this document.

14 A Yes, sir. You did.

15 Q And I asked you to read --

16 A No, sir. You didn't ask me to read anything. You told
17 me to read this. I read it, and I referred to which part I
18 thought you were talking about which had to do with two
19 suspects possibly -- possibly two suspects having handguns.
20 We never talked about anything about a cell phone yesterday.

21 Q Would you read the section right there about the cell
22 phone.

23 A "Plumer's keys to the vehicle along with his cell phone
24 were located --"

25 THE COURT: Don't read it out loud. It's not your

WALTER PLUMER-DIRECT EXAMINATION

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1 statement.

2 Q Is that consistent with your recollection?

3 A As I said, sir, I didn't type that. This is over a
4 year and a half ago. I don't know exactly what made
5 Lieutenant Dixon type those words. It was more than likely
6 based off what --

7 THE COURT: Now, wait a minute. We're not going to
8 speculate. Okay?

9 Q But what you're saying now is that you did not tell
10 Lieutenant Dixon that Plumer's cell phone was down there?

11 A I don't know why Lieutenant Dixon typed that in that
12 affidavit.

13 Q I just asked you a question. Did you tell him that?

14 A I can't answer that. I don't know.

15 Q Did you tell him that Plumer's car keys were found
16 there?

17 A I can't answer that. I don't know. It could have been
18 me or Detective Kay.

19 Q So you don't --

20 A I don't recall -- if this answers your question. I
21 don't recall specifically telling Lieutenant Dixon Ontavious
22 Plumer's phone and car keys are at this scene. That ties
23 him to the crime. I don't recall that. No, sir.

24 Q Okay. Well, it's clear that the keys to that Mercedes
25 were found there, right?

WALTER PLUMER-DIRECT EXAMINATION

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1 A Yes, sir. One hundred percent.

2 MR. YARBOROUGH: Okay. Thank you.

3 THE COURT: All right. Thank you, sir. You may step
4 down.

5 (Whereupon, the witness stepped down from the witness
6 stand.)

7 THE COURT: Okay. Next witness.

8 MS. WHITE: The state calls Walter Plumer.

9 WALTER PLUMER, having been first
10 duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. WHITE:

13 Q Good morning, Mr. Plumer.

14 A Good morning.

15 Q If you could tell us your name?

16 A Walter Eugene Plumer.

17 Q And where do you live, Mr. Plumer?

18 A [REDACTED] in Starr.

19 Q That's in Starr?

20 A Yeah.

21 Q Is that in Anderson County?

22 A Uh-huh.

23 Q Is that a yes?

24 A Yeah.

25 Q Ms. Scott's got to take down everything we say, so just

WALTER PLUMER-DIRECT EXAMINATION

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- 1 make sure you say yes or no instead of uh-huh or huh-uh.
- 2 Now, how are -- are you related to Ontavious Plumer?
- 3 A Yeah. I'm his granddaddy.
- 4 Q Is he your daughter's son?
- 5 A Yeah.
- 6 Q And what's his momma's name?
- 7 A Veronica.
- 8 Q Now, I'm going to show you a picture. If I can find
- 9 it. Do you have a 2005 Mercedes registered to you?
- 10 A Yeah.
- 11 Q I'm going to hand you what's been already entered as
- 12 State's Exhibit 12. Is that the plate from that Mercedes?
- 13 A Yeah. I think so.
- 14 Q Now, back on October 11th of 2015 who was driving that
- 15 car that day?
- 16 A Well, I let him borrow the car to go pick up his baby.
- 17 And other than that I don't know who else got in there with
- 18 him.
- 19 Q What time did he -- did he get the car?
- 20 A I believe about 1:00 or 2:00.
- 21 Q And did you see the car again that day?
- 22 A No.
- 23 Q Did you see it the next day?
- 24 A Huh-uh.
- 25 Q Is that a no?

WALTER PLUMER-DIRECT EXAMINATION

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1 A No.

2 Q Now, did some gentlemen from the Greenwood Police
3 Department come to talk to you on October 12th?

4 A Yeah.

5 Q And while they were talking to you did some deputies
6 from Anderson come to talk to you?

7 A Yeah.

8 Q Why were the deputies from Anderson there?

9 A Actually, I don't know what the -- all I know, somebody
10 had called and said that they heard report that the car was
11 stolen. But I know I didn't call.

12 Q Now, you -- thinking back to when you were talking to
13 -- it was Detective McClinton. Do you remember talking to
14 Detective McClinton?

15 A Yeah, I think. It's been a while.

16 Q It's been a while, hasn't it?

17 A Yeah.

18 Q When you were talking to him you didn't tell him
19 immediately that your grandson was driving the car, did you?

20 A No.

21 Q Do you remember what you told him first?

22 A Let me see. Yeah, I think I told him that he was --
23 it's been so long. It's been a while since I talked with
24 him, so...

25 Q Do you remember telling him at first that you were sick

MIKE DIXON-DIRECT EXAMINATION

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1 and had gone to bed and the car was missing when you got up?

2 A Yeah. Yeah, I believe --

3 Q You did tell him that? And do you remember telling him
4 you didn't know who took the car?

5 A No.

6 Q So you do not remember telling Detective Dixon and
7 Detective McClinton that you didn't know who took the car?

8 A No, I don't think. I might have made a mistake.

9 Q Do you remember telling them that your daughter asked
10 you to report the car as stolen?

11 A I don't know if it was my daughter or what. I know I
12 -- well, I can't remember back that far because my --

13 Q Do you remember after speaking with the Greenwood
14 Police Department and you -- you said that -- what did the
15 Anderson Deputies do? What did you tell them? Did you go
16 on to report the car as stolen?

17 A I think I did. And then I -- and then I just went on
18 and told the truth.

19 MS. WHITE: Thank you, Mr. Plumer. Please answer any
20 questions Mr. Yarborough has for you.

21 MR. YARBOROUGH: I don't have any questions for this
22 witness, Your Honor.

23 THE COURT: All right. Thank you, sir. You can step
24 down. Thank you very much.

25 (Whereupon, the witness stepped down from the witness

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1 stand.)

2 MS. WHITE: And, Your Honor, Mr. Plumer can be excused
3 from his subpoena.

4 THE COURT: Any objection?

5 MR. YARBOROUGH: No objection.

6 THE COURT: All right. You're released from your
7 subpoena. Thank you.

8 THE WITNESS: Thank you.

9 THE COURT: Next witness.

10 MR. THOMAS: Your Honor, the State calls Mike Dixon to
11 the stand.

12 MIKE DIXON, having been first duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. THOMAS:

16 Q Lieutenant Dixon, what's -- what is your current job?

17 A Lieutenant over investigations.

18 Q And how long have you been --

19 A About six years.

20 Q And before you worked for Greenwood what did you do?

21 A I was on the road prior to working in detectives.

22 Q And before that?

23 A Military.

24 Q And as lieutenant over investigations what's sort of
25 your role?

MIKE DIXON-DIRECT EXAMINATION

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1 A I'm normally the one that gets the phone calls that
2 they need a detective to come in. So I usually call the
3 investigator that's on call and have them respond.

4 Q And for major cases do you supervise sort of the entire
5 investigation?

6 A I do.

7 Q Even though you assign a case officer specifically?

8 A That's correct.

9 Q In this case what was your first involvement on October
10 11th, 2015?

11 A I got a phone call from -- I believe it was the shift
12 lieutenant at the time saying they just had a shooting.
13 Needed a couple of detectives to come in.

14 Q And what did you do when you got that call?

15 A I contacted the on-call investigator which was
16 Detective McClinton.

17 Q And after you talked to him what did you do?

18 A After he responded I got dressed. I came in. I went
19 straight to the office. Based off the information I
20 received from Detective McClinton a search warrant was going
21 to be needed for the residence.

22 Q So you typed up the search warrant?

23 A I did.

24 Q Is that part of your normal course of duties?

25 A It is.

MIKE DIXON-DIRECT EXAMINATION

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1 Q After you got the search warrant what did you do?

2 A I responded to the scene, served the search warrant,
3 and Kenya started -- Griffin started processing the scene.

4 Q Did you help with that at all or did you just --

5 A I more or less -- we don't want a whole bunch of people
6 processing something at one time. We let normally a lead
7 investigator and the evidence technician gather what they
8 can.

9 Q And as far as the next real sort of investigative thing
10 that happened in this case what -- what was your next, I
11 guess, assignment of duties to somebody?

12 A I basically turned the case over to Detective
13 McClinton. We all get together and discuss what we have
14 learned and see what the next step is going to be.

15 Q And for -- would you consider a shooting a major case?

16 A It is.

17 Q And for major cases do you involve basically the entire
18 detectives division?

19 A That's correct.

20 Q What -- sort of walk through me -- with me the timeline
21 of what the investigation -- course of the investigation.
22 What was the first thing that you had Detective McClinton
23 do?

24 A First of all I immediately responded to the scene.
25 Talked with -- if there's any neighbors or any witnesses or

MIKE DIXON-DIRECT EXAMINATION

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1 anything along those lines. If there's a victim, that's
2 usually the very first step, collecting all the evidence we
3 can and gathering all the intel we can based off what we
4 find at the scene. After that we start trying to identify
5 the suspects and try to locate them.

6 Q On October -- and that was all on October 11th --

7 A That's correct.

8 Q -- when it starts rolling? On October 12th what --
9 what did you all do?

10 A Detective Kay and Detective McClinton actually went and
11 talked to the victim. That was at the hospital.

12 Q Okay. And after that what was the next step?

13 A I believe after that we went and talked to -- myself
14 and Detective Clinton went and talked to, I believe, the
15 owner of the vehicle that we found at the residence.

16 Q And what was his name?

17 A I believe it was Walter Plumer.

18 Q And where did he live?

19 A It was -- I believe it was in Anderson. I don't know
20 the exact address.

21 Q And what day did you all go talk to him?

22 A That would have been October 12th. I'm sorry -- yeah,
23 it was October 12th.

24 Q And when you arrived at his house in Anderson what was
25 the scene there?

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1 A We had Mr. Plumer outside talking to him. About the
2 time we arrived there was two other deputies. I believe it
3 was Anderson County deputies that showed up. And while Wes
4 was talking with him I actually talked to the deputies and
5 they said they were there based off a -- a car that was
6 supposed to be stolen.

7 Q And what did Mr. Walter Plumer tell you initially when
8 you talked to him about the Mercedes Benz?

9 A That it was stolen.

10 Q And did that story change?

11 A It did.

12 Q What did he eventually tell you?

13 A That his -- I believe his grandson, Ontavious -- he
14 called him Too-Too, was the one he had let have the car the
15 night before.

16 Q Did he tell you why he let him borrow the car?

17 A I'm not sure. I can't remember exact details what he
18 gave.

19 Q After that, what did you all do on October 13th?

20 A Detective Kay and Detective McClinton went to the
21 hospital. I believe they obtained a statement from the
22 victim in this case.

23 Q And taking a step back. Walter Plumer, did he
24 eventually report his car stolen?

25 A No.

1 Q Why did he tell you he wanted to report it stolen
2 initially?

3 MR. YARBOROUGH: Object, Your Honor.

4 THE COURT: He doesn't know his state of mind.

5 Q Well, what did -- let me rephrase that. What did he
6 tell you was the reason why he reported it stolen?

7 A I believe it was that the car was involved in
8 something. I don't know if he knew exactly what it was at
9 the time. I'm not the main person who talked to him. It
10 was Detective McClinton.

11 Q Fair enough. On the 13th what did you all do?

12 A The 13th I know we obtained a statement from Mr. Wells
13 in the case.

14 Q And based on that statement what did you do?

15 A After talking with him myself, getting with the other
16 detectives, we obtained a warrant for Mr. Plumer's arrest.

17 Q And who typed up the arrest warrant affidavit?

18 A I did.

19 Q And what did you base your information in that
20 affidavit on?

21 A Information we gathered throughout the time and my
22 experience, there's a lot of stuff when you type a warrant
23 that ends up changing from time to time. The original
24 affidavit is more or less just a charging document for
25 probable cause. But we gather all the information we can

MIKE DIXON-DIRECT EXAMINATION

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1 and what we have learned and obtain the warrant.

2 Q Has some of the information in the warrant that you
3 typed up turned out to have not proven to be accurate?

4 A That's correct. And that's something normal that does
5 happen.

6 Q So it was a mistake?

7 A That's correct.

8 Q After you typed up the arrest warrant how long was it
9 before you actually served that on Mr. Plumer?

10 A December 4th.

11 Q So how long -- and when did you type up the arrest
12 warrant?

13 A October 13th.

14 Q And you eventually -- Mr. Plumer was arrested on that?

15 A That's correct. The victim was able to positively
16 identify Plumer.

17 Q Was there a bond hearing --

18 A There was.

19 Q -- for Mr. Plumer? And at that bond hearing who
20 conducts those?

21 A Judge Miller with the city.

22 Q And what's Judge Miller's standard practice when he
23 holds a bond hearing?

24 A He Mirandizes them. Tells them what they're charged
25 with, what they're facing, and allows the -- I guess the

MIKE DIXON-DIRECT EXAMINATION (IN CAMERA)

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1 investigator on the scene to speak and give details about
2 it, along with allowing -- if there's anything else to be
3 said from the Defendant at that time.

4 Q So when you say he Mirandized him, what did Judge
5 Miller say to Mr. Plumer?

6 MR. YARBOROUGH: Objection.

7 THE COURT: It's hearsay. Just so it's clear, ladies
8 and gentlemen, this is not this Judge Miller. It's a
9 different Judge Miller. All right. Go ahead.

10 Q What are the Miranda rights as you know them?

11 A You have the right to remain silent, which means you
12 don't have to say or answer any questions. If you want to
13 answer questions now without an attorney -- similar to that.
14 We usually have a sign filled -- a form filled out when we
15 Mirandize them.

16 Q Was Mr. Plumer, did he appear to understand that he had
17 those rights?

18 A He did.

19 Q Did he give a statement after being advised of those
20 rights?

21 MR. YARBOROUGH: Objection, Your Honor.

22 THE CLERK: Ladies and gentlemen, let's take a short
23 morning break. Don't discuss the case. We'll get back with
24 you very shortly.

25 (Whereupon, the jury exited the courtroom at 10:42

1 a.m.)

2 THE COURT: Okay. What's your objection?

3 MR. YARBOROUGH: I object to this line of -- it sounds
4 to me like he's trying to elicit some kind of stuff Mr.
5 Plumer made. I haven't been put on any notice that he made
6 a statement or that he was intending to use it in any kind
7 of Rule 5 discovery.

8 MS. WHITE: Your Honor --

9 MR. THOMAS: It's in the incident report.

10 MS. WHITE: And pretrial I brought up. Possible
11 *Jackson v. Denno* that they might ask.

12 THE COURT: Well, let's do it now. Let's get it done.

13 *In-Camera*

14 Q Lieutenant Dixon, was Mr. Plumer in Custody?

15 A He was.

16 Q Was he advised of his Miranda rights?

17 A He was. It was not by me. By Judge Miller. Normally
18 any time he -- whenever he holds court in the morning he
19 always Mirandizes before he tells them anything.

20 Q Was Mr. Plumer advised of his right to remain silent?

21 A He was.

22 Q He was advised of his right to have an attorney before
23 giving any statements?

24 A Yes.

25 MR. YARBOROUGH: Your Honor, I'm going to object to

MIKE DIXON-DIRECT EXAMINATION (IN CAMERA)

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1 this.

2 THE COURT: This is a hearing. Just let him finish his
3 examination. This is to determine the voluntary intelligent
4 nature of it.

5 Q Was Mr. Plumer coerced in any way to give any
6 statements at that bond hearing?

7 A No.

8 Q Was he promised anything in exchange for his
9 statements?

10 A No.

11 MR. YARBOROUGH: Your Honor, I'm going to continue to
12 object to --

13 THE COURT: I understand. I'm going to give you a
14 chance to cross-examine. I'm not ruling on the
15 admissibility of it. The jury is not in here. They're
16 trying to establish the free and voluntary nature of this
17 statement. Go ahead.

18 Q Had he been -- was he offered anything to drink or
19 anything before that, do you know?

20 A No. I had not even -- I hadn't even talked to him
21 prior to this.

22 Q Did you ask him any questions at the bond hearing?

23 A I did not.

24 Q Did he seem uncomfortable? Did his will seem overborne
25 by any -- in any way?

MIKE DIXON-CROSS-EXAMINATION (IN CAMERA)

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1 A He did not.

2 Q He was in handcuffs though, right?

3 A That's correct. Actually, I believe in the bond
4 hearing a lot of times they're not. Since it's located in
5 the jail they weren't in handcuffs.

6 Q Did he appear to be under the influence of any alcohol,
7 drugs, anything like that?

8 A Not that I could tell, no.

9 Q Did his responses to questions from the judge seem
10 coherent?

11 A they did.

12 Q Did he appear to understand his rights? I think I've
13 already asked you that, but I just want to make it clear.
14 He understood his Miranda rights?

15 A It appeared to be, yes.

16 Q And did he after that give a statement to the judge?

17 A It was -- normally when someone asks the judge can I
18 say something, the judge will say absolutely, say what you
19 want. And this is all after he's been Mirandized when he
20 first -- when somebody first walks in. And he said that he
21 was there and had been shot also during the incident.

22 MR. THOMAS: I think that's all the questions I have.

23 Q And you put that in your incident report?

24 A I did. Once I went back I talked to Detective
25 McClinton and Detective Kay and I ended up completing a

MIKE DIXON-CROSS-EXAMINATION (IN CAMERA)

220

1 supplemental just to what I heard during the bond hearing.

2 MR. THOMAS: I think that's all the questions I have,
3 Your Honor.

4 THE COURT: All right. You want to examine him about
5 that?

6 CROSS-EXAMINATION

7 BY MR. YARBOROUGH:

8 Q You didn't ask him any of those questions?

9 A That's correct.

10 Q You didn't personally advise him of his rights?

11 A That's correct.

12 Q All you did was hear Judge Miller advise him of his
13 rights?

14 A Yes, sir.

15 Q And Judge Miller was -- he was acting in what kind of
16 capacity?

17 A He's the City Court Judge.

18 Q And did you write down the questions that he asked Mr.
19 Plumer?

20 A I did not.

21 Q Do you know if he advised him of all of his rights?

22 A I believe so, yes.

23 Q You believe so or you know so?

24 A I know he does. It's -- I've worked with Judge Miller
25 for years.

MIKE DIXON-CROSS-EXAMINATION (IN CAMERA)

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1 Q Well, I mean, can you specifically recollect what
2 questions he asked?

3 A I don't believe the judge asked him any questions. I
4 believe he was reading him -- he Mirandized him, he told him
5 what he was charged with. He asked me to give the details
6 of what I knew about the case. I gave a brief summary of
7 what happened.

8 Q What did you say with your summary of what happened?

9 A That there was a shooting that had taken place. That
10 Mr. Plumer was then identified as a suspect and that he was
11 arrested. I didn't go into a whole lot of details in the
12 case.

13 Q So all you were doing was acting as a police officer
14 presenting a probable cause?

15 A That's correct.

16 Q And what you're saying is Mr. Plumer said what?

17 A That he had been at the -- that he had also been shot
18 that night at the incident.

19 Q And do you have your notes of the Mirandized questions?

20 A No, I didn't. I was not taking notes during the bond
21 hearing.

22 Q Do you have any kind of transcript from that?

23 A I don't believe they are recorded.

24 Q Do you have -- do you have your notes of what Mr.
25 Plumer said?

MIKE DIXON-CROSS-EXAMINATION (IN CAMERA)

222

1 A There's not any notes. It's basically a bond hearing.

2 I'm not normally in there taking notes. I just go by what

3 he said to Judge Miller.

4 Q And what specifically did he say to Judge Miller?

5 A He said he had -- admitted to being at the residence

6 and being shot twice.

7 Q And where is this in --

8 A It's on a supplemental report.

9 Q Supplemental report where?

10 A It's the only one that I completed as far as the

11 supplemental goes. Supplemental completed by M. Dixon.

12 Q Do you have that with you?

13 A I do.

14 Q Can I see it?

15 MS. WHITE: It's right here.

16 Q It also talked about -- in there that you were aware of
17 some report that he had made with Greenville County?

18 A That's correct.

19 Q Did you -- did you personally hear that report?

20 A Detective Kay actually called and found out that it was
21 recorded and filed in Greenville.

22 Q But you didn't do it?

23 A I did not.

24 MR. YARBOROUGH: Your Honor, I'm going to --

25 THE COURT: No, we're not done yet. We're not ready

MIKE DIXON-CROSS-EXAMINATION (IN CAMERA)

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1 for argument. Do you have any other witnesses to present on
2 this *Jackson v. Denno* hearing?

3 MR. THOMAS: I don't, Your Honor.

4 THE COURT: Anything from the Defense? Any evidence to
5 present with respect to the voluntary intelligent nature of
6 the statement?

7 MR. YARBOROUGH: No, sir, Your Honor.

8 THE COURT: Who all was in the courtroom -- this was in
9 a courtroom?

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: Who all was in the courtroom?

12 THE WITNESS: Myself, Judge Miller, Mr. Plumer, I
13 believe Mr. Plumer's father, if I'm not mistaken was there,
14 maybe a couple other Defendants. I'm not positive on that.
15 This was a bond hearing in the afternoon. Normally at 3:00.
16 The afternoon bond hearings are pretty slim.

17 THE COURT: Okay. Any argument?

18 MR. YARBOROUGH: Your Honor, first of all, he's not the
19 one that Mirandized him. He was just present at a hearing
20 where he alleges that all the Miranda questions were asked.
21 We hadn't been thrown any notice that they were -- they were
22 going to use this statement, and I would object to it at
23 this time.

24 THE COURT: Based on what? Is there a Rule 5
25 violation? Was this supplied in discovery?

MIKE DIXON-DIRECT EXAMINATION

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1 MS. WHITE: Your Honor, it's been available and
2 downloaded. I can pull up the exact date this particular
3 document was downloaded. There's been four different
4 downloads from our case management system. Also, it's been
5 in my trial notebook for over a month that Mr. Plumer --
6 excuse me, Mr. Yarborough came and looked at last week. I
7 handed him my entire notebook and let him go through it. So
8 it's been turned over in discovery.

9 THE COURT: All right. Well, I'm going to find it was
10 freely, voluntarily and intelligently made. You know, it's
11 a question of fact for the jury at this point.

12 MR. YARBOROUGH: Based on that, I'm assuming you would
13 let him testify that he was there and he was shot but not --

14 THE COURT: This witness can testify to what he heard
15 in court. That's all he can testify to. The statement by
16 your client.

17 MR. YARBOROUGH: He went outside of that when he was
18 testifying. I'd just ask you to --

19 THE COURT: Outside how?

20 MR. YARBOROUGH: Well, I don't --

21 THE COURT: You asked him about something else in the
22 incident report which was unrelated to the *Jackson v. Denno*
23 hearing.

24 MR. YARBOROUGH: Right.

25 THE COURT: That was you eliciting it. All this

MIKE DIXON-DIRECT EXAMINATION

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1 hearing was to do was to determine the voluntary intelligent
2 nature of the statement. Whether or not it was actually
3 made, whether or not this magistrate judge actually gave the
4 Miranda warnings is for the jury to determine. But I'm
5 finding that there is -- that they have met the burden under
6 *Jackson v. Denno*. Okay? Why don't we just take a short
7 morning break so everybody can kind of get -- Lieutenant,
8 you may stand down. Don't discuss your testimony. We'll be
9 right back.

10 (Whereupon, the witness stepped down from the witness
11 stand.)

12 (Whereupon, a recess was held from 10:49 a.m. to 11:03
13 a.m.)

14 (Whereupon, the jury entered the courtroom at 11:03
15 a.m.)

16 THE COURT: All right.

17 DIRECT EXAMINATION RESUMED

18 BY MR. THOMAS:

19 Q Lieutenant Dixon, you said there was a bond hearing in
20 this case?

21 A That is correct.

22 Q And at that bond hearing was Mr. Plumer advised of his
23 Miranda rights?

24 A He was.

25 Q And what were those rights again?

MIKE DIXON-DIRECT EXAMINATION

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1 A He had the right to remain silent. He had the right to
2 talk to an attorney. The same Miranda rights that we all
3 are given.

4 Q Did he appear to understand those?

5 A He did.

6 Q Was he coerced or threatened in any way to make a
7 statement that day?

8 A No.

9 Q Did he -- was he given the opportunity to make a
10 statement?

11 A Judge Miller always gives them an opportunity to ask
12 some questions or say something.

13 Q And that was after he had -- Mr. Plumer had been read
14 his Miranda rights?

15 A That's correct.

16 Q And what was the statement that Mr. Plumer made?

17 A Well, during the investigation we had -- Detective Kay
18 had learned that he had --

19 Q Let me just -- let me ask you -- let me just ask you --
20 I only want to know what Mr. Plumer said.

21 A He said that he was at the residence at the same time
22 of the incident location and also been shot.

23 MR. THOMAS: Thank you, Lieutenant Dixon. That's all
24 the questions I have for you. I'm going to let you answer
25 anything Mr. Yarborough has.

MIKE DIXON-CROSS EXAMINATION

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1 THE WITNESS: Yes, sir.

2 CROSS-EXAMINATION

3 BY MR. YARBOROUGH:

4 Q Did you prepare the arrest warrants?

5 A I did.

6 Q So the affidavit that was signed that went with the
7 arrest warrants that were actually -- you did them?

8 A That's correct.

9 Q And in that affidavit you stated that Mr. Plumer's keys
10 and cell phone were found at the location; is that correct?

11 A Yes, sir.

12 Q And you swore under oath that was the information you
13 had?

14 A That's correct.

15 Q And that's -- is that also the information that you
16 presented at the bond hearing?

17 A I didn't quite go into all the details. I usually give
18 a brief summary of what the incident was.

19 Q And that summary is usually based on your affidavit?

20 A That's correct.

21 Q And that information was information that you collected
22 as the investigator in the case?

23 A Yeah. I talk to all my detectives and gather whatever
24 information I can in order to get the probable cause for the
25 warrants and what they've learned and talked about.

MIKE DIXON-CROSS EXAMINATION

228

- 1 Q And at that point at the bond hearing your
2 investigation had show that Mr. Plumer had been shot twice?
- 3 A That's correct.
- 4 Q Did you -- did you have any -- did you get the blood at
5 the scene or anything along those lines? Did you get the --
6 did you collect the blood that was found on the porch?
- 7 A I did not.
- 8 Q Did you go to this scene?
- 9 A I did.
- 10 Q And on the day of the incident?
- 11 A Correct.
- 12 Q Did you find a gun there?
- 13 A Me personally, I didn't do -- that's what we have an
14 evidence technician for. I arrived on scene and I do
15 whatever I can to support -- usually the lead investigator
16 and the evidence technician are the ones who go through the
17 scene.
- 18 Q And that would have been detective McClinton?
- 19 A That's correct.
- 20 Q And did you -- did you go inside the location?
- 21 A I did.
- 22 Q And did you find marijuana around the --
- 23 A ,Again, I didn't document anything. I didn't find
24 anything. I was mainly there to support my detectives.
- 25 Q But did you see the marijuana?

MIKE DIXON-CROSS EXAMINATION

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1 A I can't remember exactly what I saw. I kind of walked
2 in the house, and once the search warrant was there I
3 allowed Sergeant Griffin and Detective McClinton to be in
4 the house.

5 Q So you -- you stood outside or --

6 A I stood outside and I was inside maybe -- I wrote down
7 what they collected.

8 Q And did they collect some keys to a Mercedes?

9 A Yes, sir.

10 Q And those keys went to the car that was outside?

11 A I believe so. Yes, sir.

12 Q And did you collect a cell phone?

13 A There was a cell phone collected. Correct.

14 Q And did -- do you know how many bullets were collected?

15 A I don't know off the top of my head. No, sir.

16 Q Do you have your report with you?

17 A I don't have the copy of -- the search warrant would
18 have the return of what all items were collected from the
19 house.

20 Q So you don't know how many times the gun that's been
21 admitted into evidence was fired by Mr. Wells?

22 A That's correct.

23 Q You don't --

24 A I don't know exactly what rounds were fired.

25 Q But you collected -- I mean, or somebody gave you those

MIKE DIXON-CROSS EXAMINATION

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1 rounds that night; is that --

2 A The rounds collected that night from the house, yes.

3 Q And did you collect anything out of Mr. Wells' car?

4 A Again, I'm not exactly sure what all was collected.

5 That's why I keep a list of -- on the back of the search

6 warrant there's a return of what all was collected from the

7 cars, the house and stuff like that.

8 Q And you did the return of the search warrant?

9 A I did.

10 Q And you just don't recall it at this time?

11 A I don't off the top of my head, no. I mean, I don't

12 have a copy of the search warrant with me.

13 Q You don't have a copy of the --

14 A I do not.

15 MR. YARBOROUGH: Thank you. I don't have any further

16 questions.

17 THE COURT: Anything else?

18 MR. THOMAS: No redirect, Your Honor.

19 THE COURT: All right. Thank you. You can step down.

20 (Whereupon, the witness stepped down from the witness
21 stand.)

22 THE COURT: Next witness.

23 MS. WHITE: The State calls Kenya Griffin.

24 KENYA GRIFFIN, having first been
25 duly sworn, testified as follows:

KENYA GRIFFIN-DIRECT EXAMINATION

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1 DIRECT EXAMINATION

2 BY MS. WHITE:

3 Q Good morning.

4 A Morning.

5 Q Can you introduce yourself to the jury?

6 A Kenya Griffin with Greenwood City Police Department.

7 Q And how long have you been with the City Police
8 Department?

9 A Almost 14 years now.

10 Q What's your current job title?

11 A I am the crime scene and evidence technician.

12 Q Have you had any special training to do that kind of
13 work?

14 A I have. I attended the National Forensics Academy,
15 which is a 10-week-long school.

16 Q So, generally speaking, if there's a shooting, do you
17 get called out to process the scene?

18 A I do, yes.

19 Q Were you called out the evening of October 11th, 2015?

20 A I was.

21 Q And what location did you respond to?

22 A I don't recall the exact house number but it was [REDACTED]

23 [REDACTED].

24 Q And when you arrived on the scene what did you do?

25 A When I got there I talked to the lieutenant for the

KENYA GRIFFIN-DIRECT EXAMINATION

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1 shift. Got basically what they had. The information they
2 had. I was told that there was a search warrant being
3 obtained, so I had to wait on that. But then I basically
4 took pictures of the outside of the residence until we got
5 the search warrant.

6 Q Did the search warrant also cover the vehicles that
7 were on scene?

8 A It did.

9 Q What -- when did you process the vehicles?

10 A It was the next day, I believe.

11 Q So that evening you were just concentrating on the
12 house itself?

13 A That's correct.

14 Q Was the scene secured when you arrived?

15 A It was.

16 MS. WHITE: Pause for just a second and let Ms. Scott
17 catch up.

18 Q Now -- I may have already asked this. But when you're
19 processing a scene what's the first thing you do?

20 A Take pictures.

21 Q And do you have -- as you locate things do you have any
22 way that you know where you found something?

23 A I do. I have evidence placards that I -- as I come
24 across pieces of evidence that I put down so you can notate
25 the location of it.

KENYA GRIFFIN-DIRECT EXAMINATION

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1 MR. YARBOROUGH: If she's putting the pictures in, I
2 don't have any objection to her admitting them into
3 evidence.

4 THE COURT: All right.

5 (Whereupon, State's Exhibit Nos. 48 through 52 was
6 marked for identification.)

7 Q So you said that you marked everything that you saw
8 with numbers and then you took -- you take pictures?

9 A Correct.

10 MS. WHITE: These are going to be without objection,
11 Mr. Yarborough?

12 MR. YARBOROUGH: Yes.

13 MS. WHITE: Your Honor, the State's offering Exhibits
14 48, 49, 50, 51 and 52 into evidence at this time.

15 THE COURT: Okay.

16 (Whereupon, State's Exhibit Nos. 48 through 52 were
17 admitted into evidence.)

18 Q Can you see the screen from up there?

19 A I can, yes.

20 Q We see in number one right here, what is that?

21 A That is a shell casing.

22 Q And can you tell where that is in the house?

23 A It's right in as you walk into the living room in front
24 of the couch.

25 Q So if you're looking -- which direction would the front

KENYA GRIFFIN-DIRECT EXAMINATION

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1 door be from that picture? Can you tell?

2 A It would be behind the couch.

3 Q So this is -- if you come in the front door --

4 A If you're standing in the front door the couch would
5 have been to this side (indicating) and the shell casings
6 were in front of the couch.

7 Q And can you tell what number two is as marking in that
8 picture?

9 A Number two is also a shell casing.

10 Q And showing you State's 51. Is that a better shot of
11 number two?

12 A It is.

13 Q Is this the front of the house behind this couch?

14 A It is, yes.

15 Q Number three, which is State's Exhibit 52, what does
16 that appear to be?

17 A That's also a shell casing.

18 Q And can you tell where that one is?

19 MR. YARBOROUGH: Let me know what the last number you
20 just marked, please.

21 MS. WHITE: 52.

22 MR. YARBOROUGH: 52. Thank you.

23 Q Can you tell where that is?

24 A I believe it's also in the area of the couch.

25 Q Is that the corner of the television?

KENYA GRIFFIN-DIRECT EXAMINATION

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1 A Yes.

2 Q Now, with regard to numbers one, two --

3 MS. WHITE: Can I approach the witness, Your Honor?

4 THE COURT: Yes.

5 Q I'm going to hand you what's been marked as State's 27,
6 28 and 29.

7 MR. YARBOROUGH: Without objection.

8 Q Can you tell me what those are?

9 A These are the shell casings from markers one, two and
10 three that I collected.

11 Q And did you collect those on the evening of October the
12 11th?

13 A I did, yes.

14 Q Well, what did you do -- well, I'll ask that in a
15 minute.

16 MS. WHITE: So State's 27, 28 and 29 are in evidence
17 without objection?

18 MR. YARBOROUGH: Without objection.

19 (Whereupon, State's Exhibit Nos. 27, 28 and 29 were
20 admitted into evidence.)

21 (Whereupon, State's Exhibit Nos. 53 through 70 were
22 marked for identification.)

23 MS. WHITE: Your Honor, the State offers -- and these
24 are, again, pictures Mr. Yarborough and I just discussed.
25 Nos. 53 through 70 into evidence.

KENYA GRIFFIN-DIRECT EXAMINATION

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1 THE COURT: Any objection?

2 MR. YARBOROUGH: Without objection.

3 THE COURT: Okay.

4 (Whereupon, State's Exhibit Nos. 53 through 70 were
5 admitted into evidence.)

6 Q So we talked about two and three. What's number four?

7 A Number four is also a shell casing.

8 Q And is that in front of the television?

9 A It is.

10 Q All right. Number five, can you tell me what that is?

11 A That's also a shell casing.

12 Q And based on your experience, what is a shell casing?

13 A It's what the gun ejects after a bullet is fired from
14 the gun.

15 Q So that's -- that is a round that has been fired?

16 A Right.

17 Q And number six. I'm going to show you State's 56 and
18 57 at the same time, because they're two different views.
19 What is number six?

20 A A projectile.

21 Q And is that -- when you say projectile, is that --

22 A The actual bullet from the shell casing.

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

24 THE COURT: Yes.

25 Q I'm going to hand you what's been marked as State's 30,

KENYA GRIFFIN-DIRECT EXAMINATION

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1 31 and 32. Can you identify those for me?

2 A 30 is the shell casing from marker number four. 31 is
3 also a shell casing for marker number five. And 32 is the
4 projectile for marker number 6.

5 Q And did you also collect these on October the 12th?

6 A I did.

7 Q And talking about -- and I'm confusing myself.

8 MS. WHITE: Judge, State offers 30, 31 and 32 into
9 evidence. I think that was without objection.

10 MR. YARBOROUGH: That's without objection.

11 THE COURT: Okay.

12 (Whereupon, State's Exhibit Nos. 30, 31 and 32 were
13 admitted into evidence.)

14 Q Exhibit 32 I think was for marker number six. You said
15 that's a fired bullet?

16 A That's correct.

17 Q I'm sorry. I'm trying to break these down into
18 manageable chunks. Number seven, what is that?

19 A I believe that's also a shell casing.

20 Q And where was that located?

21 A On kind of in the kitchen under a -- the diningroom
22 chair.

23 Q And numbers -- in this picture 8, 10 and 11?

24 A They're also shell casings.

25 Q And are those also in the kitchen?

KENYA GRIFFIN-DIRECT EXAMINATION

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1 A They are.

2 Q Item number nine in this picture, what is that?

3 A That's a gun holster.

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

5 THE COURT: Yes.

6 (Whereupon, State's Exhibit No. 91 was marked for
7 identification.)

8 Q I'm handing you what's been marked for ID as State's
9 No. 91. Can you identify what's in that bag for me?

10 A Yeah. It's a brown leather gun holster.

11 Q Is that the holster you collected on October the 11th,
12 2015?

13 A It is.

14 MS. WHITE: State offers Exhibit 91 into evidence, Your
15 Honor.

16 MR. YARBOROUGH: No objection.

17 THE COURT: Okay.

18 (Whereupon, State's Exhibit No. 91 was admitted into
19 evidence.)

20 Q And again, that holster was found right with the
21 victim's shirt?

22 A That's correct.

23 Q Now, item number 14, and this is State's 65, what is
24 that?

25 A It's an unfired bullet.

KENYA GRIFFIN-DIRECT EXAMINATION

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1 Q Can you tell where that was located?

2 A In the kitchen area.

3 Q Would that have been close to where the victim was
4 found?

5 A It was, yes.

6 Q Would you say there were a lot of rounds fired in that
7 house?

8 A There was.

9 Q I'm trying to save us some time and not go through
10 every single picture. And did you handle all of this
11 evidence in the same fashion?

12 A I did, yes.

13 Q Item number 19, what is that?

14 A It's kind of a glare on the picture. I can't --

15 Q I'm sorry is that better?

16 A Yeah. It looks like a cartridge casing, or a shell
17 casing.

18 Q Do you know what this is? Is that's blood or just a
19 stain?

20 A It appears to be a blood stain.

21 Q And again, is this the area where the victim was found?

22 A It was.

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

24 THE COURT: Yes.

25 Q I'm going to hand you what's been marked as Exhibits 39

KENYA GRIFFIN-DIRECT EXAMINATION

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1 and 43. Are those some of the items we were just talking
2 about?

3 A Yes, they are.

4 Q And what did you -- did you collect those on October
5 12th -- excuse me, 11th, 2015?

6 A I did.

7 MS. WHITE: The State offers 39 and 43 into evidence,
8 Your Honor.

9 MR. YARBOROUGH: Without objection.

10 THE COURT: No objection.

11 (Whereupon, State's Exhibit Nos. 39 and 43 were
12 admitted into evidence.)

13 Q And No. 39, is that -- I can't really -- what is that?

14 A That's the unfired bullet.

15 Q The one that we just saw a minute ago?

16 A Yes.

17 Q I'm going to hand you State's -- for ID State's 71
18 through 90 and just get you to glance through those for me.
19 Are those all pictures that you took at the house that
20 night?

21 A Yes, they are.

22 MS. WHITE: The State offers 71 through 90 into
23 evidence, Your Honor.

24 MR. YARBOROUGH: Without objection, Your Honor.

25 THE COURT: Okay.

KENYA GRIFFIN-DIRECT EXAMINATION

241

1 (Whereupon, State's Exhibit Nos. 71 through 90 were
2 admitted into evidence.)

3 Q Number 20 -- State's Exhibit 73, your number 22, what
4 is that?

5 A That's what I believe to be a defect in the floor from
6 a projectile striking it.

7 Q And your number 23, State's 75, what is that?

8 A That's actually a projectile embedded in the floor.

9 Q Were you able to remove that?

10 A I was not.

11 Q So that's, as far as you know, still there today?

12 A As far a I know, yes.

13 Q State's No. 82, can you tell me -- I'll try with the
14 glare. Can you tell me what that is?

15 A That is the front door. The rods through the door are
16 actual holes are in the door and the wall.

17 Q When you -- are you the one who put those rods in
18 there?

19 A Yes.

20 Q And when you're putting the rods in there are you
21 connecting the dots essentially?

22 A Right. I'm trying to basically show which direction
23 the rounds were fired from.

24 Q And were there any holes higher up than the door?

25 A There was not.

KENYA GRIFFIN-DIRECT EXAMINATION

242

1 Q And State's 83, where is that?

2 A That's kind of a kitchen diningroom. The dividing
3 wall. Pointing back -- the rod that's pointing back was the
4 area that the victim was lying in.

5 Q And is this the front door up here?

6 A It is.

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

8 THE COURT: Yes.

9 Q I'm going to hand you what's been marked for ID as
10 State's 33 through 47. Are those all the items, the casings
11 and projectiles you collected that night?

12 A Yes, they are.

13 Q After you collected all -- the entire -- everything
14 we've talked about, what did you do with it?

15 A I brought it back to the police department and secured
16 it in our evidence room.

17 Q And tell me a little bit about your evidence room. Who
18 has access to that?

19 A Just myself, the alternate evidence custodian, and the
20 administration captain.

21 Q Can Detective McClinton go in there without you knowing
22 about it?

23 A No, he could not.

24 Q Could Chief Brooks go in there and mess with something
25 without going through you?

KENYA GRIFFIN-DIRECT EXAMINATION

243

1 A No.

2 MS. WHITE: State offers 33 through 47 into evidence,

3 Your Honor.

4 MR. YARBOROUGH: Without objection.

5 THE COURT: No objection.

6 (Whereupon, State's Exhibit nos. 33 through 47 were
7 admitted into evidence.)

8 Q Are you able to forensically analyze evidence yourself
9 in Greenwood?

10 A No, I'm not.

11 Q What do you do with the evidence?

12 A It's taken to Columbia to the State Law Enforcement
13 Division, or SLED.

14 Q Did you take these items to SLED?

15 A I did.

16 Q What date did you do that?

17 A October 22, 2015.

18 Q I'm going to hand you what's already been -- what's
19 been previously identified as State's Exhibit 23. Did that
20 exhibit ever come into your possession?

21 A It did.

22 Q When did you get that?

23 A October 13, 2015.

24 Q And what, if anything, did you do with it?

25 A I took it down to SLED for analysis.

KENYA GRIFFIN-DIRECT EXAMINATION

244

- 1 Q What is -- what is that, or what does it purport to be?
- 2 A It's blood from the sidewalk in front of the residence.
- 3 Q And you said you took that down to SLED as well?
- 4 A I did.
- 5 Q And when did you do that?
- 6 A October 22, 2015.
- 7 Q Prior to taking that to SLED how was it maintained?
- 8 A It was secured in our evidence room.
- 9 Q Is there anything special you have to do with a blood
- 10 swab like that?
- 11 A No.
- 12 Q Did you ever have occasion to take a DNA sample from
- 13 Mr. Plumer?
- 14 A Yes, I did.
- 15 Q Do you remember when you did that?
- 16 A I don't remember the exact date, no.
- 17 MS. WHITE: May I approach the witness, Your Honor?
- 18 THE COURT: Yes.
- 19 (Whereupon, State's Exhibit No. 92 was marked for
- 20 identification.)
- 21 Q I'm going to hand you what's been marked as State's 92.
- 22 Can you identify that for me?
- 23 A This would be the buccal swab that I took from Mr.
- 24 Plumer.
- 25 Q And how do you take a buccal swab?

KENYA GRIFFIN-DIRECT EXAMINATION

245

1 A It's basically just a large Q-tip that you swab inside
2 the cheeks with.

3 Q And did you seal that up after you took it?

4 A I did, yes.

5 Q What did you do with that after you took it?

6 A It was secured -- it gets secured in our evidence room
7 until I have a chance to take it to SLED.

8 Q I'm going to hand you what's been marked for
9 identification as State's 19. Did that ever come into your
10 possession?

11 A Yes, it did.

12 Q Who did you receive that from?

13 A From Officer Kerry Cooper.

14 Q Do you know where that was retrieved?

15 A From a residence across the street from the incident
16 location.

17 Q Did you -- what did you do with that, if anything?

18 A Secured it into the evidence room until I had a chance
19 to submit it to SLED.

20 Q Was it submitted along with everything else?

21 A It was, yes.

22 Q I think we're almost done, Sergeant Griffin. Finally,
23 I'm going to hand you what's been marked as State's 20. And
24 just open that up and tell me if that ever came into your
25 possession.

KENYA GRIFFIN-CROSS EXAMINATION

246

1 A Yes, it did.

2 Q Who did you receive that item from?

3 A From Detective McClinton.

4 Q And what did you do with this, if anything?

5 A Transported it to SLED.

6 Q Do you recall what date that was?

7 A I believe it was on the same day as everything else.

8 Q When you took all of this down to SLED who did you sign
9 it over to?

10 A To Jennifer Aycock.

11 Q The phone that was recovered from the scene, do you
12 recall what happened to it?

13 A It was turned over to Detective McClinton for some
14 analysis.

15 MS. WHITE: Thank you, Sergeant Griffin.

16 THE COURT: Cross.

17 CROSS-EXAMINATION

18 BY MR. YARBOROUGH:

19 Q Sergeant, you go out to the crime scene and collect
20 evidence. Is that what your job is?

21 A Yes, sir.

22 Q And so, that was your job on the 11th?

23 A That's correct.

24 Q And when you went out there the ambulance had already
25 been in and out of there, right?

KENYA GRIFFIN-CROSS EXAMINATION

247

1 A That's correct.

2 Q And what time did you get there?

3 A I'm not sure exact time. I was probably contacted a
4 little after 8:00. It may have been 15, 20 minutes later
5 that I was on scene.

6 Q So you went straight over there. And you started --
7 the first thing you did is you took pictures?

8 A Well, I talked to the officers on scene to find out any
9 information they could provide me and then I take pictures.

10 Q So you took -- there they are. You took all these
11 pictures?

12 A Yes, sir.

13 Q And there's 50 or 60 of them?

14 A Yes, sir. That sounds about right.

15 Q Ma'am?

16 A That sounds about right. Yes, sir.

17 Q And the scene was in a little bit of disarray?

18 A Yes, sir.

19 Q And part of that was because people had been in and out
20 of there?

21 A I can't testify that anybody's been in and out of
22 there. I know EMS was in and out.

23 Q Okay. And so, then you get in and you take pictures of
24 the -- of the area?

25 A Correct.

KENYA GRIFFIN-CROSS EXAMINATION

248

- 1 Q And did it -- it looked like there had been numerous
2 gunshots in there?
- 3 A Yes, sir.
- 4 Q And what kind of weapons were used?
- 5 A I'm not sure I understand what you're asking me.
- 6 Q Yeah. But what kind of shell casings did you get? Do
7 you recall the different types of firearms that were used?
- 8 A No, sir. I don't. There were 40 caliber shell casings
9 is what I collected.
- 10 Q Forty caliber shell casings?
- 11 A Yes, sir.
- 12 Q And did you get the information out of the cars? The
13 vehicles? Did you take pictures of what was in the cars?
- 14 A Yes, sir. I did.
- 15 Q And what was in the -- what was in the -- in the car
16 that was parked in the front? What was in that car?
- 17 A I don't recall.
- 18 Q Do you recall that there were boxes of ammo?
- 19 A I don't recall. No, sir.
- 20 Q Did you know that that first care was Mr. Wells' car?
- 21 A No, sir. I wasn't aware whose cars they were.
- 22 Q Okay. And you don't recall seeing multiple boxes of
23 ammunition in there?
- 24 A No, sir. I don't.
- 25 Q Do you have those pictures of that car with you?

KENYA GRIFFIN-CROSS EXAMINATION

249

1 A No, sir. I don't.

2 Q But you took those pictures?

3 A Yes, sir. I believe I did.

4 Q You believe you did or you're sure you did?

5 A Without looking at the pictures I'm not sure what
6 you're referring to, so I can't say if I took them or not.

7 Q Okay. Was there anybody else out there taking
8 pictures?

9 A Sometimes the patrol officer will take pictures before
10 I get there. So I'm not sure if -- if they took pictures
11 that night or not.

12 MR. YARBOROUGH: Just a second, Your Honor. May I
13 approach the witness, Your Honor?

14 THE COURT: Yes.

15 (Whereupon, Defense Exhibit No. 1 was marked for
16 identification.)

17 Q Do you recognize that car?

18 A Yes, sir. That was parked beside the house that night.

19 Q Is that the first car or the back car?

20 A I believe this car was parked on the side of the house
21 and then there's two other cars behind the house.

22 Q And what kind of car is that?

23 A It looks like a Nissan.

24 Q And did you take pictures of what was in the Nissan?

25 A No, sir. I did not.

KENYA GRIFFIN-CROSS EXAMINATION

250

1 Q And was there a reason why you didn't do that?

2 A I'm not sure why I didn't.

3 Q Did you take -- there was a Mercedes and then there was
4 a -- the other car?

5 A Yes, sir. That's the Mercedes.

6 Q That's the Mercedes. And did you take --

7 MR. YARBOROUGH: Have that marked.

8 (Whereupon, Defense Exhibit No. 2 was marked for
9 identification.)

10 Q Did you take pictures of the car, the Mercedes? What
11 was in the Mercedes?

12 A I didn't take pictures of the inside of the Mercedes
13 that night.

14 Q Did you do it later?

15 A I did, yes.

16 Q And did you take pictures of what was in the -- was the
17 other car -- the other car was a Mustang?

18 A I believe so, yes.

19 Q I was looking through those pictures. I just didn't
20 see one of the Mustang. What was in the back of that
21 Mustang?

22 A I don't recall that I collected anything out of that
23 Mustang, so I'm not sure.

24 Q So you didn't take anything out of the Mustang. But do
25 you remember there being a number of bullets back there?

KENYA GRIFFIN-REDIRECT EXAMINATION

251

1 A I don't remember. No, sir.

2 Q That's fair enough. Do you know how many different
3 types of bullets did you find in the house?

4 A How many types of bullets did I find?

5 Q Yeah, different types of caliber of bullets.

6 A They were all -- the shell casings that I collected
7 were all 40 caliber. As far as the projectiles I can't tell
8 you what -- what caliber they were.

9 Q They were all 40 caliber. And did you -- did you find
10 anything else in the house? Did you find any -- did you
11 take pictures of the marijuana that was in the house?

12 A Yes, sir. I believe there's pictures of that.

13 Q So you saw some marijuana. And where was that
14 marijuana?

15 A It was on the floor, if I remember correctly.

16 Q And was it a leafy marijuana?

17 A I can't remember if it was a marijuana cigar or if it
18 was loose marijuana. I'm not sure.

19 Q And it's your job to take the pictures and to save it
20 as evidence, right?

21 A That's correct.

22 Q And this gun you found -- or when did you -- did this
23 gun come into your possession?

24 A It was turned over to me by Detective McClinton.

25 Q Do you know what day, or would that be marked on the

KENYA GRIFFIN-REDIRECT EXAMINATION

252

1 box or something?

2 A It's probably on the box. It was turned into me on
3 October 14th of 2015.

4 Q So that was three days later, on the first day you were
5 out there?

6 A Yes.

7 Q And you've kept that in your possession?

8 A Yes, sir, until it was taken to SLED.

9 Q And that's basically your role in this thing? That's
10 everything you've done?

11 A Correct.

12 MR. YARBOROUGH: Thank you. I don't have any further
13 questions. Thank you, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. WHITE:

16 Q Sergeant Griffin, the pictures that we went over, are
17 those all of the pictures you took that night?

18 A No, they're not.

19 Q Does that look like the right number to be the rest of
20 them?

21 A Yes.

22 Q Holding up about an inch thick stack?

23 A Yes.

24 Q And is it possible in your experience that other people
25 were taking pictures as well?

KENYA GRIFFIN-REDIRECT EXAMINATION

253

1 A Yes.

2 Q Do you provide all of the pictures you take to my
3 office?

4 A I do.

5 Q And from your experience, is that ultimately provided
6 to the defense?

7 A Yes.

8 Q Now, do you have a copy of the search warrant with you?

9 A No, I do not.

10 Q Do you recall who actually executed -- who signed that
11 return?

12 A I don't recall, no.

13 MS. WHITE: Thank you, Sergeant Griffin.

14 THE COURT: Thank you, ma'am. You can step down.

15 MR. YARBOROUGH: One more question, Your Honor.

16 THE COURT: What?

17 MR. YARBOROUGH: She asked her if she took all the
18 pictures. I was just going to ask her if she recognized
19 these three pictures.

20 MS. WHITE: Your Honor, I asked -- I believe this is
21 outside the scope.

22 THE COURT: Go ahead and do it.

23 RE CROSS-EXAMINATION

24 BY MR. YARBOROUGH:

25 Q Do you recognize that picture?

AMY STEPHENS-DIRECT EXAMINATION

254

1 A No, I do not.

2 Q How about that picture?

3 A No, sir. I don't.

4 MR. YARBOROUGH: Thank you.

5 THE COURT: All right. Thank you. You can step down.

6 (Whereupon, the witness stepped down from the witness
7 stand.)

8 THE COURT: Next witness.

9 MS. WHITE: The State calls Amy Stephens.

10 AMY STEPHENS, having first been
11 duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. WHITE:

14 Q Would you introduce yourself to the jury?

15 A My name is Amy Stephens and I'm employed with the South
16 Carolina Law Enforcement Division.

17 Q What are your duties at South Carolina Law Enforcement
18 Division?

19 A I'm a forensic technician in the evidence control
20 department and our daily responsibilities are to log in,
21 package and transfer evidence for forensic analysis.

22 Q When a case comes in to SLED is it assigned an internal
23 lab number?

24 A Yes. Every case that is submitted to our laboratory
25 receives a unique lab number and each piece of evidence also

AMY STEPHENS-DIRECT EXAMINATION

255

1 receives an item number.

2 Q The case that we are here on today, what is -- what is
3 the lab number that it was assigned?

4 A The SLED lab number is L15-14030.

5 Q Now, when -- generally speaking, when an item comes
6 into SLED what's the process for checking it in?

7 A A submitting officer will arrive at our laboratory to
8 submit evidence. The evidence is packaged accordingly. The
9 case information is entered into our computer system. That
10 lab -- unique lab number is generated. The labels
11 associated with the evidence are placed on the corresponding
12 packages, and then that evidence will be either transferred
13 to our evidence room or will be transferred directly to
14 another technician or analyst.

15 Q On this case number, I think you said it was 15-14030?

16 A That's correct.

17 Q Did you -- was any evidence received into SLED?

18 A Yes, it was.

19 Q And who was the technician who signed that in?

20 A Some evidence in this particular case was received by
21 Jennifer Aycock, who is a forensic technician in evidence
22 control, on October 22nd, 2015.

23 Q And as an item moves through SLED does each person --
24 do you all maintain a chain of custody?

25 A We do. Every time evidence is -- a piece of evidence

AMY STEPHENS-DIRECT EXAMINATION

256

1 is retrieved or transferred by an individual or to an
2 individual shelf we maintain an electronic chain of custody.

3 Q And does it stay sealed from the point it's checked in
4 until the scientist retrieves it?

5 A It does.

6 Q And is the chain of custody a record that's kept in the
7 ordinary course of business?

8 A It is.

9 Q I'm going to hand you what's been marked as State's
10 Exhibit 93. Can you identify that for me?

11 A This is a chain of custody for SLED lab number
12 L15-14030.

13 Q And does that verify as a complete and accurate chain
14 of custody?

15 A Yes, it does.

16 Q So I'm going to hand you what are in evidence as
17 State's 27 through 47. And I realize this is kind of a
18 complicated way to do this. Are those all of the items that
19 were checked in by Jennifer Aycock? Or were those items
20 checked in by Jennifer Aycock?

21 A Yes, they were.

22 Q And the same question for what's been identified as
23 Nos. 19 and 23. State's Exhibits 19 and 23.

24 A State's Exhibit 23, the heat sealed pouch that's
25 labeled item number 31 was received by Jennifer Aycock. The

AMY STEPHENS-DIRECT EXAMINATION

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1 heat sealed pouch labeled container F was actually created
2 in-house by a forensic technician.

3 Q Okay. And what about Exhibit No. 19?

4 A Yes. That also was received by forensic technician
5 Jennifer Aycock.

6 Q Item -- what's been identified for -- what's State's
7 Exhibit 20 for identification, just look at that and tell me
8 if that was also received by technician Aycock.

9 A Yes. This item was received by forensic technician
10 Jennifer Aycock as well.

11 Q With regard to -- I believe these were casings,
12 projectiles and a firearm, where did those ultimately end up
13 at SLED?

14 A They ended up in our firearms department. It went
15 through a process of being transferred from the submitting
16 officer to our technician to our evidence room. A
17 technician retrieved it from the evidence room and
18 transferred it to a scientist within the firearms
19 department.

20 Q And now I'm going to hand you what's been marked for ID
21 as State's Exhibit 92. Can you tell me who checked that in
22 at SLED?

23 A I received this evidence from Kenya Griffin with the
24 Greenwood Police Department on November 17th, 2016.

25 Q And was that evidence submitted for DNA analysis?

AMY STEPHENS-CROSS EXAMINATION

258

1 A Yes, it was.

2 Q With regards to that and the other item, State's 23 --
3 excuse me, submitted for DNA analysis, what all -- what was
4 the chain on those?

5 A As far as State's Exhibit No. 92, which is SLED item
6 number 38, I logged that evidence in. I transferred it to a
7 DNA shelf within our evidence room. Another technician
8 within my department retrieved that evidence and then
9 transferred it to the forensic scientist, Jennifer Clayton,
10 who was the DNA analyst in this case.

11 Q And State's 93. You said that's the chain of custody
12 for SLED?

13 A That's correct. That's correct.

14 MS. WHITE: State offers Exhibit 93 into evidence, Your
15 Honor.

16 MR. YARBOROUGH: Without objection.

17 THE COURT: Okay.

18 (Whereupon, State's Exhibit No. 93 was admitted into
19 evidence.)

20 MS. WHITE: Thank you, Ms. Stephens. Please answer any
21 questions Mr. Yarborough has.

22 CROSS-EXAMINATION

23 BY MR. YARBOROUGH:

24 Q You log stuff into SLED and log it out?

25 A That's correct.

PATRICK DURKIN-DIRECT EXAMINATION

259

1 Q And then that's what you did in this case?

2 A That's correct.

3 MR. YARBOROUGH: Thank you. I don't have any further
4 questions.

5 THE WITNESS: Thank you.

6 THE COURT: All right. Can we release her from
7 subpoena?

8 MS. WHITE: Yes, sir.

9 THE COURT: Any objection?

10 MR. YARBOROUGH: No, sir.

11 THE COURT: All right.

12 THE WITNESS: Thank you.

13 (Whereupon, the witness stepped down from the witness
14 stand.)

15 THE COURT: Call your next witness. Let's go.

16 MR. THOMAS: State calls Patrick Durkin.

17 PATRICK DURKIN, having first been
18 duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. THOMAS:

21 Q Officer Durkin, could you please introduce yourself to
22 the jury for us?

23 A Officer Durkin with Greenwood City Police Department.

24 Q How long have you been working with the city?

25 A Since November 12th of 2001.

PATRICK DURKIN-DIRECT EXAMINATION

260

1 Q And were you working on October 11th, 2015?

2 A That's the date of this incident, correct?

3 Q Were you working on -- would you like to refer to your

4 --

5 A I was working that evening, I guess, yes.

6 Q Yeah. And so, you responded to the scene of the
7 shooting?

8 A That is correct.

9 Q And when you got there did they send you somewhere
10 else?

11 A Shortly after I arrived on scene they -- I was directed
12 to go down to the hospital where the victim was.

13 Q And when you got there where was the victim?

14 A When I arrived at the hospital the victim was enroute
15 with EMS. On arrival the victim went into treatment, room
16 six in the emergency room, and I followed them in there.

17 Q And while you were in there did you have the
18 opportunity to view the victim and his gunshot wounds?

19 A I did.

20 MR. THOMAS: Your Honor, may we approach?

21 (Whereupon, a sidebar was held.)

22 (Whereupon, State's Exhibit Nos. 94, 95, 96, 98 and 99
23 were marked for identification.)

24 Q Officer Durkin, I'm going to hand you what's been
25 premarked for identification as State's Exhibit 94, 95, 96,

PATRICK DURKIN-DIRECT EXAMINATION

261

1 98 and 99 and ask you if you recognize those.

2 A I do.

3 Q What are those?

4 A Photographs of the victim that I took while in
5 treatment room six.

6 Q And do those photographs that you took truly and
7 accurately depict the injuries that you saw to the victim
8 there?

9 A Yes. To the best of their ability that we could do
10 without jeopardizing the health of the individual.

11 MR. THOMAS: Your Honor, at this time I'd move to enter
12 these into evidence.

13 THE COURT: All right.

14 (Whereupon, State's Exhibit Nos. 94, 95, 96, 98 and 99
15 were admitted into evidence.)

16 Q And these are all photographs you took of his injuries.
17 What is this photograph of?

18 A I believe that's -- is that his left thigh?

19 Q You tell me what it looks like to you.

20 A It's --

21 THE COURT: You can stand down.

22 MR. THOMAS: If you need to come down, you can.

23 THE COURT: But just keep your voice up so you can --
24 we can record it.

25 (Whereupon, the witness stepped down from the witness

PATRICK DURKIN-DIRECT EXAMINATION

262

1 stand.)

2 A Yes, sir. That's his left thigh.

3 Q And what is this in relation to that? Is this just a
4 closeup of --

5 A I believe that's a closeup of the left thigh as well.

6 Q And this is a photo of?

7 A The right side of his lower back.

8 Q And what's that right there?

9 A That was one of the gunshot wounds.

10 Q And what's this photo of?

11 A His left leg, also one of the wounds. I'm sorry. His
12 shin.

13 Q And last one?

14 A That's a photograph of his right thigh.

15 Q When you arrived after you took these photographs did
16 you have any other interaction with Mr. Wells, the victim?

17 A Yes, sir. I spoke to him trying to identify if he had
18 any information on who the shooters were, and then later I
19 spoke to him to find out if he had -- if a vehicle that was
20 on scene, if it was his or not.

21 Q What was his condition while you were speaking to him?
22 How did he appear?

23 A He was in excruciating pain.

24 Q Was he able to give you answers to your questions
25 though?

PATRICK DURKIN-CROSS EXAMINATION

263

1 A I recall that he was -- he was able -- and what I have
2 written in my supplement, that he was able to depict that he
3 was -- let's see. May I read from my supplement?

4 Q Just review it and refresh your recollection.

5 A He was able to state that there were two black males
6 that had entered his residence and told him to give it up
7 prior to beginning shooting at him. He stated that he
8 wasn't entirely sure what it was based off of.

9 Q And after you got that statement from him did you do a
10 gunshot residue? Did you perform a kit on him?

11 A Yes, sir. Once -- once he was back from CT and after
12 having x-rays then I was able -- once he was stabilized I
13 was able to perform -- or conduct a gunshot residue test.

14 Q Walk us through what you have to do -- what you had to
15 do for him to do that gunshot residue test? What's the
16 protocol? What was the condition of his hands?

17 A Upon arrival they -- once -- it's protocol for the
18 hospital involving any type of shooting incident like that,
19 that they place paper bags over the hands so that if there
20 is any evidence it's preserved, or at least to the best of
21 their ability preserved, until the individual is stabilized.
22 It's a small kit. Upon opening the kit there's a very
23 detailed list step by step what is done. I don't -- I do
24 not have that list in front of me, but there's a series of
25 vials and it very specifically states which test goes on

PATRICK DURKIN-CROSS EXAMINATION

264

1 which part of which hand, and there's different procedures
2 that you go down through the checklist and do and then just
3 mark, and then it's contained back inside of that case,
4 which was later placed into evidence.

5 Q So did you have to unbag Mr. Wells' hands to do the --
6 to perform the kit?

7 A Yes, sir.

8 Q And after you perform the kit what did you do with it?

9 A I place it in evidence locker 15 at Greenwood City
10 Police Department.

11 Q And that kit doesn't give you any instant results?

12 It's not a test in and of itself? It's just a kit?

13 A It's -- all the information was sent off to SLED. It
14 doesn't have any instantaneous response.

15 MR. THOMAS: Thank you, Officer Durkin. I'll let you
16 answer any questions Mr. Yarborough has.

17 CROSS-EXAMINATION

18 BY MR. YARBOROUGH:

19 Q You went to the incident location first?

20 A Yes, sir. I arrived on scene and was directed to go to
21 the hospital and prepare for the victim to be brought there.

22 Q And did you go inside the house?

23 A No, sir. I did not.

24 Q So you just got to the scene and then you went to the
25 hospital?

PATRICK DURKIN-CROSS EXAMINATION

265

- 1 A Yes, sir.
- 2 Q And as part of your investigation you took those
- 3 pictures, correct?
- 4 A Yes, sir.
- 5 Q And you did the gunshot residue test?
- 6 A That's correct.
- 7 Q Did you do anything else?
- 8 A In addition to speaking to him to find out if he was
- 9 able to identify the shooters.
- 10 Q Was he able to identify the shooters?
- 11 A Not at that point.
- 12 Q And he told you that somebody jumped in and said give
- 13 it up, or something along those lines? Is that --
- 14 A That's correct.
- 15 Q That's what you wrote in your report?
- 16 A Yes, sir.
- 17 Q And then what was your purpose in doing the gunshot
- 18 residue test?
- 19 A In any instance like that whether there's a -- we know
- 20 that a victim was involved or not, or if there was -- we
- 21 always, if we are able to, perform a gunshot residue test.
- 22 Even if it's fairly certain that a victim did not have a
- 23 firearm or utilize a firearm we always still try to do that.
- 24 Q And do you know if he had a firearm?
- 25 A I do not.

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1 MR. YARBOROUGH: Thank you. I don't have any further
2 questions.

3 MR. THOMAS: No redirect.

4 THE COURT: Thank you. You can step down.

5 THE WITNESS: Thank you, sir.

6 (Whereupon, the witness stepped down from the witness
7 stand.)

8 THE COURT: How you all doing? You want to keep going
9 or take a break for lunch? I shouldn't have asked. What
10 other kind of witnesses do you have?

11 MS. WHITE: Your Honor, the rest of them are SLED
12 analysts, so I'm not sure if they'd be lengthy or not.

13 THE COURT: Okay. I tell you what. Let's -- why don't
14 we break for lunch now and ask you all to be back at 1:30.
15 That's an hour and 15 minutes. I hope that's enough time.

16 Remember, do not discuss the case. Don't go visit the
17 scene. Don't look anything up. Have a good lunch. We'll
18 see you at 1:30.

19 (Whereupon, the jury exited the courtroom at 12:12
20 p.m.)

21 (Whereupon, a lunch recess was held from 12:12 p.m. to
22 1:38 p.m.)

23 (Whereupon, the jury entered the courtroom at 1:38
24 p.m.)

25 THE COURT: Welcome back. I hope everybody had a nice

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1 lunch and we're ready to resume. Next witness.

2 MR. THOMAS: State calls Megan Fletcher.

3 MEGAN FLETCHER, having first been
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. THOMAS:

7 Q Is it Agent Fletcher?

8 A Megan is fine.

9 Q All right, Ms. Fletcher. Where do you work?

10 A I work at the South Carolina Law Enforcement Division
11 in the forensic services laboratory in the trace evidence
12 department.

13 Q And what do you do in trace evidence?

14 A I'm a forensic scientist and I analyze different types
15 of trace evidence. Those include gunshot residue, fire
16 debris, paint, fibers, glass, duct tapes, bank dye,
17 explosives, and general unknowns.

18 Q And what kind of education do you need to work there?

19 A I have a Bachelor's degree in biochemistry and English,
20 and I also have a Master's of Forensic Science emphasizing
21 in computer forensics and forensic chemistry.

22 Q And what kind of training have you received while you
23 were working at SLED?

24 A Throughout my career at SLED I have undergone the
25 training programs for each of the specific disciplines. So

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1 gunshot residue has a different training program than fire
2 debris, or paint, or fibers. I also do continuing education
3 each year.

4 Q And how long have you been doing all this?

5 A About nine and a half years.

6 Q And specifically as it relates to gunshot residue, is
7 that something you normally do?

8 A Yes, sir.

9 Q And what kind of training do you have to do -- to
10 perform gunshot residue --

11 A I underwent --

12 Q -- analysis?

13 A I'm sorry. I underwent about a nine month in-house
14 training program, and that included written, oral, and
15 practical exercises that go over the theory of gunshot
16 residue and how it -- how it pertains to forensic science,
17 as well as the instrumentation used to analyze gunshot
18 residue.

19 Q And are there other people in your office that do
20 gunshot residue type work?

21 A Yes, sir.

22 Q And do you all normally review each other's work?

23 A Yes, sir. Every report that SLED issues, specifically
24 trace evidence, is technically and administratively
25 reviewed.

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1 Q And you don't do anything else? You don't do any
2 drugs, any DNA? You specifically just do trace evidence?

3 A Yes, sir. I only am competent for trace evidence.

4 Q And how many times have you testified in court?

5 A Nine times.

6 MR. THOMAS: Your Honor, at this time State would
7 tender Ms. Fletcher as an expert on gunshot residue.

8 MR. YARBOROUGH: Without objection, Your Honor.

9 THE COURT: All right. So qualified.

10 Q Ms. Fletcher, explain to us what gunshot residue is.

11 A So gunshot residue is everything that comes out of a
12 gun when it's fired. That includes the bullet, the pieces
13 of the bullet that break apart, primer residue, smoke, soot,
14 things like that. When we talk about gunshot residue in the
15 trace lab at SLED we're talking about the primer residue.
16 So we're looking for characteristic particles that are
17 associated with that primer residue. Those are discreet
18 particles. So singular particles that are molten or round
19 in shape and containing elements lead, barium, and antimony.

20 Q What does a typical gunshot residue kit consist of?

21 A Typically a gunshot residue kit will consist of four
22 particle lifts. They basically look like stamps with a
23 sticky surface. One is used for the right palm of the hand,
24 another for the right back of the hand, left palm of the
25 hand and the left back of the hand.

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1 Q And what do you do when you get one of those in? How
2 do you analyze it?

3 A Those are analyzed on an instrument called a scanning
4 electron microscope with an energy dispersive x-ray
5 detector, and that instrument allows us to magnify down
6 really -- down about 30,000 times so that we're able to see
7 these microscopic particles. It also allows us to determine
8 what elemental profile is -- that these particles contain.
9 So we can see that they are, in fact, molten. We can see
10 that they do contain lead, barium, and antimony.

11 Q So when somebody fires a gun basically it expels along
12 with a bullet a bunch of tiny particles that -- what were
13 those three things again?

14 A Lead, barium, and antimony.

15 Q And as far as that stuff that comes out of it, where
16 generally does that go? How is it dispersed when the gun's
17 fired?

18 A The majority of the gunshot residue comes out the
19 muzzle of the gun, depending on the type of a gun. If it's
20 a semiautomatic it would also come out the ejector port. If
21 it was a revolver type it could also come out the cylinder
22 gaps. But if it's coming out the muzzle most of it is
23 directed forward. It can also come backwards, especially
24 depending on environmental conditions.

25 Q So generally speaking, who gets gunshot residue on

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1 them?

2 A Anybody really within the vicinity of a gun. It's
3 dependent on the type of ammunition and the type of gun.
4 But it can go outwards forward out to 20 -- 20 feet or so.
5 It can also go backwards a couple of feet, and to the side a
6 couple of feet.

7 Q And what kind of factors would affect whether or not
8 someone firing a gun would have gunshot residue on them?

9 A The main factor for determining if somebody has gunshot
10 residue on them that is known to have fired a gun is the
11 time -- the time in between the shooting and the time of
12 collection. Over a time, specifically four to six hours,
13 that gunshot residue starts to dissipate off of somebody's
14 hands because of their normal physical activity. Gunshot
15 residue is very fragile, and simply wiping your hands on
16 your pants or touching other objects will transfer that
17 gunshot residue.

18 Q Can you just wash it off with water?

19 A Yes, sir.

20 Q And if somebody fired a gun and then the police
21 collected a GSR kit three hours later, would that be more or
22 less accurate than if they collected one, say, an hour later
23 or sooner?

24 A It depends on how much gunshot residue was there to
25 begin with to see how much would have left the hands. But

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1 the activity of that person would also dictate how much
2 gunshot residue was left on their hands. So if they've
3 washed their hands then it would not be as precise to tie it
4 back to an original incident.

5 Q And when you get gunshot residue test into SLED, if
6 it's noted on there that it's the victim, what's your
7 procedure for testing that?

8 A For a victim what we do is we look -- we look for
9 gunshot residue on all four areas of the hands. However,
10 that's only reported as an entire kit. And the reason for
11 this is because we expect to find gunshot residue on the
12 hands of victims. We recently looked at a bunch of our
13 older cases to determine what -- what type of percentage we
14 were looking at with the victim's containing -- or having
15 gunshot residue particles on their hands, and it was roughly
16 75 percent of the time we see a victim who has sustained a
17 gunshot wound does contain -- does have gunshot residue on
18 their hands.

19 Q But 30 percent of the time, give or take, it doesn't
20 appear?

21 A That's correct.

22 Q And so, if I give you a scenario hypothetical where two
23 people are in a room, relatively small room firing guns at
24 each other, what would you expect to find if you were to
25 test the clothing of both of those individuals?

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1 A The clothing of both of those -- they've both been
2 shot?

3 Q It would be a scenario where both were shot, yes.

4 A We would expect to find gunshot residue on the clothing
5 of people who have been shot. Typically our lab does not
6 perform analysis on the clothing of those people just
7 because that gunshot residue should be present on victim's
8 clothing.

9 Q But if there's no gunshot residue does that tell you
10 anything about -- does that eliminate the possibility that
11 they were involved in a shootout?

12 A On the clothing?

13 Q Right.

14 A It doesn't eliminate the possibility. It's when -- if
15 gunshot residue is not present it can mean that they were
16 never involved. It can also mean that it was removed from
17 the clothing some sort of way. It was subjected to a
18 washing or rain or something like that.

19 Q What about a vigorous shake? Like, you know, sometimes
20 when I fold my clothes I shake them before I fold them.

21 A You could expect that if they were shaken, but it might
22 still be present. I wouldn't be able to determine.

23 Q What about blood? How would blood getting onto, say,
24 your hands, how would that affect the GSR results?

25 A Blood can affect it in two ways. One, it can actually

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1 wash away some of the gunshot residue. It can also inhibit
2 part of the analysis if the gunshot residue lifts are
3 covered in blood, just because they start to change the
4 morphology of the particles and mask them.

5 Q And as far as testing the kits, you all use a scanning
6 electron microscope?

7 A Yes, sir.

8 Q Are there other methods to test a gunshot residue kit?

9 A There are a couple different types of gunshot residue
10 kits. Ones that contain swabs, which are not the particle
11 lifts. They can be tested using different instruments that
12 will detect the quantities of metals that are present. They
13 will not detect the actual gunshot residue particles or the
14 particles characteristic of this primer residue. There's
15 also -- there's been studies out there, they can test for
16 nitrates off those particle lifts.

17 Q How reliable are those other methods compared to what
18 you do at SLED?

19 A They are not specific to the primer residue to the
20 gunshot residue. Nitrates are found everywhere. Lead,
21 barium, and antimony are not found everywhere, but they're
22 found in other locations other than gunshot residue. When
23 you look at a particle of gunshot residue and you see that
24 all three elements are together -- are present together,
25 that means that that's characteristic of gunshot residue.

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1 It's not found in any other source.

2 Q And for lab number 15-14030 did you perform any GSR
3 tests?

4 A No, sir. I did not.

5 Q And why's that?

6 A It was my understanding that the kit was taken off of a
7 victim of a gunshot wound and we were requested by the
8 Solicitor's Office to not analyze it any further.

9 Q And just in general, when nobody, you know, calls you
10 and says, hey, we need this for court, about how long does
11 it take you to run GSR kits? What's your wait time right
12 now?

13 A Typically a gunshot residue kit is not analyzed at our
14 laboratory until somebody calls on it for court or
15 investigative purposes.

16 Q So you still have -- it's my understanding you still
17 have cases open from as far back as 2013?

18 A Yes, sir.

19 Q And even when someone calls you and says, hey, we need
20 this tested, it still takes you how long to get it down?

21 A It can take up to eight to 12 weeks when somebody calls
22 and requests that.

23 MR. THOMAS: Thank you so much, Ms. Fletcher. I'll let
24 you answer any questions Mr. Yarborough has.

25 THE WITNESS: Yes, sir.

MEGAN FLETCHER-CROSS EXAMINATION

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1 CROSS-EXAMINATION

2 BY MR. YARBOROUGH:

3 Q Ms. Fletcher, how are you?

4 A I'm good. How are you?

5 Q Good. You've worked for SLED for nine and a half
6 years?

7 A Yes, sir.

8 Q And you specialize in gunshot residue?

9 A That's one of my areas of expertise.

10 Q And what are the other areas?

11 A I also perform analyses in fire debris, paint, fibers,
12 glass, explosives, pressure sensitive tapes like duct tape,
13 bank dye analysis, and general physical and chemical
14 unknowns.

15 Q And so in this case have you done the gunshot residue
16 test on Mr. Wells?

17 A I performed no analysis in this case.

18 Q And are you -- were you sent the -- sent the test, or
19 the kit -- I guess the kit is the best way to refer to it,
20 right?

21 A Yes, sir.

22 Q Were you sent the kit down to SLED?

23 A The kit was submitted to SLED, yes.

24 Q And it was submitted when?

25 A I don't know when it was submitted.

MEGAN FLETCHER-CROSS EXAMINATION

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1 Q You don't know -- you don't know when that test was
2 done? The test of Mr. Wells?

3 A When the kit was collected?

4 Q When the kit was collected.

5 A No, I don't know when that was collected.

6 Q And did you do the test for Mr. Plumer?

7 A We did not receive a gunshot residue kit from him.

8 Q And are you aware that one was done?

9 A I am aware that one was taken.

10 Q And it was taken at Greenville County?

11 A That's my understanding.

12 Q And why didn't you do it?

13 A It was never submitted to the laboratory.

14 Q So it was never submitted to the laboratory, yet the
15 one on Mr. Wells was submitted to the laboratory?

16 A Yes, sir.

17 Q And did you make the decision not to test the one on
18 Mr. Wells?

19 A It was a decision by the Solicitor's Office to not test
20 it based on what a victim's kit can actually tell you.

21 Q Can actually what?

22 A Can actually tell somebody about an incident.

23 Q And what could they actually tell somebody about an
24 incident?

25 A Gunshot residue can get on you three different ways;

MEGAN FLETCHER-CROSS EXAMINATION

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1 being in th vicinity of a firearm, shooting it, or touching
2 something that has gunshot residue on you, because we expect
3 it to be on victims. We can't tell you which one of those
4 three scenarios is more likely.

5 Q And so, if a -- if a person was shot and they were four
6 or five feet away, you might expect to find it on the back
7 of their hands? Is that consistent with how that works?

8 A We don't make a determination with -- in respect to
9 palms versus back of our hands. We aren't going to say that
10 somebody was shooting or just touching something based on
11 that.

12 Q But if -- if you shoot a firearm you're more likely to
13 find it on the inside of your hands than on the back of your
14 hands, right?

15 A No, sir. You're -- it's just as likely to find it on
16 both areas.

17 Q And it would be -- you can find it on clothing?

18 A Yes, sir.

19 Q And you explained that as when it goes in it tends to
20 get on the clothing? Is that when the bullet goes in or --
21 I don't understand -- understand what you were --

22 A If the clothes are -- if they are close enough to that
23 cloud of gunshot residue they can -- the clothing --
24 particles of gunshot residue can settle on that clothing.
25 Gunshot residue also travels with the bullet. So it's

MEGAN FLETCHER-CROSS EXAMINATION

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1 expected to be around the bullet hole of that clothing as
2 well.

3 Q And you've testified nine times?

4 A Yes, sir.

5 Q In gunshot residue cases?

6 A Seven times in gunshot residue.

7 Q Seven times in gunshot residue cases. And you've done
8 analysis on gunshot residue cases a hundred times?

9 A Probably closer than 250.

10 Q Two hundred and fifty. And so, what happens is you
11 guys are the collecting lab for all the gunshot residue
12 tests that are run around the state of South Carolina,
13 right?

14 A We are the only -- we are the state laboratory to test
15 gunshot residue kits, yes.

16 Q And so -- and you do that because you find it's a good
17 way to figure out if somebody fired a gun or not, right?

18 A It can help in investigation purposes.

19 Q And when you say it helps, it tends to show somebody
20 shot a gun?

21 A Not all the time, no. We can only say that it came
22 from one of three scenarios. They were in the vicinity,
23 they shot or they picked it up by touching something else
24 with gunshot residue on it. Only in rare circumstances can
25 we eliminate any one of those.

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1 Q And were you able to eliminate it in either one of
2 these cases?

3 A Typically with victims, if they had gunshot residue on
4 them, I wouldn't be able to eliminate any one of those three
5 scenarios.

6 Q Right. And nobody sent you the test on Mr. Plumer?

7 A We didn't receive a kit in that case.

8 Q And who makes that decision?

9 A The submitting agency.

10 Q And that's either the Solicitor's Office or the
11 Sheriff's Office or --

12 A Typically whoever collected the kit.

13 Q And did you -- did you make the decision -- I guess I'm
14 just having a little bit of trouble. You had Mr. Wells' kit
15 in Columbia -- or where are you located? You're in
16 Columbia?

17 A We're in Columbia.

18 Q You had Mr. Wells' kit there?

19 A Yes, sir.

20 Q And it -- it sat there for x-amount of time?

21 A Yes, sir.

22 Q Which would be in excess of -- well, you said you could
23 get it done in four to six weeks?

24 A If somebody calls and requests it, it typically takes
25 about eight to 12 weeks after a request date.

MEGAN FLETCHER-REDIRECT EXAMINATION

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1 Q And it sat there for that period of time and it wasn't
2 tested?

3 A From the time of submission until it was returned it
4 sat at SLED.

5 Q And are you the one that makes the decision -- if it's
6 there, I mean, do you make the decision to test or you're
7 still waiting on an outside agency?

8 A Right now with gunshot residue cases we only test cases
9 that have been called on for investigative purposes or for
10 court purposes.

11 Q And that wasn't called on in this case?

12 A No, sir.

13 Q In neither Mr. Wells' or Mr. Plumer's case?

14 A There was no -- no kit submitted for Mr. Plumer.

15 Q But are you aware that one was done?

16 A I am now. Once I was called for court I was aware.

17 But I wasn't aware prior to that.

18 Q And you were aware because you investigated or you
19 asked?

20 A When I spoke with the Solicitor's Office they offered
21 that information.

22 MR. YARBOROUGH: Okay. Thank you.

23 REDIRECT EXAMINATION

24 BY MR. THOMAS:

25 Q Ms. Fletcher, just so I'm clear. When you say

MEGAN FLETCHER-REDIRECT EXAMINATION

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1 submitting agency who are you referring to?

2 A The submitting agency would be a sheriff's office or a
3 police department, or in some cases SLED.

4 Q So if a kit was selected by Greenville County who would
5 the submitting agency be?

6 A Greenville County.

7 Q In a scenario where you have a victim who admits to
8 firing a gun, what opinion -- how would your analysis of the
9 GSR kit change your opinion on whether or not he shot the
10 gun?

11 A With a victim of a gunshot -- gunshot wound, if they
12 are positive for the presence of gunshot residue they either
13 fired a gun or were in the vicinity to a gun or touched
14 something with gunshot residue on it.

15 Q So if someone admits to firing a gun, does the kit
16 really tell you anything?

17 A No, sir.

18 Q And in a scenario where someone fires a gun and then
19 has a GSR kit performed on them three hours later what would
20 you -- what would you expect to find?

21 A It really depends on what was there to begin with.
22 Depending on the number of shots there could be more gunshot
23 residue to begin with. Therefore, there would be more to
24 lose over that time period. So I can't really offer an
25 opinion.

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1 MR. THOMAS: Thank you.

2 RECROSS-EXAMINATION

3 BY MR. YARBOROUGH:

4 Q If there were 20 or 30 shots fired would you expect
5 there to be more gunshot residue?

6 A In the beginning. Yes, sir.

7 MR YARBOROUGH: Thank you.

8 THE COURT: Thank you. You may step down.

9 (Whereupon, the witness stepped down from the witness
10 stand.)

11 THE COURT: Call your next witness.

12 MR. THOMAS: The State calls Tracey Thrower.

13 TRACEY THROWER, having been first
14 duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. THOMAS:

17 Q Lieutenant Thrower, where do you work?

18 A I'm employed by the South Carolina Law Enforcement
19 Division, also known as SLED, in the forensic services
20 building in the firearms department.

21 Q And what is your role in the firearms department?

22 A I am the supervisor of the firearms department. I am
23 also a firearm and toolmark examiner.

24 Q And how long have you been doing that?

25 A I've been employed in the firearms department for about

TRACEY THROWER-DIRECT EXAMINATION

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1 18 years.

2 Q What kind of education do you have to qualify you for
3 that?

4 A A Bachelor of Science degree from Winthrop University.
5 I've also been through the firearm and toolmark course of
6 instruction which is taught by SLED. This was about a three
7 year course of instruction, mentorship type instruction,
8 which was taught by court qualified firearm examiners.
9 During that course of instruction I had to perform extensive
10 reading, extensive studying. I had to assist examiners in
11 preparing of their cases. I had -- I was given practical
12 problems, practical exams, written exams. They send me to
13 various schools, seminars, and conferences in the field of
14 firearm identification and identification in general. Upon
15 completion of my final exam and passing it I was allowed to
16 work cases on my own. Since then I have also been through
17 the school taught by the Federal Bureau of Investigation on
18 specialized techniques and firearm identification. I've
19 also completed the school taught by Bruce Murdoch and Paul
20 Moran on scientifically defensible criteria for the
21 identification of toolmarks. I completed the course taught
22 by the Bureau of Alcohol, Tobacco, and Firearms on serial
23 number restoration. I've completed numerous armorer courses
24 taught by factory representatives of firearm manufacturers
25 on how to take various guns apart, how to diagnose

TRACEY THROWER-DIRECT EXAMINATION

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1 malfunctions and how to fix them, among other courses I've
2 taken.

3 Q And you said you've been doing this how long?

4 A About 18 years.

5 Q And you're the supervisor?

6 A Yes, sir.

7 MR. THOMAS: Your Honor, at this time we tender
8 Lieutenant Thrower as an expert in firearms and toolmark
9 analysis.

10 MR. YARBOROUGH: No objection, Your Honor.

11 THE COURT: All right.

12 Q A couple housekeeping things, Lieutenant Thrower. I'm
13 going to hand you what's been marked as State's Exhibit 20.
14 Do you recognize that?

15 A Yes. This --

16 Q What is that?

17 A This is SLED item 30. It is a Taurus model PT84C
18 semiautomatic pistol, 40 Smith and Wesson caliber, bearing
19 the serial number SEW28497. It is the pistol with the
20 magazine. And it bears the SLED lab number, item number and
21 my initials where I engraved on it with an electric pencil.

22 Q So that is -- that's a gun you got from your evidence
23 technicians?

24 A Yes.

25 Q And it's been made safe?

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1 A It has been made safe. As you can see, it is zip tied
2 with the chamber open. You can look and feel the chamber.
3 It is unloaded.

4 Q And you analyzed that gun, and it's referred to in your
5 report as item 30?

6 A Correct.

7 MR. THOMAS: Your Honor, at this time I'd move State's
8 Exhibit 20 into evidence.

9 MR. YARBOROUGH: No objection.

10 THE COURT: All right. Without objection.

11 (Whereupon, State's Exhibit No. 20 was admitted into
12 evidence.)

13 Q I'm going to leave that with you. And I'm going to
14 hand you what's been premarked as State's Exhibit 19. Do
15 you recognize that?

16 A Yes. State's Exhibit 19 is the SLED item number 18.
17 It is one fired bullet. I have also scribed on the base of
18 this bullet the SLED lab number, item number and my
19 initials.

20 Q And what's the lab -- what item number is that?

21 A SLED item 18.

22 MR. THOMAS: At this time, Your Honor, I'd move --

23 MR. YARBOROUGH: Without objection.

24 (Whereupon, State's Exhibit No. 19 was admitted into
25 evidence.)

TRACEY THROWER-DIRECT EXAMINATION

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1 Q Briefly just walk us through the process of analyzing a
2 firearm and analyzing shell casings and bullets to see if
3 they match.

4 A Essentially what happens, the evidence is submitted to
5 the laboratory. I get an evidence control pick up the
6 evidence, bring it back to my office. My office has all the
7 equipment I need in it to do my examination. First thing I
8 do is I will print off the inventory of what has been
9 submitted to the laboratory. I then open the evidence,
10 inventory the evidence, verify that what is submitted is
11 actually what is said to have been submitted. I look at the
12 evidence. I see if there's any sort of trace material that
13 may be present. Basically by trace material, something that
14 was not placed there by the manufacturer. So if I see
15 hairs, fibers, anything that appears to look like blood,
16 that's the kind of stuff I'm looking for. If it's there, I
17 would collect it. If not, I move on. I photograph all the
18 evidence. Photographing packaging, how the evidence was --
19 how it was submitted, identifying information about the
20 evidence. I then examine the evidence. I have worksheets
21 that we have for each type of evidence. I document various
22 things. Like for the gun, make, model, caliber, serial
23 number, trigger pull weights. You name it, it's -- we go
24 through it. A lot of stuff that we document. I would then
25 test fire the gun. We have a bullet recovery tank. It's a

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1 vertical tank. It's about a three foot diameter piece of
2 pipe that goes down through the floor. We're on the second
3 floor. The bottom of the pipe is on the first floor and
4 there's -- it's cone shaped at the bottom. It's full of
5 water. So when I test fire the gun I shoot down into the
6 water, the bullet travels down the water. The water slows
7 the bullet to a safe speed, at which time it bounces along
8 the bottom of the funnel, winds up in a metal cup. We pull
9 the cup up. I now have fired bullets in my hand that test
10 fired that I know came from that gun because I shot them.
11 The cartridge cases, do the same thing. We have a paper bag
12 that sits sideways on top of the tank lid. When you shoot
13 the gun, the gun ejects the cartridge cases into the paper
14 bag. So I know have representative examples of both fired
15 bullets and cartridge cases from the gun. I take those back
16 to my office. I also mark those with the electric pencil,
17 with the case number, item number, initials, and these are
18 test specimens. We document any kind of fired bullets that
19 are submitted. Any kind of fired cartridge cases in the
20 same way. We have worksheets. We take pictures. We
21 document a lot of things.

22 Q Did you have an opportunity to that in this case?

23 A Yes, sir.

24 Q And you did that with that gun in front of you?

25 A Yes, sir.

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1 Q I'm going to hand you State's Exhibits 36, 28, 29, 31,
2 35, 37, 40, 42, 43 and 41. Do you recognize those? And
3 what are they?

4 A State's Exhibit 36 is the SLED item number 1. It is a
5 fired 40 Smith and Wesson caliber cartridge case. It has my
6 case number, item number and initials on it. State's
7 Exhibit 28 is SLED item number 2. It is also a 40 Smith and
8 Wesson caliber fired cartridge case. It bears my case
9 number, item number and initials. State's Exhibit 29 is
10 SLED item number three. It is one fired 40 Smith and Wesson
11 caliber cartridge case that bears my case number, item
12 number and initials. State's Exhibit No. 31, SLED item
13 number four. 140 Smith and Wesson caliber cartridge case.
14 It also bears my case number, item number and initials.
15 State's Exhibit No. 35 is SLED item number 5. One fired 40
16 Smith and Wesson caliber cartridge case. It bears my lab
17 number, item number and initials. State's Exhibit No. 37 is
18 SLED item number six. One fired 40 Smith and Wesson caliber
19 cartridge case that bears my information. State's Exhibit
20 No. 40 is SLED item number seven. One fired 40 Smith and
21 Wesson caliber cartridge case that bears my information.
22 State's Exhibit No. 42 is SLED item number 8. One fired 40
23 Smith and Wesson caliber cartridge case, bears my
24 information. Let's see. State's Exhibit No. 43 is SLED
25 item number 9. One fired 40 Smith and Wesson caliber

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1 cartridge case. It bears my laboratory number, item number
2 and initials. And State's Exhibit No. 41, which is SLED
3 item number 16. One fired 40 Smith and Wesson caliber
4 cartridge case. It also bears my lab number, item number
5 and initials.

6 Q And you analyzed all of those?

7 A I analyzed these 10 cartridge cases, yes.

8 Q And you compared them to the samples you got out of
9 item number 30, the gun?

10 A Yes, I did.

11 Q What conclusion did you draw from that analysis?

12 A By microscopically comparing these cartridge cases with
13 the test specimens fired from State's Exhibit No. 20, I was
14 able to determine that these 10 cartridge cases were fired
15 by State's Exhibit No. 20.

16 Q I'm going to hand you State's Exhibit 44 and 32. Just
17 identify those for us.

18 A State's Exhibit No. 44 is SLED item number 21. It is a
19 fired bullet. It also bears my laboratory number, item
20 number and initials. And State's Exhibit No. 32 is SLED
21 item number 20, is one fired bullet. It also bears my lab
22 number, item number and initials.

23 Q And what was the conclusion you drew from analyzing
24 those two bullets?

25 A I microscopically compared these two bullets to each

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1 other. Then I also compared each of these bullets to test
2 bullets fired by State's Exhibit No. 20. This pistol. From
3 my analysis I determined that State's Exhibit No. 32 and
4 State's Exhibit No. 44 were fired by the State's Exhibit No.
5 20 pistol.

6 Q And when you say you microscopically analyzed them,
7 what are you looking for?

8 A Essentially what I'm doing is I'm utilizing a
9 comparison microscope. A comparison microscope is two
10 microscopes that sit side by side and they're connected by
11 an ocular bridge, so that when I look through my eye pieces
12 I can see these two items sitting side by side and I can
13 overlap their images so that I can really compare them side
14 by side. For bullets what I'm looking for is rifling
15 impressions. Inside the barrel of a firearm is a series of
16 spiraling grooves called rifling. This rifling is placed
17 there by the manufacturer to cause the bullet to spin or
18 rotate as it goes towards the target. The purpose of this
19 spin is to give the bullet stability, to make it stable in
20 flight so that it will travel further and more accurately.
21 The benefit for a firearm examiner of this rifling is this
22 bullet travels down the barrel of the gun the inside of that
23 barrel scratches the outside of this bullet and leaves
24 rifling impressions on it. Now, inside those rifling
25 impressions are individual identifying characteristics.

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1 These are the characteristics that cannot be controlled by
2 the manufacturer. They're accident in nature. So during
3 the manufacture some individual characteristics get placed
4 on the inside of that barrel. Then as overtime as that
5 firearm is used it continues to change microscopically. So
6 over time the gun becomes more and more individual over time
7 through use, abuse, rust, corrosion, if somebody purposely
8 tries to damage the inside of the gun with a screwdrivers.
9 All these things to make that firearm more individual and
10 identifiable. So what I do is I place -- I start with two
11 test specimens from the gun. I place one test specimen on
12 the left stage and one on the right stage and I start
13 looking at the markings. I had a single land impression on
14 my left stage. And I look within that first land impression
15 to see if I see anything that really stands out. If not, I
16 spin it and go on to land impression two. And I continue
17 this until I find a mark that really stands out that kind of
18 pops to me. I think look at that marking. I look at all
19 the individual scratches or striations within that single
20 set of marks. I look at how wide each individual scratch
21 is. I look at how high the tip of the peak of that ridge is
22 and how deep the furrow is between that scratch and the next
23 scratch. I look at all these scratches and how they form up
24 as a group and how that group becomes a pattern. Once I am
25 familiar with that pattern I then look at my second bullet

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1 on the right stage, and I place these images side by side
2 and I look for that same pattern. If I don't see it on land
3 two versus land one, I rotate this bullet, and I just keep
4 rotating until I find where they line up. Then I look to
5 see how well they agree. If I'm happy with the amount of
6 agreement that I see, then I rotate both bullets together,
7 so I now look at land three versus land three. Rotate, land
8 four versus land four, until I've looked at the entire outer
9 surface of that bullet. If I find sufficient agreement, at
10 that point I can conclude that the firearm is marking
11 consistently enough that I can identify to it. I then take
12 down one test specimen and I put an evidence specimen up on
13 the microscope versus a test specimen, and I start this
14 whole process again until I've looked at all the markings on
15 the bullet. And based on that I can form a conclusion if I
16 think the submitted firearm did nor did not fire a
17 particular submitted bullet.

18 Q And in this case that firearm fired those two
19 projectiles?

20 A In this case, State's Exhibit 20, this Taurus pistol,
21 fired State's Exhibit No. 32 and State's Exhibit No. 44.

22 Q And is it possible that some of those empty casings
23 you've got there contained those bullets --

24 A Yes.

25 Q -- at some point in time?

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1 A They could have, yes.

2 Q I'm going to hand you State's 45 and 38. What are
3 those?

4 A State's Exhibit No. 38 is a fired bullet. It is SLED
5 item number 19. It bears my laboratory information.

6 State's Exhibit No. 45 is SLED item number 22. It is also a
7 fired bullet. It also bears my laboratory information.

8 Q And when you compared those to your samples and your
9 specimens from that test fire what was your conclusion?

10 A State's Exhibit 38 and State's Exhibit 45 were not
11 fired by State's Exhibit No. 20. These were fired by
12 something else.

13 Q And what's the biggest clue to you on that?

14 A When -- we talked a little bit about rifling. The
15 spiraling grooves that are in the barrel of a firearm. A
16 basic class characteristic, something that is designed by
17 the manufacturer, is how many lands and grooves are in the
18 barrel. This firearm has six lands and grooves. The
19 firearm that fired this only has five. So five does not
20 equal six. It's a pretty quick examination to figure out
21 State's Exhibit 20 did not fire these two bullets.

22 Q And State's Exhibit 19.

23 A State's Exhibit 19 is SLED item number 18. It is also
24 a fired bullet. It also bears my lab number, item number
25 and initials.

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1 Q And what's your conclusion about where that bullet came
2 from?

3 A This fired bullet may have been fired by item 20, or it
4 may have been fired by another firearm that had the similar
5 general rifling characteristics. It is a 40 caliber bullet.
6 Six lands and grooves. The same type of rifling. It had
7 the same class characteristics as the item 20 pistol.
8 However, the -- most of the jacket material that bears the
9 marks that I need from the gun is ripped off and gone. It's
10 damaged. I don't have the markings I need to identify it to
11 this particular firearm.

12 Q So it could be, but you just can't say one way or the
13 other?

14 A It could be. It might be another gun with similar
15 characteristics.

16 Q And when you say that of the jacket has been ripped
17 off, that -- is that something that could happen naturally
18 or does that mean it's been tampered with?

19 A Naturally. That type of bullet is one that has a very
20 thin jacket on the outside of a lead core. It's
21 electroplated. It's placed there. It's very, very thin.
22 And many times the rifling will actually rip that jacket off
23 of that type of bullet.

24 Q I'm going to hand you -- I think this should be our
25 last tedious one. 27, 30, 33, 34, 46 and 47. If you could

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1 just quickly identify those.

2 A State's Exhibit 27 is SLED item number 10. State's
3 Exhibit No. 30 is SLED item number 11. State's Exhibit No.
4 33 is SLED item number 12. State's Exhibit No. 34 is SLED
5 item number 13. State's Exhibit No. 46 is SLED item number
6 14. State's Exhibit No. 47 is SLED item number 15. All of
7 these are fired 40 Smith and Wesson caliber cartridge cases
8 and they each bear my lab number, item number and initials.

9 Q And what was the result of your comparison of those to
10 your test samples?

11 A These items were all fired by a single firearm, however
12 they were not fired by State's Exhibit No. 20, the Taurus
13 pistol. These were fired by a second firearm.

14 Q So all of those are consistent with each other --

15 A Correct.

16 Q -- in that regard?

17 A These were all fired by the same gun, just not State's
18 Exhibit No. 20. This is the second gun.

19 Q And let's just be clear. What kind of -- in terms of
20 the class of gun that that Taurus is. Is that automatic or
21 a revolver?

22 A It's a semiautomatic pistol.

23 Q And what happens when you fire a semiautomatic pistol?

24 A A semiautomatic pistol is a -- is a handgun that is
25 designed to fire each time the trigger is pulled. So you

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1 have to pull the trigger separately each time to make it
2 fire. That's the semiautomatic portion. It's a pistol
3 which means it's a handgun. And with this it also utilizes
4 a portion of the energy of discharge. So all that gunpowder
5 that burns that pushes the bullet down the barrel, it uses
6 some of that power also to cause the slide on the barrel to
7 go backwards. When the slide goes back it extracts and
8 ejects the cartridge case and then as the slide goes back
9 forward it strips around from the magazine and loads it to
10 be fired next. So another pull of the trigger will cause
11 the next round to fire, another pull, the next round. And
12 that's basically how a semiautomatic pistol works. They
13 will continue to fire each time the trigger is pulled as
14 long as there's ammunition in the feed mechanism.

15 Q And so, we've got two sets of casings. One that
16 definitely came from that gun --

17 A Correct.

18 Q -- and one that definitely did not come from that gun?

19 A That is correct.

20 Q Both of those came from automatic handguns?

21 A I can definitely tell you the first set that came from
22 State's Exhibit No. 20 came from a semiautomatic pistol.
23 Everything that I see on these is consistent. It has a
24 heavy firing pin drive which is typical of a barrel that
25 drops as the slide goes forward and backward. It's a

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1 caliber that's popular in semiautomatic pistols. But
2 ultimately I don't know what it was fired in.

3 Q Based on the analysis if the cartridges, at least, if
4 these were all collected from the same place how many guns
5 would have been involved?

6 A Based on the cartridge cases, two.

7 Q And based on the recovered projectiles?

8 A Somewhere between two and four.

9 MR. THOMAS: Thank you, Lieutenant Thrower. I'll let
10 you answer any questions Mr. Yarborough has.

11 THE COURT: All right. Cross-examination.

12 CROSS-EXAMINATION

13 BY MR. YARBOROUGH:

14 Q The cartridge casings, you said somewhere between two
15 and four?

16 A The cartridge cases were two guns.

17 Q Two guns?

18 A Two guns, yes.

19 Q What does that mean? Two and -- when you said two and
20 four just a second ago?

21 A The bullets. Essentially we had two bullets that I
22 could identify to State's Exhibit No. 20. The Taurus
23 pistol. There was one more bullet that had all the same
24 class characteristics, which are those determined by the
25 manufacturer prior to manufacture, but we had that one

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1 bullet that part of the jacket was missing. So that one had
2 -- that bullet had the same class characteristics, so it
3 could have been fired by item 20, however the individual
4 characteristics that I need weren't there. So I can say
5 it's consistent with item 20, but I can't say it was fired
6 by item 20.

7 Q And then where was that? Where you said --

8 A So that's up -- that's up to two guns right there.

9 Then we had the two --

10 Q Hold on just a second. Now, that's two guns. And you
11 said how many bullets fired by item -- that gun --

12 A Two bullets fired by item 20, definitely.

13 Q Maybe, and maybe a third?

14 A Maybe a third.

15 Q And then you said some more bullets?

16 A And then we had -- of the five bullets we have two
17 bullets left. Okay? Those two bullets were the ones that
18 had five lands and grooves. Okay? So they could not be
19 fired by this gun. However, when I compared those two
20 bullets to each other, they were damaged. There were some
21 injury to them. There was not enough markings there to say
22 that they were fired by the same gun. So they could have
23 been fired by a second and third gun, or they could have
24 been fired by the same gun. I just don't know.

25 Q So you had how many spent bullets?

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1 A I had five total fired bullets.

2 Q Five total. Three from -- or two, maybe three --

3 A Two, definitely from item 20, and then one maybe. So
4 that's one to two guns on the first three bullets.

5 Q And you think that the third bullet could have been
6 fired from --

7 A It could have been. I just can't tell.

8 Q And then you were talking about two more bullets, or
9 shell casings that were fired?

10 A Two more fired bullets, which could represent one gun
11 or two guns.

12 Q And that's basically what you think?

13 A Correct.

14 MR. YARBOROUGH: Okay. Thank you. No further
15 questions, Your Honor.

16 THE COURT: All right. Thanks. You can step down.

17 (Whereupon, the witness stepped down from the witness
18 stand.)

19 MS. WHITE: State calls Jennifer Clayton.

20 THE COURT: Can we release him from the subpoena?

21 MS. WHITE: Yes, sir. Please.

22 THE COURT: Any objection?

23 MR. YARBOROUGH: No, sir, Your Honor.

24 THE COURT: All right. Thank you.

25 JENNIFER CLAYTON, having first been

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1 duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. WHITE:

4 Q Good afternoon.

5 A Good afternoon.

6 Q Could you introduce yourself to the jury, please.

7 A I am Jennifer Clayton.

8 Q And where do you work, Ms. Clayton?

9 A I am currently employed by the South Carolina Law
10 Enforcement Division, also known as SLED.

11 Q What work do you do for SLED?

12 A I am a forensic DNA analyst.

13 Q What sort of educational background do you have?

14 A I earned a Bachelor of Science in Biology from the
15 University of North Carolina at Chapel Hill. I've also
16 taken classes at NC State and USC. My course work includes
17 molecular biology, biochemistry, genetics and statistics. I
18 completed an internship with the North Carolina State Bureau
19 of Investigations Molecular Biology Department. That's the
20 equivalent of SLED's DNA department. I originally hired on
21 with SLED as a forensic technician in the DNA department and
22 I worked as a technician for two years before being hired as
23 an analyst. Once I was hired as an analyst I completed a
24 one year training program under another qualified analyst
25 and I did casework under his supervision before I was

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1 allowed to do casework on my own.

2 Q And how long have you been working in -- working in the
3 field of DNA and DNA analysis?

4 A As an analyst it would be 13 years in August.

5 Q Have you ever been qualified as an expert in DNA
6 analyst before?

7 A Yes, I have.

8 Q Approximately how many times?

9 A Approximately 50, I think.

10 MS. WHITE: Your Honor, the State offers Ms. Clayton as
11 an expert in DNA analysis.

12 MR. YARBOROUGH: Without objection, Your Honor.

13 THE COURT: All right.

14 Q Were you asked to perform any cases -- excuse me, any
15 analyses regarding this case?

16 A Yes, I was.

17 Q And I'm going to hand you, first of all, what's been
18 marked for identification as State's Exhibit 23. And with
19 regard to Exhibit 23, can you tell me what that is?

20 A State's Exhibit 23 is SLED item number 31 which is
21 swabs from a front walkway, and it is also item -- SLED item
22 16.1 and 17.1. 16.1 is swabs from cartridge cases and 17.1
23 is a swab from an unfired cartridge.

24 Q Now, with regards to item 31. Did -- when did that
25 come into your possession?

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1 A May I refer to my notes?

2 THE COURT: Uh-huh.

3 A I took SLED number 31 into my custody on September 19th
4 of 2016.

5 Q Did you receive it -- was it sealed up when it came
6 into your possession?

7 A Yes, it was.

8 Q Did it appear to have been tampered with in any way?

9 A No, it did not.

10 MS. WHITE: Your Honor, State offers Exhibit 23 into
11 evidence at this time.

12 MR. YARBOROUGH: Without objection, Your Honor.

13 THE COURT: Okay.

14 (Whereupon, State's Exhibit No. 23 was admitted into
15 evidence.)

16 Q Now, when you get something that's suspected to be
17 blood, what's the first thing that happens with that?

18 A I perform serological testing. So since item 31 had a
19 request for blood testing on it, I tested it for blood.
20 Performed the presumptive testing, and presumptive testing
21 for blood was positive on that item. So I then took that
22 item to DNA analysis.

23 Q And do you analyze that item and found DNA there?

24 A I did develop a DNA profile. Yes.

25 Q Now, I'm going to hand you what's been marked for

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1 identification as State's Exhibit 92. Can you identify that
2 for me?

3 A That is SLED item number 38 and it is a buccal swab
4 from Ontavious Plumer.

5 Q And when did that come into your possession?

6 A I took that into my custody on November 29th of 2016.

7 Q And did you --

8 MS. WHITE: Excuse me. Your Honor, State offers
9 Exhibit 92 into evidence at this time.

10 MR. YARBOROUGH: Without objection.

11 THE COURT: Okay.

12 (Whereupon, State's Exhibit No. 92 was admitted into
13 evidence.)

14 Q Did you perform any analysis on item 92?

15 A Yes, I did.

16 Q And were you able to develop a profile from that?

17 A Yes, I was.

18 Q And comparing item 92 -- or State's 92 with State's 23
19 what conclusions did you draw?

20 A For State's item 23 which contains several SLED items,
21 SLED item 16.1 and 17.1, no DNA profile was developed, so
22 there were no comparisons to be made for that item. For
23 SLED item number 31, which is also parts of State Exhibit
24 23, a DNA profile was developed and that DNA profile matches
25 the DNA profile of Ontavious Plumer. And the probability of

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1 randomly selecting an unrelated individual, having a DNA
2 profile matching this item is approximately one in 4.6
3 quintillion. What that means is if you were to go out into
4 the population and just choose any one person at random, the
5 probability that they would just happen to have the same DNA
6 profile as this item of evidence is approximately one in 4.6
7 quintillion.

8 Q And how many people are on earth right now
9 approximately? Do you know?

10 A The estimation right now is approximately seven
11 billion.

12 Q Now, and I probably got a little bit -- DNA, is that
13 something -- what is DNA?

14 A DNA is a launching chemical. It's found in every cell
15 in the body with the exception of red blood cells. We
16 inherit half of our DNA from our mother and half of our DNA
17 from our father, and we are able to develop DNA profiles
18 from this. And with the exception of identical siblings no
19 two individuals are born with the same DNA profile. And
20 that's what makes it useful in forensics. We're able to
21 develop DNA profile from items of evidence and also develop
22 DNA profiles from known standards and compare the two. A
23 known standard is a sample that's taken directly from an
24 individual, so that we know the DNA profile developed from
25 that item came from that particular individual.

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1 Q So with regards to this case, the blood found in item
2 23, your item 31, that was Mr. Plumer's blood?

3 A The -- for the swatch from the walkway the DNA profile
4 did match, and in my opinion, assuming he does not have an
5 identical sibling, that DNA profile came -- the DNA profile
6 from the walkway came from Ontavious Plumer.

7 MS. WHITE: Thank you. Please answer any questions Mr.
8 Yarborough has.

9 MR. YARBOROUGH: Thank you.

10 CROSS-EXAMINATION

11 BY MR. YARBOROUGH:

12 Q The blood you analyzed -- it's blood, right?

13 A The test that we did is a presumptive test which
14 indicates the presence of blood but does not confirm the
15 presence of blood.

16 Q What is -- I'm sorry. What does that mean?

17 A It means that blood is indicated but it is not
18 confirmed that it is, in fact, blood. It is -- where a
19 confirmatory test would say that yes, that definitely is
20 blood, a presumptive test says that it could be blood. The
21 presumptive test that we do will test blood positive with
22 any type of blood. For instance, it'll test positive of
23 human blood, animal blood. But our DNA test does not test
24 positive with any type of blood. It is human specific. And
25 you can actually also get some positive tests with certain

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1 plant materials from -- with this presumptive test. But
2 again, the DNA test that we do is human specific. It will
3 not yield a DNA result from plant material.

4 Q So that -- what you have right there though is DNA
5 specific for human blood from Ontavious Plumer?

6 A No. The test for the body fluid is a presumptive test.
7 So blood is indicated. The DNA profile that was developed
8 from that swab matches the DNA profile of Ontavious Plumer.

9 Q The swab is taken from his mouth? Is that -- that's
10 what the swab is?

11 A His known standard; that's correct.

12 Q And when was that -- when was that done?

13 A I do not know when that was collected.

14 Q Do you have it there with your report?

15 A When it was collected by the agency?

16 Q Yeah.

17 A The item of evidence has 11/4 -- no, that's not
18 correct. Oh, the date sealed is 11/7/16. I don't know if
19 that's the collection date or not though.

20 Q 11/7/16?

21 A Correct. That's what's listed as the sealed date on
22 the evidence.

23 Q And when did you test it?

24 A When did I receive it or when did I test it?

25 Q Let's do both.

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1 A Okay. I received it November 29th of 2016.

2 Q And you tested it?

3 A One moment, please. I began my analysis on 11/29/2016
4 and completed the analysis on 11/30/2016.

5 Q So you got it, and it gone down there and then you
6 tested it, and then you got the result the next day?

7 A That's correct.

8 Q And just so I'm clear. That -- one thing you're
9 testing is the DNA that -- that's swabbed and you're testing
10 that against what was provided to you at the -- from the
11 scene, and that's blood, right? Or appears to be blood?

12 A The stain had the appearance of blood and the
13 presumptive testing was positive for the presence of blood.
14 I then developed a DNA profile from that sample and it
15 matched Ontavious Plumer.

16 Q The blood matched the swab -- or the swab matched the
17 blood; is that right?

18 A The buccal swab from Ontavious Plumer? Is that --

19 Q But that was taken on November the 7th. The blood was
20 taken when?

21 A Oh, the sample from the walkway?

22 Q Yeah.

23 A The seal date for the swab from the walkway is dated
24 10/13/15.

25 MR. YARBOROUGH: Thank you.

JENNIFER CLATON-REDIRECT EXAMINATION

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1 REDIRECT EXAMINATION

2 BY MS. WHITE:

3 Q Just to kind of clarify the timeline a little bit. You
4 analyzed the swab from the walkway, I think you said -- when
5 was that again?

6 A I took it into my custody September 19th of 2016, and I
7 would have started the analysis shortly after that. If you
8 give me a moment I can tell you the date. I began analysis
9 on September 23rd, 2016 and completed the analysis on
10 September 27th, 2016.

11 Q And did you then submit a report asking for a known
12 standard to compare that to?

13 A I did issue a report on October 11th and it did request
14 the submission of a known standard from Ontavious Plumer.

15 Q And it was after that that you received a known
16 standard from Mr. Plumer?

17 A That's correct.

18 Q And was this -- was all of this a rush case? Did my
19 office ask you to prepare this quickly for trial?

20 A Yes. If I recall correctly, I believe you had called
21 and requested that we go ahead and expedite the analysis for
22 trial.

23 MS. WHITE: Thank you.

24 THE COURT: All right. Thank you, ma'am. You can step
25 down. Any objection to releasing her from subpoena?

1 MR. YARBOROUGH: No, sir.

2 THE COURT: All right. Thank you, ma'am. You're
3 released.

4 (Whereupon, the witness stepped down from the witness
5 stand.)

6 MS. WHITE: May we approach, Your Honor?

7 THE COURT: All right.

8 (Whereupon, a sidebar was held.)

9 THE COURT: All right. Ladies and gentlemen, it would
10 be great sometimes if we could punch a time clock here in
11 court but, of course, that just doesn't work. We
12 accommodate a lot of different people and their schedules.
13 We're going to take a break this afternoon and we'll get
14 back to you as soon as we can. Do not discuss the case, and
15 we're not going to let you leave to go to the scene. So
16 you're captive.

17 But let me just tell you that it's a physician is the
18 next witness. And so, we're waiting -- we're trying to get
19 him -- hurry him up and get him here as quickly as we can.
20 Okay? So you all take a nice break.

21 If they -- Mr. Willingham, if anyone wants to go
22 outside, please accommodate them. All right, sir?

23 THE BAILIFF: Okay.

24 THE COURT: All right. Thank you.

25 (Whereupon, the jury exited the courtroom at 2:51 p.m.)

1 THE COURT: Mr. Plumer, I just want you to -- if you
2 would, raise your right hand.

3 ONTAVIOUS PLUMER, having first been
4 duly sworn, testified as follows:

5 THE COURT: I want you to understand -- you can put
6 your hand down. You have an absolute Constitutional right
7 to testify in your own defense. You have an equal absolute
8 Constitutional right not to testify. It cannot be held
9 against you. The decision about whether or not to testify
10 is oftentimes involves strategy, it involves different ideas
11 that you may -- it would be best left to your discussions
12 with your attorney. He will make recommendations to you
13 about whether or not he thinks you should or should not
14 testify. But in the end, that right to testify belongs to
15 you and you only, and the final decision is up to you. I'm
16 not asking you now if you've made a decision about that, but
17 we will need to know something fairly soon, in the next hour
18 probably, about whether or not you intend to testify. And
19 we will also determine whether or not you have any criminal
20 history, I don't know anything about it, that they can use
21 to impeach your credibility. We'll go over that and let you
22 know about that, too. You understand you're in a bit of a
23 hurry. All right.

24 THE BAILIFF: Some of them want to go outside.

25 THE COURT: Okay, yeah. That would be great. But, Mr.

1 Willingham, it's only going to be about 15 minutes or so.

2 Any impeachable offenses?

3 MS. WHITE: Yes, sir.

4 THE COURT: Hang on. Hang on. Okay.

5 MS. WHITE: Let's see --

6 THE COURT: I think we're good.

7 MS. WHITE: 2008, breach of trust, petty -- well, 2007,

8 petty larceny. An attempted armed robbery from 2013 and

9 assault and battery high and aggravated nature in 2013.

10 Failed to stop for a blue light in 2010. Attempted murder

11 in 2010. Armed robbery in 2010. PWID marijuana in 2011.

12 THE COURT: Armed robbery in 2010?

13 MS. WHITE: Yes, sir.

14 THE COURT: How is he out of prison?

15 MS. WHITE: He got a very good deal on that in

16 Greenville.

17 THE COURT: Well, he must not have pled guilty to armed

18 robbery.

19 MS. WHITE: We have the sentencing sheets, Your Honor.

20 Let me make sure. It's attempted armed -- well, I've

21 already said that one.

22 THE COURT: Attempted armed robbery.

23 MS. WHITE: It may have been -- that may have been a

24 revocation from the previous -- previous charge.

25 THE COURT: Who sentenced him?

RICKY LADD, M.D.: DIRECT EXAMINATION

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1 MS. WHITE: That would have been --

2 MR. THOMAS: The judge code is 2130.

3 THE COURT: Sounds very familiar. Okay.

4 MS. WHITE: And that looks like the extent of it,
5 Judge.

6 THE COURT: Okay. You understand if you take the
7 witness stand they'll be able to cross-examine you about
8 your prior criminal history?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. Well, you discuss it with your
11 attorney. All right. We'll just stand at ease.

12 (Whereupon, a recess was until from 2:54 p.m. to 3:12
13 p.m.)

14 (Whereupon, the jury entered the courtroom at 3:12
15 p.m.)

16 THE COURT: Call your next witness.

17 MS. WHITE: State calls Dr. Ricky Ladd.

18 DR. RICKY LADD, having first been
19 duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. WHITE:

22 Q Good afternoon.

23 A Hey.

24 Q Could you tell us your name, please.

25 A It's Ricky Ladd, L-a-d-d.

RICKY LADD, M.D.: DIRECT EXAMINATION

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1 Q And are you a doctor?

2 A Yes, ma'am.

3 Q Did we call you away from the hospital here?

4 A I was actually in the middle of a shift. Yes, ma'am.

5 Q What -- tell me a little bit about your educational
6 background.

7 A Yeah. I'm from Mississippi. I went to undergrad
8 school called Millsaps College in Jackson, Mississippi, and
9 then I went to Ole Miss Medical School from 1993 to '97.
10 Did my residency at Richland Memorial Hospital in Columbia,
11 South Carolina from '97 to 2000. Moved to Louisiana. I
12 worked there for five years. Moved back to Columbia in 2005
13 and worked at Baptist Hospital in downtown Columbia. And
14 started here three years ago. April of 2014.

15 Q And what's your field of expertise?

16 A Emergency medicine.

17 Q Do you hold any certifications?

18 A I'm board certified through ABEM, American Board Of
19 Emergency Medicine. I've been board certified since I
20 finished residency.

21 Q And so, how long has that been?

22 A Seventeen years.

23 Q So 17 years as an ER physician?

24 A Yes, ma'am.

25 MS. WHITE: The State offers Dr. Ladd as an expert in

1 emergency medicine.

2 MR. YARBOROUGH: Without objection.

3 THE COURT: All right.

4 Q Were you working at Self Regional on October the 11th,
5 2015?

6 A Yes, ma'am.

7 Q Did you see a patient by the name of Oshamar Wells?

8 A Yes, ma'am.

9 Q What problem did he present with?

10 A Apparently he -- or from the history that we got, he
11 had been involved, he stated, in a home invasion where he
12 was shot multiple times. He arrived with as a -- what we
13 call trauma level one alert. We do different levels for
14 traumas, but level one is being potential life-threatening
15 emergency. So he came in as a level one trauma. And the
16 trauma surgeon was called in immediately as well, so...

17 Q What -- were you his treating -- were you the ER doctor
18 --

19 A Yes.

20 Q -- who first saw him?

21 A Yes, ma'am.

22 Q What wounds did he have?

23 A I'm going to have to refer to the record here. But he
24 had several gunshot wounds. At least six wounds that we
25 saw, if I -- I've got my note. He had a gunshot wound --

RICKY LADD, M.D.: DIRECT EXAMINATION

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1 small gunshot wound to the left upper buttock and a larger
2 one to his right low back region, and then he had a wound in
3 his -- gunshot wound to the left anterior thigh with obvious
4 swelling and just deformity. Also had a wound over his
5 right lateral thigh, and another entrance and exit wound to
6 the left lower leg below the knee. The entrance was over
7 the left proximal tibia, which is your main bone in the
8 front part of your lower leg, and it exited lateral to this
9 -- he missed all the bones there. So -- but anyway, so six
10 wounds. Three -- there were no bullets in his body, but
11 there was three -- at least three entrance/exit wounds for a
12 total of six wounds.

13 Q Now, did any of these bullets pass through areas that
14 could have hit something life-threatening?

15 A Any of them could have potentially. The one in his
16 lower leg could have hit an artery. But definitely the one
17 in his buttock that came through the left thigh and the one
18 in the right low back that came out his thigh. There's all
19 kind of internal -- depending on the angle it went in it
20 could hit internal organs. It could hit the liver, the
21 spleen. It could hit arteries. And that's the big thing we
22 see in a lot of these gunshot wounds especially in the
23 groin, pelvis area. If they hit a major artery, I mean, you
24 bleed out quickly, unless you have somebody surgically
25 repair it really fast.

RICKY LADD, M.D.: DIRECT EXAMINATION

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1 Q Now, I'm going to show you some pictures. Can you see
2 the screen from where you are?

3 A Yes, ma'am.

4 Q I'm going to show you first State's Exhibit 95.

5 A Okay.

6 Q What can you see?

7 A It looks -- it's kind of a weird angle. But it looks,
8 like I said, a gunshot wound to the right upper buttock.

9 Right where the --

10 Q You're talking about here?

11 A Yes, right there.

12 Q And is there anything right here? Can you --

13 A I can't see from this angle. I'm sorry.

14 MS. WHITE: Can I have the witness step down, Your
15 Honor?

16 THE COURT: Yes. Just keep your voice up so we can
17 hear you.

18 THE WITNESS: Okay.

19 (Whereupon, the witness stepped down from the witness
20 stand.)

21 A Yes. Another one right on the left upper -- you can
22 see the little -- you see there's the femur --

23 Q Right here?

24 A Yeah, right there. The wound you can obviously see it
25 by the upper -- kind of on the right low back area, and then

1 the one on the left upper buttock.

2 MS. WHITE: You can have a seat back up there. I think
3 the rest of these should be a lot easier.

4 (Whereupon, the witness returned to the witness stand.)

5 Q I'm show you State's Exhibit 96. Can you tell which
6 one that is?

7 A That's his left upper thigh, I believe, at an angle.
8 Yes.

9 Q And based on your experience, does that look more like
10 an entrance or an exit?

11 A It's really hard to tell. It depends on the gauge. On
12 the size of the bullet. A lot of times the exit wounds are
13 larger than the entrance would. And based -- that would
14 probably be the exit wound based on -- the other one --
15 other side was very small.

16 Q So that --

17 A The left, yeah. That one more than likely the entrance
18 and the exit is usually bigger. Based on the tumbling they
19 go through the body they come out bigger than they go in
20 typically.

21 Q And State's 98. Is that the wound you're talking about
22 in his shin?

23 A Yes, ma'am. Below the knee. You can see entrance and
24 exit, yes.

25 Q And is the exit sort of -- where's the exit?

RICKY LADD, M.D.: DIRECT EXAMINATION

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1 A You can see both of them here.

2 Q Can you see it on this one?

3 (Whereupon, the witness stepped down from the witness
4 stand.)

5 A Yeah, the wound was right over the tibia and the exit
6 was in this area. So it's probably more like here. It's
7 kind of right below the knee. Just below -- this is the
8 shin, which is the tibia. It's about a five to six
9 centimeter distance between the entrance and exit. So that
10 was more of what looks like a graze wound.

11 (Whereupon, the witness returned to the witness stand.)

12 Q And then showing you State's 94.

13 A The lateral thigh. That's it. Can you all see that?
14 The wound there?

15 Q And is this just a closer up --

16 A Yes.

17 Q -- of that one?

18 A Yes.

19 Q Thank you, Doctor. Now, did Mr. Wells require
20 treatment for any of these?

21 A Yes, ma'am. We came in just because of where the
22 bullets were located. We ended up doing CT scans of his
23 abdomen and pelvis to make sure that no vital organs were
24 injured. Luckily he missed all his major vessels and any
25 internal injuries. But he did have an obvious left femur

RICKY LADD, M.D.: DIRECT EXAMINATION

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1 fracture that required surgery the following day. Trauma
2 surgeon came in. Evaluated him. There were no injuries
3 involved that the trauma surgeon would take care of, so he
4 was actually admitted to the orthopedic service and went for
5 surgery the next day. What they call an open reduction
6 internal fixation of his left femur.

7 Q So he had surgery on his leg on the 12th?

8 A On the 12th. I've got the op note here. Yes, ma'am.

9 Q Do you know what time on the 12th he had surgery? Does
10 it say?

11 A Let me look here. Let me find the note here real
12 quick. It doesn't say the time the surgery was done, but it
13 was dictated at 3:52 in the afternoon. So I'm assuming it
14 was done late morning or early afternoon.

15 Q And based on your experience as an emergency room
16 physician, would Mr. Wells have been able to walk on that
17 leg?

18 A No. No, ma'am. Not without it being repaired.

19 Q The fracture to his left leg, was that caused by a
20 gunshot in your opinion?

21 A Well, there was obvious -- there's a CT report here
22 that shows -- he actually had two fractures. The fracture
23 to the midshaft it's hard to say if that was from a bullet
24 or from a fall. But the bullet actually transected through
25 his trochanter, which is right at the hip joint. The femur

RICKY LADD, M.D.: DIRECT EXAMINATION

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1 bone is a long bone, and right before it comes in the hip
2 there's a real thick area called the trochanteric region,
3 and it makes a curve, like a 45 degree curve into the
4 femoral neck. And then the femoral head is the ball that
5 sits in the joint. So on the CT report -- let me just pull
6 that up. He's got here, "A gunshot defect is noted within
7 the left femoral neck with disruption of the lateral cortex
8 noted, although there's preservation of the medial cortex."
9 He has a complete fracture of the proximal femoral
10 diaphysis, which is the shaft of the bone, with a full shaft
11 posterior lateral displacement, which means the bones were
12 broken and separated and shorted and basically the fragments
13 were sitting on top of each other.

14 So again, the bullet tract obviously when through the
15 femoral neck right above the trochanteric area. So I don't
16 know -- again, I can't tell you if the bullet transected the
17 femur where it was broken and shattered. That could have
18 been from a fall from -- but he was shot through the femur,
19 per the radiologist report.

20 MS. WHITE: Thank you, Dr. Ladd.

21 A And the other thing you were talking about earlier.
22 You know, you were talking about injuries. I mean, the
23 femoral vessels run right there. So if he hit an artery or
24 a vein you can bleed out in a matter of minutes. There's
25 been a lot of famous people that have been killed that way.

RICKY LADD, M.D.: CROSS EXAMINATION

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1 There's a football player, Sean Taylor. Don't know you if
2 you all remember him several years ago. He was shot -- I
3 know. I'm just saying. But that was his injury. He was
4 shot in the groin and bled out, so...

5 MS. WHITE: Thank you, Dr. Ladd.

6 CROSS-EXAMINATION

7 BY MR. YARBOROUGH:

8 Q The femur you're describing is a -- that's a hip
9 injury, leg?

10 A The femur is the thigh bone. The hip is part of the
11 femur. The hip joint itself. So the femur is -- yes, sir.

12 Q And that wasn't done by any kind of gunshot? That was
13 a fall?

14 A Again, the bullet transected the femur neck, which --
15 but the fracture that they fixed was actually below that.
16 And I can't tell you if the bullet went through there or
17 not, but the tract appeared to go through more of the
18 femoral neck.

19 Q And so, does that mean that the bullet was in the area,
20 or does that mean that there was a fall?

21 A More than likely, when he was shot he fell. And again,
22 if -- he could have broken the femur where it was split in a
23 fall.

24 Q Right.

25 A I can't tell you if a bullet transected through that

RICKY LADD, M.D.: CROSS EXAMINATION

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1 area. The CT report says it went through the femoral neck,
2 which was -- like if here's your shaft, the neck is kind of
3 like a 45 degree angle. It kind of grazed through the neck.
4 And that's probably the one that came from his buttock and
5 came out the thigh. But the fracture was a little below
6 that, where he broke -- this was fractured where the bullet
7 went through, but the fracture that was shortened was below
8 that area. Below the trochanteric.

9 Q And that's here?

10 A That's where the bullet went through. The fracture was
11 just below that.

12 Q And the fracture was just below there?

13 A Yes, sir.

14 Q And the bullet went -- went through and out?

15 A Went through the buttock and came out the thigh.

16 Q The thigh. So it went through here and came --

17 A I'd have to look at the pictures again and see if it
18 was more lateral or -- flip it over, I think. Yeah, it
19 looks like the bullet came out his lateral thigh.

20 Q So that lateral means --

21 A The outside part of his thigh. That's on the right
22 side though. That's the other leg which was the affected
23 one. It was his left leg that was broken. That's his right
24 side there.

25 Q So that -- and that bullet went in --

RICKY LADD, M.D.: CROSS EXAMINATION

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1 A This is the side that he had the wound and the upper --
2 or kind of right at the top -- the low part of the back, and
3 then the exit wound was there.

4 Q Is that an exit wound or is that an entrance wound?

5 A It's hard to tell. I would guess it's more of an exit
6 wound, because it's a little bigger. Usually the entrance
7 wounds are a little smaller.

8 Q So if that's the exit wound the shot would have come in
9 through the --

10 A Through the --

11 Q -- the front of the thigh?

12 A No. His wound on that side was in the buttock. If you
13 could put the other --

14 Q Here?

15 A I think that's the same wound. Just a closeup view of
16 the right lateral thigh. The one that had his backside.

17 Q That one?

18 A Yes, sir.

19 Q So that one went down and through?

20 A Through -- yes, sir. Kind of looks like it went and
21 just kind of crossed over. The right side nothing is
22 broken. The left side is where he had the fracture.

23 Q And that one was just a leg --

24 A That's the lower leg.

25 Q That's the lower leg. And that's the entrance or the

RICKY LADD, M.D.: CROSS EXAMINATION

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1 exit?

2 A I couldn't tell you without -- I'd have to see both
3 wounds to tell you which one was bigger and smaller.

4 MR. YARBOROUGH: May I approach, Your Honor?

5 THE COURT: Yeah.

6 A Can I see the other ones? This one -- so this is his
7 left thigh. This is the -- more likely --

8 MR. YARBOROUGH: I tell you what, will you just step
9 down and show us that.

10 (Whereupon, the witness stepped down from the witness
11 stand.)

12 Q I think if you put that face up you can do it. And
13 speak loud so she can hear you.

14 A So this is his right side. There's the wound over his
15 right upper buttock, low back area, and this is the exit
16 wound over the lateral aspect of the right thigh. Exit
17 wound over the lateral aspect of the right thigh. Let me
18 see if I can get back on the page. So the entrance probably
19 traveled at this angle and came out right there.

20 Q And through?

21 A And through. There were no bullets in his body. So
22 they all went through.

23 Q And then that one?

24 A This is the same -- this is another view of this one.
25 This was just a close view of this one. And then the left

RICKY LADD, M.D.: CROSS EXAMINATION

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1 side -- here's the bullet wound on the left. It's more of
2 the lower part of the buttock. And this is the exit through
3 the -- there's the genitalia covered up, and there's his
4 torso. So kind of the upper left thigh. And that's where
5 he had the most pain and deformity. So he -- the bullet,
6 like I said, went through the -- right above the
7 trochanteric through the lateral cortex of the femoral neck
8 --

9 Q Right.

10 A -- and he had a fracture there. But he also had a
11 fracture over around this area. The radiologist didn't make
12 any mention of his bullet tract through that wound. It may
13 have come from a fall. It's hard to say. But the bullet
14 that went right through his femoral neck was probably the
15 culprit that made him fall.

16 Q Can you step back up there?

17 A Yes, sir.

18 Q So I believe what you're saying is that the shots that
19 hit him would have knocked him down and caused the fall; is
20 that correct?

21 A Yes, sir.

22 Q And that's based on your experience of the entrance of
23 the -- of the wounds; is that right?

24 A Yes, sir.

25 Q And would that have knocked him down immediately?

RICKY LADD, M.D.: CROSS EXAMINATION

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1 A Especially the one through the groin that went through
2 -- that went through the femoral neck. Yes, sir. I would
3 imagine it would. Even the one through the lower leg could.
4 I've never been shot, but I imagine when you get shot you
5 hit the ground pretty quick.

6 Q Right.

7 A Especially when it goes through part of a bone.

8 Q Sure.

9 A That's a weight-bearing bone.

10 Q And that bone was broken -- well, you don't know if the
11 bone was broken during the shot or during the fall?

12 A I don't know the -- the femur fracture was broken
13 during the shot or the fall. But I can tell you the femoral
14 neck fracture was as a result. The radiology report is, "A
15 gunshot defect is noted within the left femoral neck with
16 disruption of the lateral cortex noted, although there is
17 preservation of the medial cortex. So the bullet kind of
18 went through the outside part of the femoral neck. Which
19 again, the femur is a long bone. And then it -- right here
20 at the trochanteric there's an angle. The femoral neck goes
21 up to the ball which sits in the hip joint. So the femoral
22 neck -- when old people fall, that's a real common area they
23 break. So the bullet kind of went through the outside part
24 of that and then came out the front part of the thigh, which
25 probably caused him to fall. The radiologist goes on to

RICKY LADD, M.D.: CROSS EXAMINATION

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1 say, "There's a complete fracture of the proximal left
2 femoral diaphysis." Proximal means closer to the -- closer,
3 higher up. So just below the femoral neck the proximal left
4 femoral diaphysis shaft of the bone has got a complete
5 fracture there with full shaft posterior displacement, which
6 means the bone was broken, shortened, and kind of
7 posteriorly displaced. Pushed back behind itself, if that
8 makes sense. Lined up like this. When we snapped it, it
9 kind of did like this.

10 Q Got you.

11 A So then they had to pull it back --

12 Q That snaps the femur?

13 A That's -- yes, sir. And you can't bear weight on that.

14 Q And once the femur is gone you can't bear weight?

15 You're down?

16 A You're down.

17 MR. YARBOROUGH: Thank you, Your Honor. No further
18 questions.

19 REDIRECT EXAMINATION

20 BY MS. WHITE:

21 Q Dr. Ladd, is there any way to know which of these was
22 caused first, like what order they were in?

23 A No, ma'am. No. No, ma'am.

24 MS. WHITE: Thank you.

25 THE COURT: All right. Thank you very much.

1 THE WITNESS: That's it? All right.

2 MS. WHITE: He can be released.

3 THE COURT: You're released from the subpoena.

4 THE WITNESS: That's it?

5 THE COURT: Yeah.

6 THE WITNESS: Thank you, sir.

7 (Whereupon, the witness stepped down from the witness
8 stand.)

9 THE COURT: Call your next witness.

10 MS. WHITE: The State rests, Your Honor.

11 THE COURT: All right. Mr. Foreman, ladies and
12 gentlemen of the jury, this is the time I have to discuss a
13 couple legal issues with the attorneys. So I'm going to
14 excuse you to your jury room. I'll get back with you very
15 shortly. Thank you.

16 (Whereupon, the jury exited the courtroom at 3:33 p.m.)

17 THE COURT: Let me see the lawyers up here for one
18 second.

19 (Whereupon, a sidebar was held.)

20 MR. YARBOROUGH: Two things that perhaps happened here.
21 There was a marijuana deal that everybody agrees happened,
22 and then we don't know exactly what happened with the
23 shooting. There's several pieces of evidence that appear
24 that are not consistent with the story that the --

25 THE COURT: Look, this is not about credibility.

SAMEKA HAWES-DIRECT EXAMINATION

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1 That's for the jury.

2 MR. YARBOROUGH: Your Honor, to protect the record, at
3 this point I move for directed verdict based on the evidence
4 that has been presented by the State. I don't think it
5 raises to the level of proving attempted murder, armed
6 robbery or possession of a weapon during a violent crime.

7 THE COURT: Okay. Well all those motions are denied.

8 Mr. Plumer, do you intend to testify? Stand up. No?

9 THE DEFENDANT: No, sir.

10 THE COURT: Do you have any evidence you want to
11 present?

12 MR. YARBOROUGH: About him testifying or about --

13 THE COURT: No, no. Any evidence.

14 MR. YARBOROUGH: Yes, sir. Your Honor, I've got two
15 witnesses that are available this afternoon and I was
16 planning on calling some in the morning if that was --

17 THE COURT: Well --

18 MR. YARBOROUGH: Your Honor, I didn't believe the State
19 was going to be through. I've got an expert coming up on
20 the gunshot residue in the morning and I've got two
21 Greenville County deputies that would be here first thing in
22 the morning.

23 THE COURT: Well, let's get whatever you can do today.
24 Let's get it done.

25 MR. YARBOROUGH: Yes, sir, Your Honor. Let me walk

SAMEKA HAWES-DIRECT EXAMINATION

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1 right out in the hall and I'll see what I can --

2 THE COURT: Hang on and wait. Let him get his witness.

3 (Whereupon, a brief recess was held.)

4 THE COURT: Mr. Yarborough, let me talk to you and Ms.
5 White very briefly.

6 MR. YARBOROUGH: Sir?

7 THE COURT: Let me talk to the lawyers real quick.

8 MR. YARBOROUGH: Yes, sir.

9 (Whereupon, a sidebar was held.)

10 THE COURT: That's it. Let's go. Are you ready?

11 MR. YARBOROUGH: Yes, sir, Your Honor.

12 THE COURT: All right. All done.

13 (Whereupon, the jury entered the courtroom at 3:58
14 p.m.)

15 THE COURT: All right. Ladies and gentlemen, thank you
16 for your patience. Call your first witness.

17 SAMEKA HAWES, having first been
18 duly sworn, testified as follows:

19 THE COURT: State your name for the record.

20 THE WITNESS: My name is Sameka Hawes.

21 DIRECT EXAMINATION

22 BY MR. YARBOROUGH:

23 Q Sameka, where are you from?

24 A I'm from Greenwood.

25 Q And you've lived here all your life?

SAMEKA HAWES-DIRECT EXAMINATION

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- 1 A Yes.
- 2 Q Do you know Ontavious Plumer?
- 3 A I don't.
- 4 Q You don't know him?
- 5 A No, I don't.
- 6 Q Did you -- did you meet him on October the 11th of year
- 7 before last?
- 8 A The date that the incident happened -- occurred, yes.
- 9 Q Yeah. What were you doing that day?
- 10 A I was sitting on the side of the road at my brother's
- 11 house in the car.
- 12 Q And where does your brother live?
- 13 A On [REDACTED] [REDACTED].
- 14 Q And that's [REDACTED] [REDACTED] where?
- 15 A [REDACTED] [REDACTED] over here down the street.
- 16 Q Down the street from where?
- 17 A From here.
- 18 Q From here? And did you see Ontavious that day?
- 19 A Yes.
- 20 Q And when you saw him do you remember, was it daytime,
- 21 nighttime?
- 22 A It was in the daytime.
- 23 Q It was in the daytime? Where was he when you saw him?
- 24 A Running up to my car.
- 25 Q And he was running up to your car. And what -- what

SAMEKA HAWES-DIRECT EXAMINATION

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- 1 kind of shape was he in?
- 2 A He was bleeding.
- 3 Q He was bleeding. Had he been shot?
- 4 A Yes.
- 5 Q And did you -- did he flag you down?
- 6 A Yes.
- 7 Q And he flagged you down and he had been shot. Did he
- 8 look like he was in pain?
- 9 A Yes.
- 10 Q How could you tell he looked like he was in pain?
- 11 A Just his facial expression and he was just -- the way
- 12 he was talking. He needed a lift to the hospital.
- 13 Q And did -- was there anybody with him at that time?
- 14 A It was him.
- 15 Q It was just him?
- 16 A Uh-huh.
- 17 Q And did he have a gun or a firearm on him?
- 18 A No, sir. He didn't have anything.
- 19 Q And did you get him in your car?
- 20 A Yes.
- 21 Q And when you were getting him in your car did you
- 22 notice him like washing his hands or anything?
- 23 A No, sir.
- 24 Q And did you -- did you take him somewhere?
- 25 A Yes, I did.

SAMEKA HAWES-DIRECT EXAMINATION

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1 Q And where did you take him?

2 A I went to take him to the hospital, but then I just
3 took him to his baby mom's house. That's where he wanted to
4 go.

5 Q Do you know his baby's mother?

6 A Well, I have -- I don't speak to her, but I know of
7 her. I've never had a conversation with her.

8 Q And so, did you know where she lived?

9 A Not at the moment. No, I didn't.

10 Q You did not know?

11 A No.

12 Q And do you know where Mr. Wells lives?

13 A No, I don't.

14 Q You don't? And so, you were just --

15 A An innocent bystander. Just an innocent bystander.

16 Q Right. You were just an innocent -- an innocent person
17 on the side of the road and you took -- you took Ontavious
18 --

19 A Yes.

20 Q And you took him to his baby's mother's house.

21 A Yes.

22 Q And you noticed he had been shot?

23 A Uh-huh.

24 MS. WHITE: Your Honor, I'm going to object to all this
25 leading. He can ask questions.

SAMEKA HAWES-DIRECT EXAMINATION

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1 THE COURT: Yeah, okay.

2 Q Did -- where -- did you see his baby's mother when you
3 went over there?

4 A I didn't.

5 Q You didn't see her?

6 A I didn't. I left.

7 Q But do you know the address?

8 A It's in [REDACTED] I don't know the address.

9 Q What's that, [REDACTED]?

10 A [REDACTED]. It's an apartment complex.

11 Q So you took him over there and took him to the
12 apartment complex?

13 A Uh-huh.

14 Q And you dropped him off?

15 A Yeah, and that was it. Never heard from him again.

16 Q And that's all you know about it?

17 A That's all I know. I can't tell you nothing else.
18 That's all I know.

19 Q Okay. Has anybody asked you to -- besides me to come
20 to court today?

21 A No. Well, besides the people that brought me the
22 paper. That's it.

23 Q The paper. You mean the --

24 A Subpoena.

25 Q Subpoena?

SAMEKA HAWES-CROSS-EXAMINATION

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- 1 A Uh-huh.
- 2 Q Yeah. And were you -- were you ever talked to by the
- 3 police about this at any time?
- 4 A An investigator came and questioned me a couple of
- 5 months ago.
- 6 Q And that was Investigator McClinton?
- 7 A No, it was a black guy.
- 8 Q It was another guy?
- 9 A Uh-huh.
- 10 Q And so, how long -- how long ago was that?
- 11 A I want to say like three months. Two, three months
- 12 ago. I can't remember.
- 13 Q Okay. And did you -- did you tell him what happened?
- 14 A Well, at first I was just nervous about it. But then I
- 15 just figured why not and just tell the truth. Because I
- 16 didn't know. Like I had totally forgot about the situation,
- 17 period. So when he came in it scared me.
- 18 Q Right.
- 19 A I mean, why not tell the truth, because that's what it
- 20 is.
- 21 Q And so, you told him what you knew about it --
- 22 A Yes, sir.
- 23 Q -- and that's all you do know?
- 24 A That's all I know.
- 25 MR. YARBOROUGH: Thank you. I don't have any further

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1 questions of this witness.

2 THE COURT: Cross.

3 CROSS-EXAMINATION

4 BY MS. WHITE:

5 Q [REDACTED] is right around the corner from [REDACTED]

6 [REDACTED]?

7 A Yes.

8 Q And Mr. Plumer you said just came running up bleeding?

9 A Yes.

10 Q Was he kind of grabbing -- grabbing the area?

11 A I can't remember. Well, once he got in the car he did.

12 Q So he was grabbing that leg where he's been shot?

13 A He said he's in pain.

14 Q And he's bleeding?

15 A Yes, he is bleeding. I had blood in my car.

16 Q So you knew you had somebody in your car who had a
17 gunshot wound?

18 A Yes.

19 Q And he didn't want to go to the hospital?

20 A Well, he did at first. But when I got near there he
21 was like, no, just take me to my baby momma house, so that's
22 what I did.

23 Q And the hospital is just --

24 A Right by --

25 Q -- a hop, skip and a jump from --

SEMEKA HAWES-REDIRECT EXAMINATION

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- 1 A Right.
- 2 Q -- [REDACTED], right?
- 3 A Uh-huh.
- 4 Q And you didn't call the police that night?
- 5 A I didn't, because I didn't want to be affiliated with
- 6 it at all.
- 7 Q Now, you said an investigator came and talked to you.
- 8 That was the defense investigator, Joe Best, right?
- 9 A Yeah, he was Joe, I guess. The black guy?
- 10 Q Yeah, a black guy. Kind of -- I guess kind of --
- 11 A I can't even remember what he looked like, to be honest
- 12 with you.
- 13 Q But it was black guy?
- 14 A It was.
- 15 Q You don't know what happened before he ran up to your
- 16 car, do you?
- 17 A I don't know anything. Don't even know him, so --
- 18 Q And you don't know what happened?
- 19 A -- I can't tell you nothing about it, period.
- 20 Q You don't know what happened after he left your car, do
- 21 you?
- 22 A I don't. I don't.
- 23 Q And how long would you say you were with him that
- 24 night?
- 25 A Maybe like 15, 20 minutes. The time it took for me to

SEMEKA HAWES-REDIRECT EXAMINATION

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1 get from [REDACTED] Street to [REDACTED].

2 Q Now, and [REDACTED] is over here by -- sort of near the
3 Highway Patrol headquarters?

4 A Yes. Right down the street from them.

5 MS. WHITE: Thank you, Ms. Hawes.

6 THE WITNESS: All right. Thank you.

7 MR. YARBOROUGH: Just briefly.

8 REDIRECT EXAMINATION

9 BY MR. YARBOROUGH:

10 Q You didn't -- you didn't see any -- a gun or anything,
11 right?

12 A I didn't see anything.

13 Q And did you notice anything else, drugs, anything on
14 him?

15 A No, I didn't.

16 Q And originally he wanted to go to the hospital and then
17 he said just take me over to --

18 A Yes.

19 Q -- my baby --

20 A Uh-huh.

21 MR. YARBOROUGH: Nothing further. Thank you.

22 THE COURT: Thank you. You can step down.

23 (Whereupon, the witness stepped down from the witness
24 stand.)

25 THE COURT: Next witness.

SEMEKA HAWES-REDIRECT EXAMINATION

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1 MR. YARBOROUGH: Your Honor, can she be excused?

2 MS. WHITE: No objection.

3 THE COURT: No objection. Go ahead.

4 MS. WHITE: Your Honor, may we approach before this
5 next witness?

6 THE COURT: Yeah, sure.

7 (Whereupon, a sidebar was held.)

8 THE COURT: Mr. Foreman, ladies and gentlemen of the
9 jury, this appears to be a good time to break for the
10 evening. Normally I like to plow on through, but I don't
11 always get what I want. Can you believe that? So -- I'm
12 sorry to make light. This is a series matter. So you all
13 please have a good night. Remember what I've told you. The
14 deeper you get into a case the more you want to discuss it.
15 The more people are going to want to know what you're doing
16 and you just can't do it. You'll have an opportunity to
17 talk about it until they probably tell you they don't want
18 to hear anymore after it's all over. Okay? Don't visit the
19 scene. Don't go on the internet. You all have a nice night
20 and I'll see you in the morning at 10:00

21 (Whereupon, the jury was released for the day at 4:10
22 p.m.)

23 THE COURT: All right. Who is this potential next
24 witness? What's her name?

25 MR. YARBOROUGH: Her name is Porsha McDuffie.

1 THE COURT: Porsha McDuffie.

2 MS. WHITE: Your Honor, the State provided Mr.
3 Yarborough last week with a number of recorded jail calls
4 from James Turner, Demetrius Goode, and Mr. Plumer. All of
5 those calls Ms. McDuffie states at several times that she
6 doesn't know anything. She didn't see -- she told
7 detectives she didn't see Mr. Plumer that night. In the
8 phone call she said she didn't see anything. In the phone
9 call with Mr. Turner, Mr. Turner is very clearly reading to
10 her a note from Mr. Plumer telling her exactly the substance
11 that he wants her to testify to. There's been a phone call
12 from Mr. Plumer saying, "Did you talk to my boy?". She is
13 very angry at him in that phone call for putting her in
14 this. There's some back and forth about that. There's
15 another phone call with Mr. Goode, Demetrius Goode, where
16 he's saying all you need to do is say X, Y and Z. She says,
17 "But I didn't go." He said, well, you got to say X, Y and
18 Z, and then he just tells her to plead the Fifth. So it's
19 very clear from those phone calls that they are trying to
20 plant what they want her to say, and I am concerned that she
21 is about to perjure herself and that Mr. Yarborough is about
22 to put up obviously false testimony to this jury.

23 MR. YARBOROUGH: Your Honor, my investigator went out
24 there. The guy helping us with the case. He'll be here
25 tomorrow. But he went out and interviewed her. He got a

1 report from her. We looked at it. There were numerous,
2 numerous jail calls. I wasn't sure who was who. But I
3 don't recall exactly that, but I'm not arguing with Ms.
4 White if that's on those jail calls or not. And there were
5 a lot of them.

6 THE COURT: Do you want to proffer her testimony?
7 Because I'll tell you this. If -- I would take it very
8 seriously if someone's monkeying around with the court
9 system.

10 MR. YARBOROUGH: I realize that. I understand that,
11 Your Honor. I think it might be -- let me have a chance to
12 --

13 THE COURT: You talk to her briefly right now. I don't
14 want to prevent your client from putting up the evidence,
15 but if he's putting up falsified evidence there will be a
16 price to pay.

17 (Whereupon, a brief recess was taken.)

18 MR. YARBOROUGH: Your Honor, she tells me she doesn't
19 want to testify.

20 THE COURT: We leave here today it's over. You
21 understand? You want to talk to him again? I mean, this is
22 the last -- how old are you?

23 THE DEFENDANT: Twenty-seven.

24 THE COURT: Twenty-seven.

25 THE DEFENDANT: Six kids, 27.

1 THE COURT: Well, how long you been practicing law,
2 Yarborough?

3 MR. YARBOROUGH: A long time, Judge. Not quite as long
4 as you have.

5 THE COURT: Well, it's time to fish or cut bait, and
6 I'm telling you it's going to be -- the consequences of life
7 without parole are just hard to enumerate. It is never get
8 out. Never. Except in a pine box.

9 MR. YARBOROUGH: Your Honor, can we break for the night
10 and come back in the morning? I may have some time to --

11 THE COURT: Well, we're going to break for the night.
12 All right. See you all in the morning.

13 MR. YARBOROUGH: Thank you, Your Honor.

14 MS. WHITE: Thank you, Your Honor.

15 MR. YARBOROUGH: Your Honor, he'd like to address you,
16 if -- Mr. Plumer would like to be able to talk to you.

17 THE COURT: He can talk to me. He's got to be careful,
18 because this trial and the jury's been empaneled.

19 MR. YARBOROUGH: Can we approach? Judge, can we
20 approach?

21 THE COURT: Well, the State's coming up, too.

22 MR. YARBOROUGH: The State, that's fine.

23 (Whereupon, a sidebar was held off the record.)

24

25

1 TRIAL DAY 3-02/08/17

2 THE COURT: I understand that your client has some
3 motion?

4 MR. YARBOROUGH: Yes, sir, Your Honor.

5 THE COURT: Have you seen this? Have you all seen
6 this? Show it to the State first.

7 MS. WHITE: I've not seen it, Your Honor. This is a
8 competency evaluation.

9 THE COURT: All right, Mr. Plumer. Did you prepare
10 this motion?

11 THE DEFENDANT: No, sir. Somebody helped -- somebody
12 helped me. A guy who knows legal work at the jail.

13 THE COURT: Well, you tell me what it is you want to
14 do. What is it? What do you -- put it on the record
15 verbally what you want to do. Not what some guy at the
16 jail....

17 THE DEFENDANT: No, it's not some guy at the jail. He
18 just wrote it for me because he -- I talked to him about my
19 situation and he wrote it up for me and he said that I could
20 present it to the Court. That's what I just done.

21 THE COURT: And who is this?

22 THE DEFENDANT: It's a guy named Dean.

23 THE COURT: Dean?

24 THE DEFENDANT: Uh-huh.

25 THE COURT: He's an inmate?

1 THE DEFENDANT: Yes, sir. He's an inmate that just
2 come back from prison. They give him 25 years and he just
3 said he wanted to help me when I told him about my
4 situation.

5 THE COURT: Okay. Mr. Yarborough, do you have any --
6 there has never been a question in my mind about your
7 client's competence to stand trial. We had a bench
8 conference. He was lucid, coherent, intelligent. Is there
9 some question about his competence? He's raising this issue
10 now.

11 THE DEFENDANT: I didn't understand stuff about --

12 THE COURT: Just a minute. Do you have any question
13 about his competence?

14 MR. YARBOROUGH: I've never had a problem with his
15 competence, Your Honor.

16 THE COURT: Okay. And why is it you want to fire Mr.
17 Yarborough?

18 THE DEFENDANT: Because when -- the last offer they
19 gave me about three months ago for the seven years, and then
20 we didn't take it. I didn't know that I -- when they served
21 the life sentence papers we -- until yesterday that you told
22 me that you had to give it to me. I didn't know that if I
23 lost the trial that you would have to give me a life
24 sentence. When I asked Mr. Yarborough about it a couple
25 weeks ago he told me that I shouldn't worry about the life

1 sentence because if I get found guilty of attempted murder.
2 that they was going to give me a lot of time anyway. I
3 didn't know that if I lose the trial that you got to give me
4 life until you told me that yesterday. That's why I say he
5 didn't make it so I could understand what was going on.

6 THE COURT: Mr. Yarborough, anything you want to add to
7 that? Did you ever offer him seven years?

8 MS. WHITE: I don't recall ever offering seven, Your
9 Honor.

10 THE DEFENDANT: That's what he told me.

11 MR. YARBOROUGH: Your Honor, we discussed possible
12 scenarios for him to plea guilty, which I do with all my
13 clients in all cases.

14 THE COURT: Yeah.

15 MR. YARBOROUGH: And I discussed with him what the --
16 what he would like for me to take to them as an offer, and I
17 made that offer to the Solicitor's Office.

18 THE COURT: So it wasn't an offer from them to you? It
19 was from you to them?

20 MR. YARBOROUGH: Her offers have always been in the
21 teens. Okay?

22 THE COURT: Okay.

23 THE DEFENDANT: And he ain't never tell me that.

24 THE COURT: Well, have you relayed the offers to him?

25 MR. YARBOROUGH: I've relayed ever offer to him, and I

1 also discussed with him the life sentence. He got -- he got
2 served with it at the jail and I got served with it at my
3 office. Before -- before I could get here to see him,
4 within 24 or 48 hours, his girlfriend called me and said he
5 got this and he's freaking out and I said I'm coming down
6 there tomorrow to discuss that with him and we talked about
7 it. And at that point --

8 THE COURT: Okay. Do you want to go forward with this
9 trial?

10 THE DEFENDANT: I want to get me another lawyer.

11 THE COURT: No, that ain't happening. The jury is
12 sworn. We are in the middle of your case. I'm not
13 relieving him and we're not stopping this case so you can
14 get a new lawyer. You want to go forward with this trial?

15 THE DEFENDANT: Yes, sir. I don't have no choice.

16 THE COURT: You do have a choice and you know what it
17 is.

18 THE DEFENDANT: I have a Constitutional right to
19 relieve my lawyer when I want to relieve him, but I guess
20 that don't -- that ain't work like that down here.

21 THE COURT: So you want to go forward with this? You
22 know what the options are.

23 THE DEFENDANT: I don't have a choice.

24 THE COURT: You know what the options are that were
25 discussed yesterday in the bench conference. The State

1 would be willing to lift the life without parole notice in
2 return for a guilty plea, so -- and you -- but you want to
3 go forward to the jury; is that right?

4 THE DEFENDANT: I don't have a choice.

5 THE COURT: You do have a choice, and it's your choice
6 and yours alone. You said you wanted to talk to your
7 family.

8 THE DEFENDANT: I talked to more than my family though.

9 THE COURT: Okay. So you want to go forward; is that
10 right?

11 THE DEFENDANT: Yes, sir. I ain't go no choice. I
12 can't. --

13 THE COURT: Stand up when you talk to me.

14 THE DEFENDANT: Obviously the Court don't believe
15 nothing I'm saying anyway about me being able to get -- my
16 disability. They ain't believing nothing about that.
17 You're going to believe what my lawyer said about it. But
18 it's my life on the line and I know what was told to me and
19 I know how I took it and I understood. So, I mean, I don't
20 have no choice but to go forward with it. And my
21 Constitutional rights being violated the whole time I've
22 been down here. So let's go on with the trial.

23 MS. WHITE: Your Honor, just to supplement the record
24 on what Mr. Yarborough was saying. There were several back
25 and forth plea negotiations. We would discuss something,

1 Mr. Yarborough would take about a week and then come back
2 and tell me he talked to Ontavious and that he wasn't taking
3 whatever we had discussed.

4 Also, when Mr. Yarborough was here with Mr. Plumer for
5 a bond hearing there was a plea discussion. I think that
6 was in the nature of straight up to maybe an ABHAN. I can't
7 remember exactly what those details were. But I know that
8 he did discuss that with Ontavious at that point. So from
9 protecting the record, I know that the plea offers have been
10 extended to Mr. Plumer.

11 THE COURT: Relayed.

12 THE DEFENDANT: I never would have told him to come
13 forward with no seven years though. He come back to me and
14 asked me would I take seven years. I never told him to go
15 forward with seven years.

16 MR. YARBOROUGH: Your Honor, I discussed the ABHAN with
17 him sitting in the courtroom. As I do with every client in
18 my practice, I mean, when the State's at one place and --

19 THE COURT: I understand. I understand how all that
20 works. And now is your last chance. If you want to go to
21 the jury with -- the life notice is on the line. It will
22 not be removed after this. Do you understand?

23 THE DEFENDANT: Y'all making me understand.

24 THE COURT: I'm sorry?

25 THE DEFENDANT: Y'all are making me understand.

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1 THE COURT: Well, now is your last chance. When I
2 bring this jury out that's it. Do you understand? Do you
3 want to talk to your lawyer one more time or not?

4 (Whereupon, there was a pause in the proceedings.)

5 MR. YARBOROUGH: Your Honor, I think he'd like to go
6 forward at this time.

7 THE COURT: Okay. Sometimes pride can be a real
8 dangerous asset to have. All right. Let's bring the jury.

9 (Whereupon, the jury entered the courtroom at 10:32
10 a.m.).

11 THE COURT: All right. Ladies and gentlemen, welcome
12 back. Thank you for your patience. And we are ready to
13 proceed with the trial.

14 MR. YARBOROUGH: Your Honor, I call Wes Smith.

15 WES SMITH, having been first duly
16 sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. YARBOROUGH:

19 Q Would you state your name for the record?

20 A Wesley Smith.

21 Q And Wes, where are you employed?

22 A I work for the Greenville County Sheriff's Office.

23 Q And how long have you been employed there?

24 A Collectively 33 years.

25 Q And what different responsibilities have you had there?

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1 A Over the years I've been a uniform patrol officer, a
2 training officer, an investigator in property crime, street
3 crimes, armed robbery, homicide. My current role I serve at
4 the Sheriff's Office is the legal coordinator, or legal
5 investigator of the Sheriff's Office.

6 Q And in your role there did you get a subpoena from my
7 office?

8 A I did.

9 Q And about when was that -- when did you get that
10 subpoena, or when did you act on it? Do you recall?

11 A I think it was the 28th of December.

12 Q And on the 28th of December what did you do pursuant to
13 that subpoena?

14 A I began to look for an incident where -- of an arrest
15 which turned out to be it wasn't an arrest. It turned out
16 to be a report of an attempted murder case.

17 Q And so, that was -- you classified that as a victim
18 crime?

19 A Yes, sir.

20 Q And so, based on that, did you look and see if you
21 could find the evidence that the subpoena was requesting in
22 that case?

23 A I did.

24 Q And what did you find in y'all's records?

25 A That the records regarding the evidence that were

WES SMITH-DIRECT EXAMINATION

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1 requested did not exist at the Sheriff's Office.

2 Q And where were they?

3 A They did not exist at all, because the record involved
4 examination of some evidence that had not been completed by
5 the Sheriff's Office.

6 Q And is that normal?

7 A Sometimes it is. Yes, sir.

8 Q And what did you find that was in evidence there?

9 A Some clothing and what's called a gunshot residue
10 collection kit.

11 Q And did you also find some pictures?

12 A Yes, there were pictures in the picture database.

13 Q And did you know who collected that evidence?

14 A In Greenville County the evidence collection is
15 accomplished by a separate agency known as the Greenville
16 County Department of Public Safety Forensic Division. And
17 the employee of that division that collected that evidence
18 was a guy named Joshua Spurgeon.

19 Q And is Joshua Spurgeon employed by the Greenville
20 County Sheriff's Office anymore?

21 A No.

22 Q And were you able to check and see how long it had been
23 since he was employed there?

24 A I didn't ask about the length of time. I know that he
25 was still there in 2015 when this case was completed.

WES SMITH-DIRECT EXAMINATION

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1 Q Right. And had you worked in the forensics division
2 before?

3 A Not in forensics. No, I have not.

4 Q Are you familiar with how this stuff is logged into the
5 evidence room or where it's kept in Greenville?

6 A Yes.

7 Q And how does that happen?

8 A The officer who collects it begins what's called a
9 chain of custody, and we have a form that establishes the
10 chain of custody. And when he collects it he documents the
11 date, the time, the circumstances -- generally the
12 circumstances of where he's at and the kind of case that
13 he's collecting the evidence for. He gives it a unique
14 number and he logs it on a sheet and he dates and times it.
15 He takes it physically -- and when he is transporting it he
16 takes it physically to property and evidence room where it
17 is signed over to an evidence custodian who documents the
18 same thing. All that information is then entered into a
19 computer database now. Our property and evidence records
20 management is all computer based now. And so, every time
21 that there's something that happens with that, if it's
22 examined, if it's signed out, if it's transferred to
23 somebody, if it's taken out temporarily or brought back in,
24 each time something is done with that evidence that is
25 documented and kept in record.

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1 Q And did you -- did you look at when that came in?

2 A Yes.

3 Q And do you recall that date? You can refer to your
4 report.

5 A According to the property report it was collected by
6 Spurgeon on October 11th, 2015 at 23:15 hours, or 11:15 p.m.

7 Q And so, it was placed into the -- when was it -- it was
8 collected at 11:15. It was placed in at what time?

9 A Please excuse me a minute. I want to say, and I'm
10 trying to find it. But I think I wrote in here that it was
11 placed into evidence about 8:00 the next -- yeah, it's 8:49
12 a.m. on the 15th of October. And there's a reason for that,
13 too.

14 Q And can you explain to us the reason for that?

15 A Uh-huh. He's -- he's a forensics officer and he has to
16 collect and preserve the evidence. And so, some of this
17 evidence was covered in blood. And if you were to package
18 up a blood stained article without it being thoroughly dry
19 it will begin to disintegrate and rot and cause -- destroy
20 what evidentiary value it has. And so, we put it in a -- if
21 they take it to the forensics office where they have drying
22 space and they will let it dry. And when it's completely
23 dry they will package it up to protect it and then put it in
24 property evidence.

25 Q And that's to preserve the evidence?

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1 A Yes.

2 Q The clothes that were put in were covered in blood, I
3 guess is what the report said?

4 A Yes, sir.

5 Q And the gunshot residue was placed into evidence?

6 A Yes, sir.

7 Q And there were -- there were pictures. Now, the
8 pictures weren't placed in? They were just put in by a
9 computer or --

10 A All photographs of crime scenes now are done on digital
11 imaging and they're relayed to a digital data base that's
12 secure. It can't be tampered with.

13 Q And once the evidence is placed into the P&E at
14 Greenville County is it secure?

15 A Absolutely.

16 Q And does it look like it was ever removed from P&E from
17 the time it was placed in until you took it out?

18 A According to the records it was not.

19 Q So that means that it stayed there and nobody took it
20 out from -- I guess it's October the 12th until you said the
21 29th of December. Is that about right?

22 A Well, I turned it over to Greenwood Police Department.
23 I arranged for it to be released to the Greenwood Police
24 Department on January 4.

25 Q On January the 4th. And who did you release that to?

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1 A Detective McClinton.

2 Q The man sitting here?

3 A Yes, sir.

4 Q And did you personally release it to him?

5 A No. My job at that point would be to facilitate him
6 coming, getting into the facility, introducing him and
7 verifying his credentials to our records personnel and
8 telling them that the Sheriff's Office is authorizing
9 release of that evidence to this agency. And then he signed
10 for the evidence. Our evidence clerk that took care of that
11 verified his credentials by looking at them and then she
12 gave him the evidence and he signed for it.

13 Q And does it appear that Detective McClinton signed for
14 it?

15 A Yes, sir.

16 Q And it doesn't appear to have been tampered with from
17 the time Spurgeon put it there until McClinton --

18 A No. I remember that he actually opened the packages so
19 he could look at it to see what he was taking when he
20 collected it.

21 MR. YARBOROUGH: I don't have any further questions.

22 Q Did you enter the -- did you give the kit to Detective
23 McClinton?

24 A The records -- I mean, the evidence personnel did. I
25 never physically touched any of it.

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1 Q And do you have that item with you today?

2 A I do not.

3 Q But you --

4 MR. YARBOROUGH: Your Honor, can I walk out in the hall
5 and grab something, just one second?

6 THE COURT: All right.

7 (Whereupon, there was a brief pause in the
8 proceedings.)

9 Q You --

10 THE COURT: Wait until you get up here.

11 MR. YARBOROUGH: I'm sorry.

12 Q You have where it was signed over?

13 A I do.

14 Q And do you have that document with you?

15 A I do.

16 MR. YARBOROUGH: Have this marked as Court's Exhibit --

17 THE COURT: Show it to the State. Not as a Court's
18 Exhibit.

19 MR. YARBOROUGH: Have this marked as Defendant's
20 Exhibit 3.

21 Q Can you tell us --

22 THE COURT: Do you have any objection?

23 MS. WHITE: No, sir.

24 (Whereupon, Defendant's Exhibit 3 was marked for
25 identification.)

WES SMITH-DIRECT EXAMINATION

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1 Q Can you tell us what that is?

2 A Yes. This is a printout of custody -- chain of custody
3 for that item. At the top it identifies the officer who --
4 who impounded it, who submitted it, the investigating
5 officer of our case, the date and time it was collected and
6 impounded, the type of case it was. It went from Josh
7 Spurgeon to Jimmy Cooley, who is one of our intake people in
8 the property evidence room, to Melanie Watson, who was the
9 person that we arranged to have it released, and then
10 Detective McClinton signed it at the bottom when he
11 collected it and took it.

12 Q So that GSR kit and the clothing and the pictures were
13 given to Detective McClinton?

14 A This is -- the specific page with the GSR kit. I have
15 specific pages for the other three items -- or the other two
16 items. That's all that right there.

17 Q That's all of it?

18 A That's all of it.

19 MR. YARBOROUGH: Without objection, Your Honor, I'd
20 move 4 and 5 into evidence.

21 THE COURT: Any objection?

22 MS. WHITE: No, sir.

23 THE COURT: All right.

24 (Whereupon, Defendant's Exhibit Nos. 4 and 5 were
25 admitted into evidence.)

WES SMITH-DIRECT EXAMINATION

359

1 Q So what is Defendant's Exhibit 4?

2 A This is the same chain of custody report. This is for
3 a white tank top with suspected blood, and this is a chain
4 of custody report for item -- another item, Air Force shoes
5 with suspected blood.

6 Q And did you turn all of that over to Detective
7 McClinton?

8 A Yeah. He got copies of all the paperwork when he took
9 it all the items of evidence, plus they gave him copies of
10 the pictures.

11 Q And did -- did you give him some pictures? Is that
12 listed on there?

13 A No, pictures are not listed with a chain of custody.
14 They're entered into a database and they remain in the
15 database and we just print them out as we need them.

16 Q And you specifically printed the pictures out as well,
17 right?

18 A In my office, yes.

19 Q And you gave those to him?

20 A I did.

21 Q And so, you gave him the GSR kit, you gave him the
22 items of clothing, and you gave him the pictures that you
23 printed out?

24 A Yes.

25 Q And did you give him anything else?

WES SMITH-CROSS-EXAMINATION

360

1 A No. Best wishes and a handshake.

2 Q Okay. And you did all that on what date?

3 A January 4th.

4 MR. YARBOROUGH: Thank you. I don't have any further
5 questions.

6 MS. WHITE: May we approach, Your Honor?

7 THE COURT: Okay.

8 (Whereupon, a sidebar was held.)

9 CROSS-EXAMINATION

10 BY MS. WHITE:

11 Q Good morning.

12 A Good morning.

13 Q You and I spoke for the first time, I believe it was,
14 January 3rd of this year?

15 A I think that's right.

16 Q And you had spoken with my boss, I think, on maybe
17 December 28th when I was on vacation?

18 A Right.

19 Q And that was the first time anyone in Greenwood knew
20 this stuff existed; is that right?

21 A To my knowledge and belief, yes.

22 Q And my office immediately made arrangements for the
23 police department to come get it from you?

24 A Yes.

25 Q Now, you weren't present when Josh Spurgeon did this

WES SMITH-CROSS-EXAMINATION

361

1 test, were you?

2 A No, I was not.

3 Q Do you know if Mr. Plumer's hands were bagged to
4 preserve evidence?

5 A I do not.

6 Q Did I hear you say that you worked in forensics before?

7 A I've worked in homicide.

8 Q Oh, homicide. So you're familiar with the importance
9 of preserving --

10 A Very much so.

11 Q -- evidence? Is bagging hands to preserve gunshot
12 residue something that you've seen done before?

13 A We do -- we typically do it on the hands of deceased
14 victims. Sometimes -- I have never asked for it to be done
15 on a living victim.

16 Q Would you agree with me that it's important to make
17 sure the subject of your test isn't washing his hands or
18 wiping his hands or doing something to possibly destroy that
19 evidence?

20 A Absolutely.

21 Q Now, would you also agree with me that a three to four
22 hour window is a lot of time for someone to have done
23 something like that? To have washed their hands or wipe
24 them?

25 A Yes.

WES SMITH-CROSS-EXAMINATION

362

1 Q Now, Mr. Yarborough was asking you about some pictures.

2 I want you to take a look at these.

3 (Whereupon, State's Exhibit Nos. 102 through 107 were
4 marked for identification.)

5 Q I'm going to hand you what's been marked for
6 identification as State's 102 through 107. Are those
7 pictures that you printed out for Detective McClinton?

8 A Yes, they appear to be.

9 Q And are those -- those are pictures that were placed in
10 the computer system by Mr. Spurgeon?

11 A They were the pictures that I accessed that were
12 related to the case number and it indicated that Spurgeon
13 had been the one to put them in, yes.

14 MS. WHITE: State offers 102 through 107 into evidence,
15 Your Honor.

16 MR. YARBOROUGH: Without objection, Your Honor.

17 THE COURT:

18 (Whereupon, State's Exhibit Nos. 102 through 107 were
19 admitted into evidence.)

20 Q And these are pictures of the Defendant's clothing and
21 his hands; is that right?

22 A Yes.

23 Q So in State's 102 we have a picture of some blood on a
24 shirt?

25 A Yes.

WES SMITH-CROSS-EXAMINATION

363

1 Q And then State's 107 is a picture of his hand?

2 A Yes. That's his right hand.

3 Q And he's got some sort of --

4 A I think that's a pulse oximeter.

5 Q And 103 is -- that's his pants?

6 A Yes.

7 Q Do you know what time Mr. Spurgeon arrived at the
8 hospital?

9 A It was about five minutes after 10 is when our deputies
10 started writing the report.

11 Q But that was Deputy Reese, correct?

12 A Yes.

13 Q And Mr. Spurgeon actually arrived at 22:55; is that
14 correct?

15 A I'm not sure. I don't know exactly when.

16 Q Do you have the forensic investigation report up there?

17 A I don't have a copy of Spurgeon's report. Mr.
18 Yarborough had asked for it when I got here.

19 Q If I hand you a copy of his report could you answer
20 that question?

21 A Yes, ma'am.

22 Q What time did he arrive at the hospital?

23 A The times that are here are the times that Spurgeon
24 arrived at the hospital.

25 Q Yes, sir.

WES SMITH-CROSS-EXAMINATION

364

1 A At 22:55, which is five minutes until 11:00.

2 Q And what time did he leave the hospital?

3 A 23:28, which is 11:28. Almost 11:30.

4 Q And what time did Deputy Reese leave the hospital?

5 A At 10:30.

6 Q So there was a 25 minute gap where no one was with Mr.
7 Plumer from law enforcement?

8 A Possibly, yes.

9 Q Mr. Spurgeon, did he leave under good circumstances?

10 A The information that was related to me was that he did
11 not. I don't know that to be firsthand knowledge.

12 MS. WHITE: Thank you, Mr. Smith.

13 MR. YARBOROUGH: I don't have anything further for this
14 witness, Your Honor.

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

16 THE WITNESS: Thank you, Judge.

17 THE COURT: Can he be released from subpoena?

18 MS. WHITE: Absolutely.

19 (Whereupon, the witness stepped down from the witness
20 stand.)

21 MR. YARBOROUGH: I call Detective McClinton.

22 THE COURT: Detective McClinton, you're still under
23 oath. Come on up and have a seat.

24 WESLEY McCLINTON, having previously
25 been sworn to tell the truth, testified as follows:

WESLEY MCCLINTON-DIRECT EXAMINATION

365

1 DIRECT EXAMINATION

2 BY MR. YARBOROUGH:

3 Q Do you have your case file with you?

4 A No, sir. I don't.

5 Q You were in Court when -- you're previously under oath.

6 You understand that?

7 A Yes, sir. I do.

8 Q And you're the lead investigator in this case?

9 A I was assigned this case. Yes, sir. I was.

10 Q And at some point you went up to Greenville to pick up
11 the evidence that we're talking about right now?

12 A Yes. I was notified by Ms. White that there's possibly
13 some evidence from Mr. Plumer going to the hospital toward
14 the end of December. Prior to that I didn't have any
15 knowledge of it. So we arranged to go up there and get it.
16 Yes, sir.

17 Q You didn't have any knowledge of it because you hadn't
18 -- you didn't have anything to do with the investigation of
19 the case in Greenville?

20 A Once we heard that there's possibly an incident where
21 Mr. Plumer was in the hospital in Greenville we contacted
22 the hospital. We received a copy of their initial report.
23 He didn't state anything about any evidence taken. He
24 didn't have anything that would make us believe that we
25 should go up there and follow up with them. We didn't know

WESLEY MCCLINTON-DIRECT EXAMINATION

366

1 that there was stuff taken and placed into evidence until
2 late December.

3 Q But you knew it when you got that report that he had
4 been shot, right?

5 A Yes, sir.

6 Q And you believe that he had been shot down here in
7 Greenwood?

8 A At the time. Yes, sir.

9 Q I mean, at that time --

10 A It was under investigation in Greenville. So --

11 Q It was under investigation by Greenwood, but you
12 realized at that point that Mr. Plumer had been shot?

13 MS. WHITE: Object to leading, Your Honor.

14 Q But I just asked you, did -- what was your
15 understanding about what had happened to Mr. Plumer?

16 A Mr. Plumer had been shot and went to Greenville
17 possibly to get treatment.

18 Q And did you know at that time how many times he had
19 been shot?

20 A I don't believe I did.

21 Q Did you -- did you get copies of the pictures that Mr.
22 Smith -- or Detective Smith was just talking about in this
23 courtroom?

24 A Did I get the copies that --

25 Q Did you get the copies --

WESLEY MCCLINTON-DIRECT EXAMINATION

367

1 A Yes, sir. Mr. Smith, when I met him early January, he
2 printed off all the photographs for us and I brought them
3 back down here and placed them into evidence.

4 Q And approximately how many photographs were that -- was
5 that?

6 A I couldn't tell you. It was a whole stack of them. I
7 don't remember exactly how many it was.

8 Q If I show you these would it help you remember?

9 A I mean, I can count what you showed me. Yes, sir.

10 Q Okay, thanks.

11 A I've got 35.

12 Q That's 35 pictures --

13 A Yes, sir.

14 Q That you received from Wes Smith out of the -- out of
15 his report when you went up there on, I think you said,
16 January the 5th?

17 A It was early January. I don't remember the exact date.

18 Q But you got those pictures?

19 A He gave me the pictures. Yes, sir.

20 Q And you signed for them?

21 A No, sir. I didn't sign for pictures.

22 Q You didn't sign for pictures?

23 A No, sir.

24 Q Let me have those pictures, please. Do you recognize
25 these pictures?

WESLEY MCCLINTON-DIRECT EXAMINATION

368

- 1 A Most of them. Yes, sir.
- 2 Q They're the ones you signed for?
- 3 A I didn't sign for the pictures, sir.
- 4 Q Well, they're the ones you got from --
- 5 A Mr. Smith printed the pictures off while he was in his
- 6 office waiting and he handed them to me. I don't even think
- 7 I looked through all the pictures. I took everything that I
- 8 got from Mr. Smith and Greenville Sheriff's Department,
- 9 placed it in our evidence locker so somebody else would look
- 10 at it.
- 11 Q And in those pictures where there pictures of Mr.
- 12 Plumer where he had been shot?
- 13 A Were there pictures of Mr. Plumer's leg?
- 14 Q Yes.
- 15 A There were pictures of a leg. I don't know who's leg
- 16 it was. It appeared to be shot.
- 17 Q But that was part of your investigation?
- 18 A At the time --
- 19 Q Yes.
- 20 A -- I was going to Greenville to pick up evidence that
- 21 we recently found out about. I brought this stuff back and
- 22 placed it into our evidence locker to continue the chain of
- 23 custody.
- 24 Q It was evidence for this case?
- 25 A Yes, sir.

WESLEY MCCLINTON-DIRECT EXAMINATION

369

1 Q Let me show you this picture. Do you recognize it?

2 A Do you recognize it? I mean, it's a picture that was
3 printed off.

4 Q That you got from Wes Smith that was printed off in
5 your investigation?

6 A Do I remember this exact picture? No, sir.

7 Q What is that a picture of?

8 A It appears to be a black male laying in a hospital bed
9 with blood on his leg.

10 Q And does he appear to have a gunshot wound?

11 A From this picture I can't see wound.

12 Q I'll show you this picture. What's that a picture of?

13 A It's an enhanced picture of a closeup of what appears
14 to be a hole in the leg, or a hole in the body. I'm not
15 sure exactly what picture this is. There's a hole in the
16 skin is what I can tell you from this picture and they have
17 a measuring device to show large it is.

18 Q But that's a picture you got as part of your
19 investigation, right?

20 A If this is one of the pictures -- like I said, I don't
21 understand -- I mean, I don't remember exactly every single
22 picture I looked at, because obviously there was a good
23 amount of them. But if that was in that group of pictures
24 that I got from Mr. Smith, then I'd seen it one time or
25 another.

WESLEY MCCLINTON-DIRECT EXAMINATION

370

1 Q Let me show you this document. Did you sign for these
2 pictures?

3 A Did I sign for the pictures?

4 MS. WHITE: Asked and answered, Your Honor.

5 THE COURT: Don't answer that question.

6 A No, sir. I did not sign for --

7 THE COURT: You don't have to -- he's already answered.

8 Q What -- where it says 43 pictures on there what is that
9 referring to?

10 A Photographs from hospital on Ontavious Plumer injuries.

11 Q And is that a document you received?

12 A This document? No, sir.

13 Q Where did that document come from?

14 A This is -- our evidence form that I complete what I'm
15 placing in the evidence locker at the Greenwood City Police
16 Department I document what all I'm putting in the evidence
17 locker and sign my name on it. So I placed it into evidence
18 on this date and this time.

19 Q And did you place 43 pictures of Mr. Plumer's shooting
20 into evidence at the Greenville Detention -- I mean, at the
21 Greenwood evidence locker?

22 A Whatever I wrote down on this piece of paper is what I
23 placed into evidence at that time and that date.

24 Q And does this appear to be what you put into evidence
25 on that time and that date?

WESLEY MCCLINTON-DIRECT EXAMINATION

371

1 A If this is the same photo you just showed me there's
2 not 44 of them, if that's where you're going.

3 Q Well, isn't that the same group that you put into
4 evidence a minute ago, or is it out of these pictures? Did
5 they come out of there?

6 A They were pictures I had pertaining to Mr. Plumer being
7 in Greenville Hospital receiving treatment. It was received
8 from Mr. Smith with Greenville Sheriff's Department and it
9 was placed into evidence. All the evidence I received from
10 them, opened it up to verify it while I was there, looked at
11 it. Me and Mr. Smith looked at it together. This is this,
12 this is this, this is this. I boxed it back up along with
13 the pictures, brought it back to Greenwood. Went to the
14 police department. Put it in our evidence locker. Locked
15 it up along with this form.

16 Q And were those pictures printed out for you in
17 Greenville?

18 A Yes, sir.

19 Q And you took them and put them into evidence in
20 Greenwood?

21 A Yes, sir. I did.

22 MR. YARBOROUGH: Your Honor, I'd like to move these
23 pictures into evidence at this time.

24 THE COURT: Any objection?

25 MS. WHITE: Your Honor, some are cumulative, but I

WESLEY MCCLINTON-DIRECT EXAMINATION

372

1 don't have any objection.

2 THE COURT: Okay.

3 MR. YARBOROUGH: I move --

4 THE COURT: They're in. Let her mark them.

5 MR. YARBOROUGH: Your Honor, would you like for her to
6 mark them individually or is a group fine?

7 THE COURT: All right. Just enter them in as one
8 exhibit.

9 (Whereupon, Defendant's Exhibit No. 6 was admitted into
10 evidence.)

11 Q These were previously put in by Ms. White. Do you
12 recognize this picture?

13 A Do I recognize the particular picture? No, sir. There
14 have been a lot of pictures in there.

15 Q This is a picture out of Defendant's Exhibit 6. Do you
16 recognize this picture?

17 THE COURT: There's nothing on there, Mr. Yarborough.

18 MR. YARBOROUGH: Thank you, Your Honor.

19 Q Do you recognize that picture?

20 A No, sir. Not that particular picture.

21 Q Did you collect pants and a shirt and bring them back
22 to Greenwood?

23 A Yes, sir. I collected everything that's in this piece
24 of paper, sir.

25 Q Does that make you familiar?

WESLEY MCCLINTON-DIRECT EXAMINATION

373

1 A No, sir. This -- these items were in bags to contain,
2 I guess, the blood when they got them. I didn't dig through
3 the bags. I opened the bags up and observed that there was
4 a pair of jeans in one, there were a pair of shoes in
5 another. There was a white tank top, I believe, in another.
6 I received the bag. I didn't fondle with the evidence, sir.

7 Q Did you look to see that there were gunshot bullets in
8 the pants?

9 A No, sir. I wouldn't have opened the pants up.

10 Q Did you look at -- do you recognize Mr. Plumer? This
11 picture? Have you seen this picture before?

12 A I don't recall seeing that exact picture. I looked at
13 quite a few pictures.

14 Q When you opened the bag to look at the pants did you
15 see -- did you notice, is that consistent with what you
16 found with the pants that you just showed it?

17 A The pants looked like a pair of bundled up jeans in a
18 bag with blood from what I could see on it. I didn't open
19 it up and lay it out on a table. No, sir. I didn't do
20 that.

21 Q Did you try and look and investigate the gunshot wounds
22 at all? Did you recognize that? Did you investigate the
23 gunshot wounds that were on Mr. Plumer?

24 A Did I investigate Mr. Plumer's gunshot wounds?

25 Q Yes.

WESLEY MCCLINTON-DIRECT EXAMINATION

374

1 A No, sir. No, sir.

2 Q But you -- at that point you believed that Mr. Plumer
3 had been shot in Greenwood, right?

4 A That was my -- that was what I was thinking. Yes, sir.

5 Q And these pictures showed that he had been --

6 MS. WHITE: Objection, Your Honor.

7 THE COURT: No, let him ask the question.

8 Q What did these pictures show you?

9 A Those pictures show me a black male subject in a
10 hospital bed -- what appeared to be in a hospital bed with
11 blood and holes in his body.

12 Q And based on your investigation, what day were those
13 pictures taken?

14 A I'm not exactly sure the date. Whatever date Mr.
15 Spurgeon took the pictures.

16 Q You didn't -- you didn't look? You didn't try to look?

17 A Did I try to look? So the incident happened on the
18 11th. So he received treatment on the 11th.

19 Q And it was clear from those pictures that he had been
20 shot?

21 A It was clear from the pictures there's a hole in the
22 body part. I'm not a scientist. I don't know if a bullet
23 caused that. That's what I would think it was.

24 Q But you did no further investigation on that area,
25 right?

WESLEY MCCLINTON-DIRECT EXAMINATION

375

1 A What particular area?

2 Q Of Mr. Plumer being shot. You didn't investigate that?

3 A In which way? I don't understand the question, sir.

4 Q What did you do to investigate the shooting of Mr.
5 Plumer?

6 A The incident that Mr. Plumer stated he had gotten shot
7 was in Greenville. I'm confused on what you're trying to
8 get here.

9 Q At some point you realized that wasn't true, right?

10 A That he didn't get shot in Greenville?

11 Q Yeah.

12 A Yes, sir.

13 Q And you realized he had been shot in Greenwood?

14 A Yes, sir.

15 Q And you had -- you were investigating the case and you
16 were getting mixed stories. And so, did you follow up on
17 anything with Mr. Plumer?

18 A There's a -- there's a huge time gap on getting mixed
19 stories from Mr. Wells and finding out there was evidence
20 from Mr. Plumer in Greenville.

21 Q Okay. Let's talk about that. There's a huge time gap.
22 You went to Mr. Plumer's grandfather's house two days later?

23 A Yes, sir.

24 Q Okay. So there's not a huge time gap, is there?

25 A Between getting mixed stories from Mr. Wells and

WESLEY MCCLINTON-DIRECT EXAMINATION

376

1 finding out Mr. Plumer had evidence in Greenville from an
2 incident he said happened in Greenville there's a huge time
3 gap.

4 Q You're saying that you didn't know that Mr. Plumer had
5 been shot on October 13th?

6 A When I found out that Mr. Plumer had been shot was when
7 we, and I believe it was Detective Kay, contacted Greenville
8 and they said they had a guy come in and said he was shot in
9 Greenville and it turned out it was Mr. Plumer.

10 Q And did you follow up on that at all?

11 A I would have had to locate Mr. Plumer to follow up with
12 that.

13 Q Well, you located his grandfather, right?

14 A We went to his grandfather's house, and his grandfather
15 happened to be there. Mr. Plumer was not -- Ontavious
16 Plumer was not there at the time.

17 Q So you didn't -- you didn't follow up anything else in
18 regard to Mr. Plumer?

19 A I would have had to had Mr. Plumer available to follow
20 up with him.

21 Q And you could have contacted him?

22 A Mr. Ontavious Plumer?

23 Q Yeah.

24 A We attempted to locate Mr. Plumer multiple times.

25 Q You went to his -- you went to where he lived?

WESLEY MCCLINTON-DIRECT EXAMINATION

377

1 A We went to quite a few places, sir.

2 Q So recently in January you got these pictures from Wes
3 Smith, right?

4 A Yes, sir.

5 Q And you also got some clothing from Wes Smith, right?

6 A Yes, sir.

7 Q And did you sign for that clothing?

8 A I signed for the items that I received in Greenville
9 with their evidence clerk. Mr. Smith didn't directly give
10 me the items. It came into their evidence area. The clerk
11 provided me with the items. We went through them. Once I
12 realized I was -- once I know what I was signing for, I had,
13 I signed the form, or the little electronic thing and
14 received the items.

15 Q And you received those items and you brought them back
16 to the Solicitor's Office in Greenwood?

17 A No, sir. I brought them back to our City Police
18 Department --

19 Q City Police Department --

20 A -- and placed them in our evidence lockers.

21 Q And you put them in --

22 A Locker number 002.

23 Q And did you do anything with them between Greenville
24 and locker number 3002?

25 A I put them in the backseat prior to leaving Greenville

WESLEY MCCLINTON-DIRECT EXAMINATION

378

1 and they sit there until I got back to Greenwood.

2 Q And that was the clothing and the GSR kit?

3 A That was everything that I signed for in Greenville.

4 Q And what all did you sign for in Greenville?

5 A Do you have that list that I signed? This is what I
6 placed into evidence. White Nike Air Force shoes, one pair.
7 GSR kit collected from hands of suspect -- subject,
8 Ontavious Plumer. White Pride tank top with suspected
9 blood. That's what I received from their evidence
10 technician. The photographs I received from Mr. Smith. All
11 in a -- I believe they were in a -- I thought they was in an
12 envelope but they wasn't. All this stuff was in a brown
13 box. I opened it up when I got it. Mr. Smith stood there.
14 I opened it up. We went through everything. Closed it back
15 up. When to this office, got the photographs. Walked out
16 of there and put them in the backseat of my car along with
17 the photographs. I drove back to Greenwood. Went to the
18 police department and put them in the evidence locker. And
19 that's the last time I touched them until today.

20 Q Last time you touched them until today. And did you
21 have the test run on the GSR?

22 A No, sir. That's not --

23 Q Did you turn it over to SLED?

24 A I put everything into evidence.

25 Q Did you turn it over to SLED?

JOSEPH BEST-DIRECT EXAMINATION

379

1 A I put everything in the evidence locker. That's not my
2 job to take it to SLED. That's all forensic -- Sergeant
3 Griffin that was up here previously, that's her job to
4 transport everything to SLED for processing.

5 Q Was it sent to SLED for processing?

6 A If she took it. I don't believe it was.

7 Q You don't believe it was or you know it wasn't?

8 A I don't believe it was.

9 THE COURT: He's answered the question. Move on.

10 MR. YARBOROUGH: I don't have any further questions of
11 this witness, Your Honor.

12 MS. WHITE: No questions.

13 THE COURT: All right. Thanks. You may stand down.

14 (Whereupon, the witness stepped down from the witness
15 stand.)

16 MR. YARBOROUGH: I call Joe Best.

17 JOSEPH BEST, having been first duly
18 sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. YARBOROUGH:

21 Q Would you state your name for the record.

22 A Joseph Best. That's B as in boy, e-s-t.

23 Q Mr. Best, where are you employed?

24 A I'm a private -- I have a private detective agency in
25 Columbia, South Carolina.

JOSEPH BEST-DIRECT EXAMINATION

380

1 Q And how long have you done that?

2 A I had my own firm for about six years, but I've been
3 doing this investigative PI work for 18, 19 years.

4 Q And how were you employed before? I mean, before you
5 had your own firm what did -- how did you do it?

6 A I was with the Greenwood Public Defender's Office as an
7 investigator from 1998 to 2006.

8 Q And so, you've -- you've worked around in this area for
9 how long?

10 A About 10 years.

11 Q And as part of your work did I contact you to do some
12 stuff for me on this case for Ontavious Plumer?

13 A Yes, you did.

14 Q And have you helped me try to do some investigation
15 down here?

16 A Yes.

17 Q And have you gone out and interviewed witnesses and
18 done that kind of stuff?

19 A Yes, I have.

20 Q And is that normal for what you do?

21 A Yes, it is.

22 Q At some point did you send -- or did you take a
23 subpoena to Greenville County for some documents that were
24 in evidence up there?

25 A I did.

JOSEPH BEST-DIRECT EXAMINATION

381

1 Q And do you recall approximately when you did that?

2 A Oh, man. Might have -- probably was in -- it was
3 before Christmas I took it up there.

4 Q And then at some point did I ask you to go pick up some
5 stuff from the Solicitor's Office here in Greenwood, or the
6 Sheriff's Office here in Greenwood?

7 A The police office -- the police department.

8 Q The police office. And did you -- do you know the
9 people over there?

10 A There's a lot of new faces over there now, but --

11 Q Right. But did you go over there and pick up some
12 evidence --

13 A Yes, I did.

14 Q -- for me in this case?

15 A I did.

16 Q And do you recall when you did that?

17 A I don't, no. It was January 6th, 2017 at 11:16 a.m.

18 Q And what did you pick up?

19 A It was four items. They were sealed, but they told me
20 what they -- it's a GSR kit that was sealed, a tennis shoe,
21 a tee shirt, and I think some jeans. They were all sealed
22 and they put them in a box and sealed it. And I think
23 Officer Griffin was the one that signed off on it.

24 Q And did you take the GSR kit anywhere for me?

25 A Yes, I did.

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1 Q Where did you take that?

2 A I took that -- the whole box, all the evidence along
3 with the kit to Dr. Robert Bennett out of Charleston, and I
4 did that on January 10th at 2:20 p.m.

5 Q And did those packages or anything, did they leave your
6 side or did anybody tamper with them?

7 A No. I put them in my safe in the -- I locked it up in
8 my office for three days until I -- we kind of figured out a
9 time to go down there and see on Dr. Bennett. And when he
10 told me to come down there around -- be there around 2:30, I
11 took it out of my cabinet and went down there on the 10th.

12 Q And that was the GSR kit and the clothing?

13 A GSR kit, the tennis shoe and the clothing, the jeans
14 and a tee shirt, they were sealed in a paper box, in a box.

15 Q Did you look at the tennis shoes or the clothing?

16 A No, I didn't. They were sealed when I got it from
17 Greenwood. So I didn't break the seal or nothing.

18 Q So you just took it to Dr. Bennett and he -- he was
19 there and he -- you dropped it off for him?

20 A Dropped it off. When he signed on it I have him a copy
21 of my form. I kept a copy, and I came back to my office in
22 Columbia.

23 Q Do you have your form with you today?

24 A Yes, I do. Right here.

25 Q And if -- let me show you -

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1 MR. YARBOROUGH: Mark this as Defendant's Exhibit 7.

2 (Defendant's Exhibit No. 7 was marked for
3 identification.)

4 Q And I show you this. Do you recognize this? I think
5 you handed me a white copy a minute ago and I show you a
6 yellow copy?

7 A That's correct.

8 Q And did you -- did you have that copy with you?

9 A That's the copy -- they made a copy of this form right
10 there. That's what I had. And I just took that form and
11 had Dr. Bennett to sign and I signed to release it. I think
12 Dr. Bennett got a copy of that also. That's the one I got.
13 This is my -- this is all my information right here.

14 Q That's all your information. Did you sign that?

15 A I did.

16 Q And you signed that as part of the chain of custody
17 between Greenwood City and you?

18 A That's correct.

19 Q And did any of the items that you got, they were all
20 sealed? You never took them in or took them out?

21 A They were sealed. They put them in that box and they
22 sealed the box. I put them in my office in the cabinet.
23 Three days later I took them to Charleston. Nothing was
24 broke. No seals were broken or anything.

25 Q No seals or anything were broken?

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- 1 A No, they weren't.
- 2 Q And what is -- what is that -- what is that outline
- 3 that was in there? Can you read the --
- 4 A The top?
- 5 Q Yeah, where it goes one -- one, two, three, four and
- 6 five. Can you read that?
- 7 A I can barely see this here. Cut Levi's blue jeans with
- 8 suspected blood size 35/32. That's item one.
- 9 Q How about -- would that be 38/32?
- 10 A 38/32. 38/32.
- 11 Q Yeah.
- 12 A On line two is white Pride tank top with suspected
- 13 blood. Extra large -- size extra large.
- 14 Q Right.
- 15 A Line three, white Nike Air Force One shoe with
- 16 suspected blood.
- 17 Q Right.
- 18 A Line four, GSR kit collected from hands of suspect
- 19 Ontavious Plumer --
- 20 Q Right.
- 21 A -- and five says 43 photographs from hospital of
- 22 Ontavious Plumer injuries.
- 23 Q And is that -- does that fairly and accurately
- 24 represent what you got and took down to Dr. Bennett?
- 25 A Pretty much. I don't think I got those photos though.

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1 I think I got just the other four items, I believe.

2 Q The photos were separate.

3 A Okay. That's correct what I got.

4 Q And, I mean, have you ever -- you probably never --
5 have you ever seen these photos?

6 A I seen some black and white photos of these at your
7 office that you had on file.

8 Q But not -- not those specific ones?

9 A Not these I haven't.

10 MR. YARBOROUGH: I don't have any further questions for
11 this witness, Your Honor.

12 CROSS-EXAMINATION

13 BY MS. WHITE:

14 Q Good morning.

15 A What's up Elizabeth.

16 Q Now, you and I had a phone conversation back -- right
17 after you sent that subpoena to Greenville; is that right?

18 A We did.

19 Q And I think you left me a voice mail saying you needed
20 some help and I called you back; is that right?

21 A That's right.

22 Q And you were needing me to get this stuff from
23 Greenville for you so you all could get a hold of it; is
24 that right?

25 A That's correct.

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1 Q And I did that? We were able to --

2 A Yeah.

3 Q -- get it to Greenwood?

4 A Yeah. Yeah, we did.

5 Q And then you were here -- I think you and Mr. Thomas

6 might have talked to Micky McAllister from the police

7 department to facilitate you going over to get it from the

8 evidence room; is that right?

9 A He's Captain, right?

10 Q To be honest, I don't know.

11 A Yeah. I got -- yeah, we did. He walked me down there,

12 you know. He walked me down there.

13 Q Are you the guy that talked to Sameka Hawes?

14 A Briefly I did.

15 MS. WHITE: Thank you.

16 THE COURT: All right. Thank you. You can step down.

17 (Whereupon, the witness stepped down from the witness
18 stand.)

19 THE COURT: Okay. Ladies and gentlemen, we'll take a

20 short morning recess. Don't discuss the case. Thank you

21 very much. You all just sit down and wait. Mr. Best, you

22 can go ahead.

23 (Whereupon, the jury exited the courtroom at 11:30

24 a.m.)

25 THE COURT: All right. We'll be at ease.

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1 (Whereupon, a recess was held from 11:30 a.m. to 11:46
2 a.m.)

3 THE COURT: Let's go ahead and bring the jury.

4 (Whereupon, the jury entered the courtroom at 11:46
5 a.m.)

6 THE COURT: Call your next witness.

7 MR. YARBOROUGH: Call Dr. Bennett.

8 DR. ROBERT M. BENNETT, having been
9 duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. YARBOROUGH:

12 Q Dr. Bennett, would you state your name for the record?

13 A Robert M. Bennett.

14 Q And, Dr. Bennett, where are you from?

15 A Charleston, South Carolina.

16 Q And can you tell us what you do for a living?

17 A I am a forensic scientist. My full-time practice is
18 providing forensic services to the South Carolina community.
19 Other states as well I've been called in to provide forensic
20 services.

21 Q When you say forensic service, what's that? What's
22 that mean?

23 A By definition it means providing scientific or
24 laboratory analysis for use in legal cases.

25 Q And what is your -- what is your background

ROBERT BENNETT, M.D.-DIRECT EXAMINATION

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1 educationally?

2 A I have two degrees from the Medical University of South
3 Carolina. One is a pharmacy degree specializing in drugs
4 and affects of drugs. The other is a Ph.D degree in drug
5 sciences and toxicology which expands in the pharmacology
6 and DNA and a variety of other related services.

7 Q And have you -- when did you graduate from pharmacy
8 school?

9 A 1980.

10 Q When did you graduate from your -- or do your
11 doctorate?

12 A 1991.

13 Q And what was that doctorate in?

14 A It was in drug sciences focusing in toxicology.

15 Q So you do a lot of work with toxicology?

16 A Correct.

17 Q And have you had additional training?

18 A Yes. I have had a number of training certifications
19 from the Department of Justice, a couple in the are of
20 firearms.

21 Q And what kind of those were in the area of firearms?

22 A Just looking at a variety of subjects such as different
23 types of ballistics, which includes gunshot residue
24 analysis. And just it's basically a basic primer for those
25 types of areas.

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1 Q And did you -- did you do classes with the Department
2 of Justice?

3 A The program was provided by the Department of Justice.

4 Q And how about in your day-to-day work do you test
5 different chemicals and --

6 A Yes. Chemistry is the core of what I do on a daily
7 basis. Everything that is done by forensic sciences boils
8 down to chemistry.

9 Q And is that -- that's kind of the basis of gunshot
10 residue analysis?

11 A It is. It's looking at the basic elements that are
12 components of ammunition and propellant that's used in
13 ammunition, and it all boils down to basic chemistry.

14 Q And can you explain that to the jury a little bit?

15 A Sure. Do you want me to get into details of
16 specifically the chemistry of gunshot residue?

17 Q Yeah, just the specifics of gunshot residue.

18 A All right. A bullet, per se, which is what it's
19 commonly referred to, actually consists of --

20 MS. WHITE: Your Honor, I'm going to object to any
21 expert testimony.

22 THE COURT: This is a little premature.

23 MR. YARBOROUGH: Okay. We'll move forward just a
24 second, Your Honor.

25 Q Have you testified before?

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- 1 A Many times, yes.
- 2 Q And across South Carolina?
- 3 A Yes.
- 4 Q And is that both in toxicology and pharmacy?
- 5 A Yes.
- 6 Q And have you worked with gunshot residue before?
- 7 A I have. I have. Just finished up a case recently,
- 8 actually. It was a federal case.
- 9 Q And have you been qualified as an expert before?
- 10 A Many times, yes.
- 11 Q And what are those qualifications as?
- 12 A Many different areas of forensic scientist. But
- 13 related to this, a few years ago I was in a post-conviction
- 14 relief case involving death in which I was -- testified on
- 15 looking at -- not specifically gunshot residue but the
- 16 ballistics and measuring the markings on bullets. Recently
- 17 finished a case -- a federal case out of Charleston District
- 18 Court involving gunshot residue in an attempted murder
- 19 racketeering case.
- 20 Q So you've testified before on number occasions?
- 21 A Numerous types of cases. Many, many cases.
- 22 Q And some of those including gunshot residue?
- 23 A I actually have not testified on a case involving
- 24 specifically gunshot residue.
- 25 Q But are you familiar with gunshot residue?

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1 A Very familiar with that, yes.

2 Q And have you studied it?

3 A For the past 20 years it's been part of my core study,
4 yes.

5 Q And part of that core study have you learned to test
6 gunshot residue?

7 A Correct, yes.

8 Q And do you work for -- or do you work with a lab that
9 helps you test that?

10 A I work with an accredited facility who performs gunshot
11 residue analysis as one of their basic core service
12 provisions and have done so for over 400 crime labs across
13 the country, and even in Europe.

14 MR. YARBOROUGH: And, Your Honor, I'd move him as an
15 expert in the taking -- or the examining of gunshot residue.

16 MS. WHITE: I'd like to voir dire his qualifications.

17 THE COURT: Yes, you may.

18 VOIR DIRE

19 BY MS. WHITE:

20 Q Dr. Bennett, you said you did a basic primer course in
21 GSR through the Department of Justice?

22 A Correct.

23 Q When was that?

24 A On -- I think I finished that in October of last year.
25 It's -- I'm sorry. It's on my resume. I've taken so many

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1 courses I can't remember the exact time and date of all of
2 them.

3 Q And you just stated that you work with a facility that
4 performs GSR analysis. What facility is that?

5 A That's called RJ Regroove. They just perform the
6 mechanistic function of the analysis. In other words, the
7 technical feature. Say you have the scanning electron
8 microscope, that's a multi-million dollar piece of
9 equipment, as well as the x-ray spectrometry equipment. So
10 they -- they perform the technical function of proving the
11 gunshot residue stuff on the instrument. The software
12 analyzes automatically. Performs an automatic spectrograph
13 analysis and provides that report for me for evaluation.

14 Q Do they also perform the visual examination?

15 A Yes.

16 Q So you're just interpreting their results?

17 A They're providing me -- let me give you an example.
18 When you go to the doctor and you get a cholesterol check.
19 The doctor doesn't perform the cholesterol check. The lab
20 does. The lab presents that to the doctor. The doctor is
21 what determines what it means, where do we go from here, how
22 do we interpret this, communicates that to the patient.
23 It's done that way a lot in forensics as well. The actual
24 technical aspect of it is performed by a technician, or
25 maybe even automatically.

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1 Q So you're not the person who actually even put this
2 test into the machine?

3 A No. That's just a technical function. I'm not a
4 technician, so I do not put it on personally.

5 Q Were you present when that was done?

6 A No, I'm not.

7 Q Have you ever personally done that?

8 A I've witnessed it. I've not actually personally, no.

9 Q And is this process subject to any sort of peer review?

10 A Absolutely.

11 Q Well, I'm talking about is each -- is each report you
12 issue or is each test you do peer reviewed?

13 A It's reviewed. Yeah, it's technically reviewed.

14 Q By who?

15 A By the professionals at the laboratory. There are PCs
16 there that perform the actual review of the analysis before
17 it's issued to me.

18 MS. WHITE: Your Honor, we have an objection.

19 THE COURT: Well, ladies and gentlemen, let me -- I
20 need to take this matter out -- take this matter up outside
21 of your presence. We'll get right back with you. Thank
22 you.

23 (Whereupon, the jury exited the courtroom at 11:57
24 a.m.)

25 THE COURT: Yes, ma'am.

1 MS. WHITE: Your Honor, all I've heard is that he has
2 training in drugs, pharmaceuticals. He did a basic primer
3 course for the Department of Justice. He has never actually
4 physically done this test, which includes both the scanning
5 micro -- the electron scanning microscope and the visual
6 examination. He did not perform the test in this case.
7 He's interpreting results provided by someone else. And it
8 goes back to our chain problem. He wasn't physically
9 present when this test was placed in the machine. He can't
10 testify about how that was even handled. So on the one
11 hand, Your Honor, I don't think that he qualifies as an
12 expert. On the other hand, we have a serious chain problem.

13 THE COURT: Dr. Bennett, have you ever been qualified
14 as an expert to testify in court to gunshot residue?

15 THE WITNESS: I have not.

16 THE COURT: All right. Yeah, I'll be happy to hear
17 your argument.

18 MR. YARBOROUGH: Your Honor, I'm asking him to testify
19 about the test that he had run. He's got the test with him.
20 We asked the Court for a continuance because we had trouble
21 getting the test run. But that was denied --

22 THE COURT: That -- okay. I didn't make -- I didn't
23 make that decision. I'm not pointing to that. What we're
24 talking about here is qualifying somebody who did not run
25 the test. Who apparently wasn't even present when the test

1 was run. You're asking him just to interpret the -- put
2 into evidence a report from some laboratory and we have no
3 one here from the laboratory. Have no --

4 MR. YARBOROUGH: Judge, he has the report from the lab.

5 THE COURT: Right, exactly.

6 MR. YARBOROUGH: He said he's seen the lab run the test
7 before.

8 THE COURT: Not in this case. He has never been
9 qualified as an expert in gunshot residue. He did not even
10 look through the electron microscope. He's reading some
11 results off a piece of paper, and you want me to qualify him
12 as an expert in this court to render opinions.

13 MR. YARBOROUGH: Your Honor, I'd ask you to let him
14 give the results of the test.

15 THE COURT: We'll take a short break. Can I see the
16 lawyers in chambers, please.

17 (Whereupon, a recess was held until 12:09 p.m.)

18 THE COURT: Dr. Bennett, you don't need to come back
19 up. I'm granting the State's motion.

20 MR. YARBOROUGH: Your Honor, can I --

21 THE COURT: You can make your arguments on the record.

22 MR. YARBOROUGH: Your Honor, to testify as an expert,
23 he is a -- he's got a chemistry degree and he's got a Ph.D in
24 pharmacology. He's worked with toxicology for a number of
25 years and he has worked in this area. He had a test run.

1 All he is doing is looking at the report that was run that
2 he asked to have run at the place that he worked where he
3 knows it's a controlled situation. In order in this state
4 to testify as an expert you've just got to have more than
5 the average person's ability to understand something, and he
6 clearly qualifies for that as an expert.

7 THE COURT: Well, anything else? Because he's not
8 going to testify. I'm not going to qualify him as an expert
9 in gunshot residue. Okay?

10 MR. YARBOROUGH: Okay.

11 THE COURT: All right. Now, do you have any other
12 witnesses?

13 MR. YARBOROUGH: I have one more witness, Your Honor.

14 THE COURT: Who is it?

15 MR. YARBOROUGH: VanJarvis Martin.

16 THE COURT: Okay. Mr. Plumer, I'm going to ask you.
17 Do you -- have you made a decision about whether or not you
18 will testify?

19 THE DEFENDANT: I'm not going to testify.

20 THE COURT: Is that your free and voluntary choice?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: I'm sorry. You have to speak up.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Okay. Do you have any questions you want
25 to ask?

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1 THE DEFENDANT: It don't seem like no questions -- I'm
2 just going to be quiet.

3 THE COURT: Okay. Let's bring the jury back.

4 (Whereupon, the jury entered the courtroom at 12:09
5 p.m.)

6 THE COURT: Call your next witness.

7 MR. YARBOROUGH: I call VanJarvis Martin.

8 VANJARVIS MARTIN, having been first
9 duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. YARBOROUGH:

12 Q Please state your name for the record.

13 A VanJarvis Martin.

14 Q And, VanJarvis, where are you from?

15 A Abbeville, South Carolina.

16 Q And how old are you?

17 A Twenty-eight.

18 Q And are you related to Mr. Plumer?

19 A Yes, sir.

20 Q How are you related to him?

21 A My first cousin.

22 Q And did you come to see him on October the 11th of
23 2015?

24 A Yes, sir.

25 Q Okay. Can you tell me about seeing him that day?

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- 1 A He had called his mom and his mom --
- 2 Q Without saying him who he called. Could you just tell
- 3 us about what he did?
- 4 A I followed his mom to his baby momma's house and we --
- 5 Q And where was that?
- 6 A Down in Greenwood.
- 7 Q And did you go into the house when you got there?
- 8 A Yes, sir.
- 9 Q And did you find Ontavious there?
- 10 A Yes, sir.
- 11 Q And what kind of shape did you notice Ontavious to be
- 12 in?
- 13 A He -- I expected he was in a little pain and I told him
- 14 he needed to wrap his leg up.
- 15 Q And did you -- did you see him wrap his leg up?
- 16 A Yes, sir.
- 17 Q And where did -- what happened after that?
- 18 A I took him -- he was in so much pain. He didn't want
- 19 to go to Greenwood, so I took him to Greenville Hospital.
- 20 Q And did you personally drive him there?
- 21 A Yes, sir.
- 22 Q And did you take him there and did you leave him there?
- 23 A Yes, sir.
- 24 Q And after that did you report to his family that you
- 25 had taken him to the hospital?

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1 A Yes, sir.

2 Q And you don't know anything before or after that, do
3 you?

4 A No, sir.

5 Q But would -- did blood get in your car?

6 A No, sir.

7 Q Why is that?

8 A Because he had his leg wrapped up.

9 Q He had his leg wrapped up. And so, you took him and
10 let him off the front door?

11 A Yes, sir.

12 Q Do you know which Greenville Hospital it was?

13 A Greenville Memorial.

14 MR. YARBOROUGH: I don't have any further questions.

15 Thank you.

16 MS. WHITE: No questions.

17 THE COURT: All right. Thank you. You can step down.

18 (Whereupon, the witness stepped down from the witness
19 stand.)

20 THE COURT: All right. Call your next witness.

21 MR. YARBOROUGH: Your Honor, we rest at that point.

22 THE COURT: Is the State going to have any reply?

23 MS. WHITE: No, sir.

24 THE COURT: All right. Mr. Foreman, ladies and

25 gentlemen of the jury, remember the -- I gave you five parts

1 to a trial. First part, opening statements. Second part,
2 evidence. So all of the evidence that you all are going to
3 hear has been presented. There'll be no more testimony. No
4 more evidence. No more tangible items to be introduced.
5 It's 12:15. The case is going to be yours shortly. The
6 next part will be the closing arguments to you by the
7 attorneys, and I'll give you the charge on the law, and then
8 you all will retire to the jury room to deliberate. So at
9 this time I'm going to let you all go to lunch. You've made
10 it this far. Remember not to talk about this. It's soon
11 going to be yours. And don't research, don't visit any
12 scenes, and we will see you back -- if I give you an hour
13 for lunch is that enough time? 1:15? Great. We'll see you
14 then. Thank you.

15 THE COURT: Just remain seated until the jury's exited.
16 (Whereupon, the jury exited the courtroom at 12:38
17 p.m.)

18 THE COURT: Any motions?

19 MR. YARBOROUGH: Your Honor, I just renew my motion for
20 a directed verdict.

21 THE COURT: Okay. Same ruling. Any request to charge
22 from anybody?

23 MS. WHITE: Yes, sir. The State's requesting, first of
24 all, that the Court charge that you can rob someone of
25 illegal drugs. And second of all, hand of one, hand of all.

1 THE COURT: Anything from the State -- I mean, from the
2 Defense?

3 MR. YARBOROUGH: Your Honor, may I approach?

4 THE COURT: Just tell me generally what your charges
5 are, what are you requesting, and I'll tell you whether or
6 not I have them or not.

7 MR. YARBOROUGH: The general presumption of innocence
8 and --

9 THE COURT: Well, here's what I'm going to charge, and
10 you tell me -- this is what I've got out. The duties of the
11 Judge and the jury. The indictment is not evidence.
12 Multiple charges, each has to be considered separately.
13 Credibility of the witnesses. You want a charge on the
14 failure of the Defendant to testify?

15 MR. YARBOROUGH: Yes, sir.

16 THE COURT: Generally a good charge for a Defendant.
17 You want something on expert witnesses? We did have one
18 expert witness.

19 MR. YARBOROUGH: Yes, sir, Your Honor.

20 MS. WHITE: Yes, sir.

21 THE COURT: Okay. Presumption of innocence, reasonable
22 doubt. Circumstantial evidence?

23 MS. WHITE: Yes, sir.

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

25 THE COURT: Hand of one is hand of all. Attempted