

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

MELVIN DEVALE THOMASON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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1 STATE OF SOUTH CAROLINA

2 IN THE COURT OF GENERAL SESSIONS

3 COUNTY OF GREENVILLE

4
5 STATE OF SOUTH CAROLINA :

6 :

7 -vs-

8 :

TRANSCRIPT OF RECORD

9 :

MELVIN THOMASON

10 :

11 October 3, 2007

12 Greenville, South Carolina

13
14 B E F O R E:

15 HONORABLE LARRY R. PATTERSON, Judge.

16
17 A P P E A R A N C E S:

18 DOUGLAS WEBB, ESQ.

19 Attorney for the Plaintiff

20 DANIEL FARNSWORTH, ESQ.

21 Attorney for the Defendant

22
23
24 MARY E. DIGIROLAMO

25 Court Reporter

I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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STEPHEN KISER

Mr. Webb	25			
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Mr. Farnsworth		36		
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APRIL BENSON

Mr. Webb	43			
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Mr. Farnsworth		56		
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ERIC MUNOZ

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Mr. Farnsworth		62		
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TRAVIS PEARSON

Mr. Webb	65			
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Mr. Farnsworth		N/A		
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JOE BROWNING

Mr. Webb	70			
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Mr. Farnsworth		N/A		
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	<u>EXHIBITS</u>	<u>MARKED</u>	<u>FILED</u>
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3	S2 - Photo	16	56
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17 CHARGE OF THE COURT 91

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1 THE COURT: Y'all ready?

2 MR. WEBB: The State is ready.

3 MR. FARNSWORTH: Judge, I'm waiting on a -- there it
4 is.

5 THE COURT: What you waiting on?

6 MR. FARNSWORTH: They didn't have -- she got me a
7 jury information list.

8 THE COURT: If you had been here Monday morning you
9 would had have one.

10 MR. FARNSWORTH: I have already been by the Clerk's
11 office. They're doing it on the computer now and I
12 didn't know that. Don't know how to use the computer
13 either.

14 THE COURT: Oh, okay. Is your client here?

15 THE DEPUTY: I'm waiting on him to come up. They
16 hadn't sent him up yet.

17 THE COURT: All right. We might as well start
18 bringing the jurors up. We're probably going to need a
19 lot of space in the courtroom because it's 10 and five
20 strikes. So we have to bring up extra jurors. Okay.
21 It's armed robbery, right?

22 MR. WEBB: Yes, Your Honor.

23 THE CLERK: Mr. Farnsworth, do you have a witness
24 list?

25 MR. FARNSWORTH: Oh, okay. Your Honor, it would

1 just be the defendant if anybody. Do you want me to make
2 a list of that?

3 THE COURT: No. Are you going to have evidence that
4 he had a deadly weapon or he represented to have one?

5 MR. WEBB: Your Honor, that he had a deadly weapon.

6 (A discussion was held off the record.)

7 THE BAILIFF: Are you ready, Judge?

8 THE COURT: Yeah, we're ready.

9 (Jury selection began at 9:15 a.m.)

10 THE COURT: All right. Ladies and gentlemen, we are
11 going to select a jury this morning in the case, a
12 criminal case between the State and Melvin Duvall
13 Thomason. Would you stand up, Mr. Thomason, and face the
14 jury panel, please? Do any of you, ladies and gentlemen,
15 know Mr. Thomason?

16 (No response from the jury panel.)

17 THE COURT: Okay. Thank you. You may be seated.
18 I need to ask you if you know anything about this case
19 or if you've heard anything about this case. If you
20 have you need to tell me what you know about it. The
21 allegations are that on December the 13th of 2005,
22 that -- while armed with a deadly weapon, Mr. Thomason
23 robbed the Spinx station. Where is the location of the
24 Spinx station?

25 MR. WEBB: Your Honor, it's on Haywood Road in

1 Greenville County.

2 THE COURT: The Spinx station on Haywood Road. Do
3 you know anything about this case? There's also an
4 allegation of an assault and battery of a high and
5 aggravated nature on the same date and time involving a
6 Steven Kiser, K-i-s-e-r. Have any of you, ladies and
7 gentlemen, heard or do you know anything about this case?

8 (No response from the jury panel.)

9 THE COURT: Okay. To these charges Mr. Thomason
10 pleads not guilty and that's the reason we're here today.
11 The plea of not guilty places the burden of proof on the
12 State to prove him guilty beyond a reasonable doubt. And
13 trying this case for the State will be Mr. Webb, if
14 you'll stand up please, and Mr. Farnsworth for the
15 defendants. Do any of you -- Mr. Mormon is going to be
16 sitting at the table too. You may know him. And this
17 lady here. Do any of you know any of the folks standing
18 up?

19 (No response from the jury panel.)

20 THE COURT: Okay. Thank you. All right. Do any of
21 you have any close personal friends or relatives who work
22 in the circuit solicitor's office? Yes, ma'am, if you
23 would stand up, please.

24 MS. ALDERMAN: My mother is Susan Alderman, and
25 she's a victim advocate.

1 THE COURT: Okay. You told me that Monday morning.
2 And your name?

3 MS. ALDERMAN: Eliza Alderman.

4 THE COURT: You told me that wouldn't effect you one
5 way or the other, that you could be fair and impartial in
6 a criminal trial?

7 MS. ALDERMAN: Yes, sir.

8 THE COURT: Okay. All right. Ladies and gentlemen,
9 I'm going read to you a list of witnesses, possible
10 witnesses. If you know any of these witnesses I'm going
11 to ask you to stand and tell me how you know these
12 witnesses. One would be Stephen Kiser, K-i-s-e-r,
13 another would be April Benson, B-e-n-s-o-n, and Eric
14 Munoz, if I pronounced that correctly, M-u-n-o-z,
15 Lieutenant Joe Browning of the Greenville Police
16 Department, Officer Travis Pearson, Greenville Police
17 Department, Detective Wilbur Bruce of the Greenville
18 Police Department. Do any of you know any of those
19 possible witnesses? Yes, sir, would you stand up? Give
20 us your name first?

21 MR. IRICK: My name is Ed Irick. And I do not
22 personally know officer Browning, but I have heard a lot
23 about him through my son who is on the Greenville Police
24 Department, and works for Officer Browning, but I don't
25 know him, have any specific ---

1 THE COURT: All right. The fact that you've heard
2 of him, or the fact that your son -- he works for the
3 Greenville Police Department?

4 MR. IRICK: Yes, sir.

5 THE COURT: Sir, could you be fair and impartial in
6 a criminal trial?

7 MR. IRICK: Yes.

8 THE COURT: Could you be fair to the defendant and
9 fair to the State, and decide this case only on the
10 evidence and testimony you heard?

11 MR. IRICK: Yes.

12 THE COURT: Thank you. All right. Ladies and
13 gentleman, the -- have any of you been the victim of a
14 violent crime, such as robbery, or assault and battery?
15 If you have, if you have been the victim, or any members
16 of your family have been -- close members of your family,
17 children, parents, been members -- been assaulted, or
18 battered, or robbed, would you please stand? Yes, sir,
19 your name?

20 MR. HASKELL: Hans Haskell.

21 THE COURT: Okay. And you -- were you the victim or
22 someone else?

23 MR. HASKELL: I was the victim. I was assaulted
24 when I was 15.

25 THE COURT: When you were 15. And about how long

1 ago was that?

2 MR. HASKELL: Oh, you're cruel. I'm 36 now.

3 THE COURT: I'm sorry?

4 MR. HASKELL: I'm 36 now.

5 THE COURT: Okay. Thank you, sir. Could you be
6 fair and impartial in a criminal trial?

7 MR. HASKELL: I believe so.

8 THE COURT: Well, you'll take an oath to do that.
9 Would you follow your oath to be fair to both parties?

10 MR. HASKELL: Yes.

11 THE COURT: Thank you, sir. Ladies and gentlemen,
12 the jury system works well in South Carolina. I've been
13 all over the state. I can't speak for other states but
14 it does in South Carolina. Twelve jurors decide the
15 facts of the case. If for any reason you could not
16 follow your oath, you will take an oath to be fair and
17 impartial as to both these parties, the State and Mr.
18 Thomason, if you could not be fair and impartial because
19 of the experiences you've had with the court system or
20 for any other reason, would you please stand?

21 (No response from the jury panel.)

22 THE COURT: Okay. We'll select the jury in this
23 case. As your name is called I'm going to ask you just
24 to stand where you are and you will either be seated or
25 excused. And the charges of this nature the defendant

1 gets 10 preemptory challenges, the State gets five.
2 We're ready to go. Madam Clerk. Just stand in place.
3 And if you're seated, bring your personal items and come
4 forward and take a seat in the jury box.

5 THE CLERK: Number 151, Ronald Wilson. What says
6 the State?

7 MR. WEBB: Please present this juror.

8 THE CLERK: What says the defendant?

9 MR. FARNSWORTH: Please excuse the juror from this
10 case.

11 THE CLERK: You're excused from this case. Number
12 155, Dianne Bolden. What says the State?

13 MR. WEBB: Please excuse this juror.

14 THE CLERK: You're excused from this case. Number
15 51, Charles Fisher. What says the State?

16 MR. WEBB: Please present this juror.

17 THE CLERK: What says the defendant?

18 MR. FARNSWORTH: Please seat the juror.

19 THE CLERK: Please have a seat in the jurors' box.
20 Number 2, Eliza Alderman. What says the State?

21 MR. WEBB: Please present this juror.

22 THE CLERK: What says the defendant?

23 MR. FARNSWORTH: Please excuse the juror.

24 THE CLERK: You're excused from this case. Number
25 1101, Lachina McGhee. What says the State?

1 MR. WEBB: Please present this juror.

2 THE CLERK: What says the defendant?

3 MR. FARNSWORTH: Please seat the juror.

4 THE CLERK: You may have a seat in the jurors' box.
5 Number 149, Sherwood Williams. What says the State?

6 MR. WEBB: Please seat the juror.

7 THE CLERK: What says ---

8 MR. FARNSWORTH: Please -- I'm sorry. Please seat
9 the juror.

10 THE CLERK: You may have a seat in the jurors' box.
11 Number 120, Traci Revis. What says the State?

12 MR. WEBB: Please present this juror.

13 THE CLERK: What says the defendant?

14 MR. FARNSWORTH: Please seat the juror.

15 THE CLERK: You may have a seat in the juror's box.
16 Number 148, Kristin Williams. What says the State?

17 MR. WEBB: Please present this juror.

18 THE CLERK: What says the defendant?

19 MR. FARNSWORTH: Please seat the juror.

20 THE CLERK: You may have a seat in the jurors' box.
21 102, Joseph McKinney. What says the State?

22 MR. WEBB: Please present this juror.

23 MR. FARNSWORTH: Please excuse this juror from this
24 case.

25 THE CLERK: You're excused from this case. 103,

1 Joseph Michael. What says the State?

2 MR. WEBB: Please present this juror.

3 THE CLERK: What says the defendant?

4 MR. FARNSWORTH: Please excuse the juror.

5 THE CLERK: You're excused from this case. Number
6 3, Myra Ashley. What says the State?

7 MR. WEBB: Please present this juror.

8 THE CLERK: What says the defendant?

9 MR. FARNSWORTH: Please seat the juror.

10 THE CLERK: You may have a seat in the jurors' box.

11 154, Joseph Bearden, Jr. What says the State?

12 MR. WEBB: Please excuse this juror.

13 THE CLERK: Okay. You're excused from this case.

14 Number 80, Tiffany Hudgins. What says the State?

15 MR. WEBB: Please present this juror.

16 THE CLERK: What says the defendant?

17 MR. FARNSWORTH: Please seat the juror.

18 THE CLERK: You may have a seat in the jurors' box.

19 48, Louis Eisenberg. What says the State?

20 MR. WEBB: Please present this juror.

21 THE CLERK: What says the defendant?

22 MR. FARNSWORTH: Please excuse the juror.

23 THE CLERK: You're excused from this case. Number

24 29, Raymond Crawford. What says the State?

25 MR. WEBB: Please excuse this juror.

1 THE CLERK: You're excused from this case. 153,
2 Bramon Wooten. What says the State?

3 MR. WEBB: Please present this juror.

4 THE CLERK: What says the defendant?

5 MR. FARNSWORTH: Please seat the juror.

6 THE CLERK: You may have a seat in the jurors' box.

7 45, John Duncan. What says the State?

8 MR. WEBB: Please excuse this juror.

9 THE CLERK: You're excused from this case. 75,
10 March Hensley. What says the State?

11 MR. WEBB: Please present this juror.

12 THE CLERK: What says the defendant?

13 MR. FARNSWORTH: Please seat the juror.

14 THE CLERK: You may have a seat in the jurors' box.

15 Number 44, Teresa Duck. What says the State?

16 MR. WEBB: Please present this juror.

17 THE CLERK: What says the defendant?

18 MR. FARNSWORTH: Please seat the juror.

19 THE CLERK: You may have a seat in the jurors' box.

20 32, Doris Cumby. What says the State?

21 MR. WEBB: Please present this juror.

22 THE CLERK: What says the defendant?

23 MR. FARNSWORTH: Please seat the juror.

24 THE CLERK: You may have a seat in the jurors' box.

25 92, Deborah Lancaster. What says the State?

1 MR. WEBB: Please present this juror.

2 THE CLERK: What says the defendant?

3 MR. FARNSWORTH: Please seat the juror.

4 THE CLERK: You may have a seat in the jurors' box.

5 THE COURT: One alternate, two and one.

6 THE CLERK: 59, Ann Gale. What says the State?

7 MR. WEBB: Please present this juror.

8 THE CLERK: What says the defendant?

9 MR. FARNSWORTH: Please excuse the juror.

10 THE CLERK: You're accused from this case. 112,

11 Suzanne Patterson. What says the State?

12 MR. WEBB: Please present this juror.

13 THE CLERK: What says the defendant?

14 MR. FARNSWORTH: Please seat the juror.

15 THE CLERK: You may have a seat in the jurors' box.

16 THE COURT: Any question about the selection of the

17 jury, Mr. Webb?

18 MR. WEBB: Nothing from the State, Your Honor.

19 MR. FARNSWORTH: Mr. Farnsworth?

20 MR. FARNSWORTH: No, Your Honor.

21 THE COURT: All right. All right, ladies and

22 gentlemen, I don't believe y'all have to come back this

23 week. Thank you for being here. And if you'll go back

24 down stairs and turn your badges in, she'll give you a

25 statement to show your employer, if you need it, and tell

1 you about how you will be paid. Thank you so much.

2 (The jury panel exited the courtroom at 9:40 a.m.)

3 THE COURT: Do you want to swear the jury, Shirley?
4 Stand please and raise your right hand, the clerk will
5 give you the oath. Please respond by saying I will when
6 you take the oath.

7 (The jury was sworn to well and truly try this case
8 at 9:41 a.m.)

9 THE CLERK: Thank you. You may be seated.

10 THE COURT: All right. Ladies and gentlemen, before
11 we begin this trial I need to tell you that you can't
12 discuss this case with anyone. Do not discuss it with
13 each other. Do not talk to anybody about this case until
14 the case is over and you start your deliberations. I
15 know you'll pay close attention to the trial.

16 And I'm going let you step back to the jury room.
17 This is where you'll be taking breaks and where you will
18 be deliberating, become here in the hall. We have two
19 jury rooms. You can use the rest rooms in both jury
20 rooms if you want to. And I'm going to let you step out
21 and see if there is any questions of law that I need to
22 go over, and then I'll bring you back out in about 10 or
23 15 minutes and we'll start the trial.

24 I may -- it looks like we'll be here until lunch
25 time. You'll finish today, but I mean probably. I can't

1 promise that. But I think you will. And I may go ahead
2 and order your lunch so it will be here when we get ready
3 to take a break. Okay. Y'all would just step out just
4 for a minute.

5 (The jury exited the courtroom at 9:42 a.m.)

6 THE COURT: Have him bring the menus up and we'll
7 order lunch for them.

8 THE BAILIFF: All right, sir.

9 THE COURT: Do you have any issues that we need to
10 take up?

11 MR. WEBB: Nothing from the State, Your Honor.

12 MR. FARNSWORTH: No, Your Honor.

13 THE COURT: Okay. All right. We'll start ---

14 MR. FARNSWORTH: Your Honor, could -- I just want --
15 could I use the bathroom before we start? Won't take but
16 a second.

17 THE COURT: Oh, we're going -- I'm going to order
18 lunch for them so it'll be about 15 minutes.

19 MR. FARNSWORTH: Okay.

20 THE COURT: Okay. We'll start back about 10
21 o'clock.

22 MR. WEBB: Can I mark these items?

23 (Plaintiff's Exhibit Numbers 1 through 8 were marked
24 for identification.

25 (A short recess was taken, after which, the trial

1 continued as follows:)

2 THE COURT: Y'all ready?

3 MR. WEBB: Yes, Your Honor.

4 THE COURT: Bring the jury in.

5 (The jury entered the courtroom at 10:09 a.m.)

6 THE COURT: Ladies and gentlemen, we're about to
7 begin the trial between the State of South Carolina and
8 Melvin Duvall Thomason. This case comes to us on two
9 indictments which I hold in my hand, one alleging armed
10 robbery, the other alleging assault and battery of a high
11 and aggravated nature.

12 Now, to these indictments Mr. Thomason pleads not
13 guilty. And that's the reason we're here. And his plea
14 of not guilty places the burden of proof upon the State
15 of South Carolina to prove him guilty of any crime
16 charged beyond a reasonable doubt.

17 Now, these indictments are just pieces of paper, and
18 these are not evidence in the case and should not be
19 considered by you. This is just the way we keep up with
20 the case, and the Clerk of Court keeps up with the cases
21 we have. You are to decide this case on the evidence and
22 testimony that you hear in the courtroom.

23 Now, his plea of not guilty does place the burden of
24 proof upon State of South Carolina to prove him guilty
25 beyond a reasonable doubt. A person charged with a

1 criminal offense is never required to prove themselves
2 innocent.

3 Now, ladies and gentlemen, you are the sole judges
4 of the facts of the case. The facts are what you
5 determine them to be from the evidence and testimony that
6 comes into court. Facts are not what the attorneys say
7 they are. The facts are what you determine them to be
8 based on the evidence and testimony. You have to apply
9 the facts to the law that I'll go over with you at the
10 conclusion of the case and write a verdict that speaks
11 the truth.

12 Now, as I told you before you went out, do not
13 discuss the case with anyone, and do not make up your
14 mind as to what the verdict should be until you've heard
15 the entire case, and these attorneys have had a chance to
16 stand up and make their last remarks to you and I go over
17 the law with you. You will evaluate the case as we go
18 along, but don't make up your mind until it's over and
19 you start deliberating in the jury room.

20 Okay. Now, we'll start with opening statements if
21 the lawyers care to make opening statements. After that
22 you will then hear the evidence -- we'll receive the
23 evidence and you will hear the testimony in this case.
24 After the evidence and testimony is in then the lawyers
25 can stand up and make their summations to you. Then

1 after that I'll go over the law and then you will go back
2 and deliberate until you reach a unanimous verdict in
3 this case.

4 We'll begin this trial with opening statements.
5 First by the State. Mr. Webb.

6 MR. WEBB: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 MR. WEBB: May it please the Court? Members of the
9 jury, good morning. We are here today because the
10 defendant is being charged with two crimes. One, armed
11 robbery. And the second crime is assault and battery of
12 a high and aggravated nature.

13 Now, in South Carolina law for armed robbery if
14 someone robs someone, takes items or money from someone
15 while using a deadly weapon, then that is armed robbery.
16 And the evidence will show that is what the defendant did
17 December 13, 2005.

18 The second charge, assault and battery of a high and
19 aggravated nature, that is when someone hits, kicks or
20 throws an object, and if that object is a deadly weapon
21 then it's an assault and battery of a high and aggravated
22 nature. The evidence will also show that that is what
23 the defendant did December 13, 2005.

24 On that day the defendant went into the Spinx gas
25 station on Haywood Road, angry that he could not have a

1 credit card that worked to pump gas. He didn't have any
2 money or cash, so he walked into the store and demanded
3 that the store clerks turn on the gas pumps. They
4 couldn't. It was against store policy. And he
5 threatened them and walked out to try a different card.

6 After he threatened them, Stephen Kiser, one of
7 store clerks pressed the emergency panic button near the
8 cash register. April Benson called the police. They
9 were scared. A few seconds later the defendant comes
10 walking into the store, mad, angry. He grabs a bottle of
11 wine from a display near the front of the store, near the
12 cash register, grabs a bottle of wine, a Merlot, picks it
13 up and slings it at Stephen Kiser, the store clerk who
14 was behind the counter. Stephen raises his right arm and
15 it hits his arm and shatters. He falls down on the
16 ground, wine everywhere, and he crawls underneath and
17 behind the counter for safety.

18 The defendant then goes back to that same display,
19 grabs another bottle of wine, sees April Benson, the
20 store manager is on the phone with the police. He grabs
21 a bottle of wine and holds it over his head and demands
22 that she hangs up from the police, stops talking to the
23 police. Afraid, she hangs up. He then, with the bottle
24 over his head and standing over her says, give me all
25 that money in the register or I'm going to hit you with

1 this bottle of wine. Afraid, terrified April Benson
2 opens the register and hands the defendant the money that
3 was inside.

4 The defendant has the money in his left arm, the
5 bottle of wine still over his head when the police come
6 running into the store, three police officers with
7 weapons drawn. They demand that the defendant gets onto
8 the ground. They order him on the ground. He doesn't
9 obey. He refuses. He still stands there with the bottle
10 of wine over his head and the money in his left arm.
11 They try to arrest him and he runs. He runs out of the
12 store, the money goes everywhere, the bottle of wine is
13 broken. He runs out of the store and the police officers
14 chase him. There is a struggle and the defendant is
15 arrested, subdued.

16 Now, today you will hear from five witnesses. They
17 will get up here right on the stand and testify and tell
18 you exactly what happened that day, December 13, 2005.
19 You will hear from Stephen Kiser, the store clerk who was
20 hit by that bottle of wine. You will hear from April
21 Benson, the store manger who was behind the register and
22 who was threatened by that bottle of wine, and you will
23 hear how scared she was that day. You will hear from a
24 customer that came into the store and saw the defendant
25 sling the bottle of wine at Stephen Kiser. In addition,

1 you will hear from two of the officers that went into the
2 store, saw the defendant with the bottle of wine raised
3 above his head and the money in his left arm. Then after
4 you hear that testimony you will also see a store video,
5 a surveillance video from the Spinx store that shows the
6 defendant doing just what I have described to you.

7 And after you hear this testimony and you see this
8 video I ask that you find the defendant guilty of both
9 armed robbery and assault and battery of a high and
10 aggravated nature. Thank you.

11 MR. FARNSWORTH: Please the Court? Ladies and
12 gentlemen of the jury, when we first began to pick you I
13 was introduced. I'm Dan Farnsworth. I represent Mr.
14 Melvin Thomason who was charged -- allegedly charged with
15 these two offenses that you have been told about by
16 Solicitor Webb.

17 Now, if you'll remember when you were picked you
18 took an oath in this case, and in that oath you said that
19 you would well and truly try this case according to the
20 law and evidence. And that's -- that's what your
21 function is. And by that -- by the evidence in the case,
22 this means anybody that testifies in this trial, the
23 testimony they give, photographs, things like that is
24 evidence in the case. You're the judges of the evidence.
25 You'll hear all of this, all these facts, get in all

1 these exhibits that are going to come in, including the
2 tape that the solicitor told you about.

3 And before you decide on anything you will be told
4 what the law is by Judge Patterson. He'll tell you what
5 the law is in criminal cases. He'll tell what the law is
6 on armed robbery. He'll tell you what the law is on
7 assault and battery of a high and aggravated nature. And
8 you will take that law and try to apply it to the facts
9 as you determine them to be and reach a verdict in this
10 case.

11 As the judge told you you're not to -- until you get
12 this case, that means the case is over and you've been
13 told what the law is, you shouldn't at that point have
14 decided this case. It's not until you go into the jury
15 room because you're not supposed to talk about the case
16 until you get the law, then you will begin your
17 deliberations and decide what the verdict should be in
18 this case.

19 Now, you've heard the old adage there's always
20 another side to the story, this type thing, and that kind
21 of is really what our system is about. Everybody has an
22 opportunity to tell what happened and this type thing.

23 Now, the burden in every criminal case, and this is
24 one of the oldest and strongest burdens in criminal law
25 is that the State in every criminal case is required to

1 prove each and every element of each offense beyond a
2 reasonable doubt.

3 And another law that is also important in a criminal
4 case and always applies in a criminal case is that every
5 accused person is presumed to be innocent. And that is
6 the greatest presumption known to law. That means from
7 the minute a person is charged with a crime he's presumed
8 to be innocent, all the way during every stage of that
9 trial until you have been charged with the law, heard the
10 facts and found beyond a reasonable doubt that that
11 person is guilty beyond a reasonable doubt.

12 So you've got two burdens there you to need to keep
13 in mind as we go through this trial. It's not going to
14 be a real lengthy trial. Hopefully we'll be through
15 today.

16 Now, in this case, as in every criminal case, my
17 client, Mr. Thomason, is not required to prove his
18 innocence to you, ladies and gentlemen. There is not one
19 burden of proof on him. He's not required to testify.
20 He's not required to present testimony. And that again
21 goes back to those two burdens. That's the reason for
22 those two burdens. That's the reason he doesn't have to
23 testify or present evidence, because the State has the
24 entire burden of proving guilt.

25 Now, you will have -- as the solicitor said, you'll

1 hear from officers that were there, there will be
2 photographs that will be introduced into evidence. And
3 this store happened to have a videotape security system,
4 and you will see the tape of this incident, and you will
5 be able to determine from that tape what the State
6 alleges what Mr. Thomason did or didn't do and perhaps
7 that will help you in deciding this case.

8 But we appreciate your service, and I know you'll
9 give this case the attention it deserves. Thank you.

10 THE COURT: Mr. Webb, call your first witness.

11 MR. WEBB: The State calls to the stand Stephen
12 Kiser.

13 THE CLERK: Mr. Kiser, if you'll step up here,
14 please. Place your left hand on the Bible and raise your
15 right hand.

16 STEPHEN KISER

17 Having been first duly sworn, testified as follows:

18 THE CLERK: Thank you. You may be seated. State
19 your full name for the record, please.

20 THE WITNESS: Stephen Joel Kiser.

21 THE CLERK: Thank you.

22 DIRECT EXAMINATION

23 BY MR. WEBB:

24 Q Mr. Kiser, I'm going to stand back here so the jury
25 can hear you better. Mr. Kiser, where do you currently

1 work?

2 A I currently work for the Waffle House and BP gas
3 station in Gaffney.

4 Q How long have you worked there?

5 A I've worked at the Herald Journal for two months
6 (sic). And I worked at the BP gas station, I start next
7 week.

8 Q Okay. Have you ever worked for the Spinx gas
9 station located on Haywood Road in Greenville?

10 A Yes, sir.

11 Q When did you work there?

12 A It was within 2005. I believe it was March of 2005
13 to maybe December or January of 2006.

14 Q And what was your title there? What did do you for
15 Spinx?

16 A I was a cashier.

17 Q Now, I want to turn to the events on December 13th
18 of 2005. Were you working that day?

19 A Yes, sir.

20 Q Do you remember that day quite well?

21 A Pretty well.

22 Q Now, do you remember a person pulling up in a Dodge
23 Ram truck that day?

24 A Yes, sir.

25 Q Can you tell me what happened after that person

1 pulled up in that truck?

2 A Well, he kind of got my attention because when he
3 pulled up he was behind an older gentleman in a brown car
4 and he slammed on brakes. I thought he was going to hit
5 him. So that's what brought my attention to begin with.
6 And then when he came in the store -- actually the pump,
7 we have an alarm on the pump when they try to pay for
8 gas, and so the pump alarm was going off. So we put on
9 one of the intercom speakers and told him he had to come
10 in and pay for his gas.

11 Q So what happened when he came in?

12 A Well, when he came in he gave me the credit card had
13 me run it. It kept saying declined. And then he
14 continued to get irate, upset.

15 Q Did he say anything to you?

16 A He was -- I do remember him cussing. I don't
17 remember exactly what was said, but I do remember him
18 cussing and getting upset.

19 Q After he did that what happened then?

20 A April Benson, the manager, came in from the back.
21 She was doing paperwork. She came up from the back to
22 try to calm him down. And it seemed like everything I
23 said was kind of upsetting him, so she was talking to him
24 and trying to calm him down.

25 Q How did he react to April Benson?

1 A He seemed to do all right at first, and then he
2 just -- when she asked him did he have another credit
3 card, could he go get another credit card, he made a
4 reference that -- something about he'll go outside to get
5 the credit card but if it doesn't take it then we'll
6 regret it not taking it, or something along those lines.

7 Q Okay. So -- and so what -- then what happened?

8 A That's when I hit the panic button and she got on
9 the phone with the police.

10 Q At the time that you hit the panic button and she
11 called the police, the defendant had already exited the
12 store that first time?

13 A Well, he was exiting as I hit the panic button and I
14 turned around and asked her, did she hear what he said,
15 and she said I'm calling the police. So that's when she
16 started calling the police.

17 Q Now, why did you press the panic button?

18 A I just felt nervous. I didn't like the situation
19 when he pulled up. I just felt something was going to
20 happen when he pulled up. So I just -- you know, I
21 thought he was mad, or ill. You know, we get customers
22 like that everyday. So I decided just to wait until he
23 got in there to see how things would go. But when he
24 came in and the way he was talking and his attitude when
25 he left that second time, I didn't have a doubt that if

1 he come back in and that credit card wouldn't take, that
2 he probably hurt us if he had the opportunity.

3 Q Now, that person that was in the gas station that
4 day, do you see that individual in the courtroom?

5 A Yes, sir.

6 Q What is he wearing?

7 A A red shirt with a zig-zagged tie, I believe it's
8 red, gold and black.

9 Q Thank you. Do you remember what he was wearing that
10 day?

11 A I believe it was some type of jersey outfit. I
12 can't remember exactly what it was, but I do remember it
13 was some type of sports outfit. His shirt was short
14 sleeved. And I don't remember what kind of pants he had
15 on because he walks up to the register you can't really
16 see that, and then when he walked back in the second time
17 I wasn't paying him much attention because I had a line
18 of customers.

19 Q Tell me what happened when he walked in that second
20 time?

21 A He walked in the second time. He seemed to have,
22 you know, calmed down a little bit until I believe he
23 heard April describing him because ---

24 Q While she -- while she was on the phone?

25 A Yeah, she was describing him. And then all of a

1 sudden he became really fidgety and then I seen him pick
2 up the wine bottle. And beside the register we had a
3 lottery display for the lottery tickets. And so when I
4 seen him pick up the bottle I didn't know if he was
5 going to hit me or run up with it, so I stepped to the
6 side and put my arm up in front of me. That's when he
7 hit me with the wine bottle when he threw the wine bottle
8 at me.

9 Q Now, which arm did it hit again?

10 A I believe it was my right, because I believe I
11 pulled up my right arm as I was coming across and he hit
12 me across my wrist.

13 Q How hard did he throw the bottle of wine?

14 A It was pretty hard. I thought he had broke it until
15 the EMS came out and checked it, and said it probably was
16 maybe a fracture but it wasn't broke.

17 Q So when you raised your arm, how high did you raise
18 it and where did it hit exactly on your arm?

19 A I just -- I raised it to cover my face. I can't
20 remember exactly if I was standing or crouching. I can't
21 remember how I was standing, but I remember I covered my
22 face with my arm.

23 Q So if you didn't raise your arm that day, the bottle
24 could have hit you in the face?

25 A He would have hit it in my face, because my arm --

1 where he hit on my wrist, right below your wrist bone is
2 where he hit and when he hit me it was right in front of
3 my face.

4 Q What happened to the bottle of wine once it hit your
5 forearm?

6 A I can't remember if it broke then or if it fell and
7 broke, but I do remember it broke.

8 Q Tell me what happened after -- after the bottle of
9 wine hit you?

10 A Well, the force made me hit the ground, kind of
11 startled me so I fell to the ground. And then I thought,
12 you know, I really can't be of any use, I had my arm up
13 against me, I thought it was broke. I really could be of
14 no use. I was shaking because I was nervous. So I
15 thought he handled -- it was kind of like a split second
16 decision. I was thinking, you know, he handled April
17 better when she was trying to calm him down, let me get
18 out of his sight, maybe he didn't feel, you know, like
19 he's got to hit me, or hit her to try to ---

20 Q So where did you go in the store after he hit you?

21 A We had an office station kind of thing behind the
22 cigarette case, so I crawled around because I was at the
23 register, so when I crawled around it's right there at
24 the office thing, so I crawled around and sat in the
25 chair in the office and had my arm up against me.

1 Q Could you still hear what was going on at the
2 register area?

3 A Yeah, I could hear what was going on, and I can also
4 see some things on the camera monitor, but it was kind of
5 going so fast that I didn't have time to think that I may
6 need to really pay real good attention to what was going
7 on, plus my arm was hurting. I was nervous, and you
8 know, I just wasn't thinking, you know, I should pay
9 attention to everything, but ---

10 Q So tell me what you heard and what you saw after you
11 went to that area?

12 A Well, when I fell, when he threw the wine bottle and
13 he had hit me, as I was falling I seen him turn around to
14 grab a second wine bottle. So I just -- I knew he was
15 coming back, I just didn't know exactly what was he was
16 going to do. So when I crawled around -- I can't
17 remember if it was as I was crawling around or after I
18 had crawled around I heard him tell my manager to get off
19 the telephone.

20 Q Um-hm.

21 A And so she hung up the phone. I can't remember if
22 she said anything, but she did hang up the phone. And he
23 told her to -- I could hear him say to give him the
24 money.

25 Q Now, at this point were you able to see?

1 A Yeah, I could see April had her hands up in front of
2 her face and he had the wine bottle held up above his
3 head.

4 Q So at this point he asked for the money, and then
5 what happened?

6 A I remember her saying something about she couldn't
7 get the register open, or I heard numbers hitting, or
8 something, there was some reason why I felt like she
9 couldn't get the register open, and he kept demanding
10 and, you know ---

11 Q Do you remember exactly what he said that day? Did
12 he ever threaten April Benson that day?

13 A I do believe I heard him threaten her, but I can't
14 remember exactly what he said to her. Like I think he
15 said something about hitting her, but I can't be sure
16 exactly how it came out, so ---

17 Q Was -- did April -- was she able to open the
18 register?

19 A She was finally able to open the register, and so
20 she gave him the money. And I was kind of not paying
21 attention because -- I can't remember if I heard sirens,
22 or if I heard the door open or something, then I heard
23 the police soon after I heard the register open. It was
24 like I heard the register open and then I heard her say
25 something, and it was like a split second, it was like

1 the next thing I knew the police was coming in, and I
2 heard the ---

3 Q What did -- did you hear the police officer saying
4 anything to the defendant?

5 A I don't really recall. At that point it had done
6 got -- you know, I was just relieved. I heard them say
7 police. I do know I heard them say police. But when I
8 heard police I thought, you know, at least we got
9 somebody here who can handle the situation, and I kind
10 of, you know, dozed out. She ---

11 Q So after you heard the police come in, then what
12 happened?

13 A Then that's when April ran around to the back where
14 I was at, and I heard things being knocked over. I heard
15 him keep saying freeze. I did hear that, or freeze like
16 a hundred times. And then when we came back out they was
17 trying to get him out from underneath the truck.

18 Q Okay. So -- so the defendant exited -- ran out of
19 the store?

20 A Yes.

21 Q Okay. After the incident, did you receive any sort
22 of medical treatment for your arm that the bottle of wine
23 hit?

24 A We had EMS come out and check my arm. And
25 that's ---

1 Q And what did EMS say to you?

2 A They told me it could be a hairline fracture, that
3 they doubted that it was broken, because I could actually
4 move my fingers. And they said that what they would
5 advise is for me to -- if I wanted to I could still go to
6 the hospital. They couldn't tell me I couldn't go to the
7 hospital, but what they advised is maybe wait and see.
8 And if it was just a hairline fracture, there really
9 wasn't much they could do except give pain medication,
10 but I could probably go to my doctor cheaper than what it
11 would be to go to the emergency room.

12 Q So you didn't go to the hospital that day?

13 A No, I did not.

14 Q Okay. Was your arm hurting at that time?

15 A Yeah, it was hurting so bad for -- it was probably
16 about 30 minutes to an hour, I couldn't move my fingers,
17 and then by the time EMS got there I could wiggle my
18 fingers but ---

19 Q How long did your arm hurt after the incident?

20 A It hurt for probably about a month, month and a half
21 after it had happened. I guess the bruising and things.
22 It just -- every time I would set it on the register, you
23 know, typing digits, it would -- it would bother me.

24 MR. WEBB: Okay. Nothing further, Your Honor.

25 THE COURT: Mr. Farnsworth?

CROSS-EXAMINATION

BY MR. FARNSWORTH:

Q Okay. Mr. Kiser, weren't there pictures taken of your arm? Didn't one of the officers take pictures of your arm?

A I believe so, sir.

Q Okay. And did you go -- did you get any medical care at all for this injury?

A The EMS.

Q Other than that, did -- they told you it may be -- may be a fracture, may not be, is that what they told you?

A Yes, sir.

Q And my question is, after that did you get any medical treatment from a doctor or the hospital?

A No, sir.

Q Okay. And was it -- did it make a contusion, that means a cut, did it make a cut on your arm, or was it --

A Yes, sir, I know what that means. No, it didn't make a contusion.

Q Okay. So -- so it was a bruise, is that -- was it just a bruise?

A It was slightly bruised, yes, sir.

Q Okay. And did -- as I understand it, you're saying that Mr. Thomason took the wine bottle and threw it at

1 you, is that correct?

2 A Yes, sir.

3 Q Okay. And about how far away, you said at some
4 point you -- while all this was going you had other
5 customers in there. Was he the first customer up to the
6 counter when this happened?

7 A No, sir.

8 Q Okay. Who was there?

9 A It was a dark haired man. I do remember that. I
10 mean, I know he's here today. But from what I remember I
11 remember a dark haired man, and I remember him looking
12 over his shoulder when I put my arm up, and then he moved
13 off to the side. I don't know what happened to him after
14 that.

15 Q Okay. Okay. So then in if Mr. Harrison -- I mean,
16 Mr. Thomason threw the bottle at you, he would have been
17 right behind the first customer in line, is that right?

18 A I believe there was two people in front of him, but
19 actually he was over at the wine display is where he was
20 actually at.

21 Q Okay. And about how far is this, about like this,
22 from the wine counter to where you were?

23 A It would be close, maybe a little bit closer, maybe
24 a little farther but close.

25 Q Okay. All right. Now, you said that he came in the

1 first time and there weren't any threats or threaten to
2 hit you with a bottle or anything at that time, was
3 there?

4 A Sir, I told you when he left the first time to go
5 get other card he did threaten us.

6 Q All right. I'm talking about when he came in there
7 the first time, were there any threats made toward you?

8 A Not that I can remember.

9 Q And you were running the counter at that time?

10 A Yes, sir.

11 Q And no threats were made against you, and he was
12 just irate about the gas not being able to -- his credit
13 card not being able to be valid, is that correct?

14 A Yes, sir.

15 Q Or go through, the sale?

16 A Yes, sir.

17 Q And -- but at that point you went ahead and pushed
18 the panic button?

19 A When he walked out after he had threatened us the
20 first time.

21 Q Okay. And what is that -- is that -- does that go
22 straight to the police department, or where does that go?

23 A I'm not really sure. I do know you press the
24 button, I believe it goes to a second party and then the
25 police get the call from the second party.

1 Q Okay. Okay. Now, he came back in a second time and
2 that's when the wine bottle -- you were hit with the wine
3 bottle?

4 A Yes, sir.

5 Q Okay. And then you were under the counter and you
6 just could overhear some noise or some things that were
7 being said?

8 A Yes, sir.

9 Q All right. But you didn't see any -- you didn't see
10 any money being given to Mr. Thomason or anything like
11 that?

12 A No, sir, I did not see the money given to him, but I
13 did see him hold the wine bottle above his head.

14 Q Okay. And what threat did you hear specifically if
15 the money wasn't given to Mr. Thomason? What did Mr.
16 Thomason say?

17 A I can't remember the exact words he used, but he
18 made it well known that if she did not give him the money
19 he would harm her in some type of way physically.

20 Q All right. Do you remember giving a statement on
21 the day that this incident allegedly occurred?

22 A Yes, sir, I do.

23 Q I'll ask you to look at that and see if that's your
24 statement you gave?

25 A Yes, sir.

1 Q All right. And would you go down to the bottom of
2 the page, about three lines before the bottom where Mr.
3 Thomason -- where the -- Ms. Benson is saying where Mr.
4 Thomason, as you've testified, is telling -- telling Ms.
5 Benson to -- to give him the cash out of the register.

6 A Yes, sir.

7 Q All right. And do you see what he said he would do
8 if she didn't?

9 A I don't believe I have it written down here.

10 Q It's not in there, is it?

11 A No, sir, it's not.

12 Q So you just heard him say give me money out of the
13 register?

14 A No, sir, I did hear him threaten her, but ---

15 Q Well, why didn't you put this in the statement you
16 gave?

17 A Because ---

18 Q Do you want to look that over again?

19 A Because when you're blood pressure is up and you're
20 nervous and you're scared, and your arm hurts, and you
21 have pain, and you don't know what is going to happen
22 with the situation, sometimes you omit things.

23 Q Okay. Okay. But you -- but no question this is
24 your statement, you weren't forced to give it, you gave
25 it freely based on what you had just seen and heard?

1 A This is my statement. Yes, sir, I did give it
2 freely.

3 Q Okay. Now, did -- when the police got there, you
4 came out from behind the counter then, or after everybody
5 went outside?

6 A Well, actually when the police came, I heard police
7 and I heard freeze a couple times. I heard the ruckus.
8 April came back there and then that's when me and her
9 both walked around together. About that time he had -- I
10 can't remember if he had just run out the door, if he had
11 been out the door for a couple minutes, but we knew he
12 was outside. And when we looked out at the truck we
13 could see Mr. Thomason underneath the truck.

14 Q Okay. What is your store policy on cash that you
15 keep in the register? Is there a policy on the set
16 amount, or ---

17 A Yes, sir, there is, and I can't remember exactly
18 what it is, but I believe it's \$50.

19 Q Fifty dollars in the cash register?

20 A Yes, sir.

21 Q That's all you can keep?

22 A Yes, sir.

23 Q All right. And do y'all have a safe in there or
24 anything?

25 A Yes, sir, we do.

1 Q Okay. That's where, in the back of the store?

2 A No, sir, it's in the front underneath the lottery
3 tickets. Where you pull out the lottery tickets, it's
4 underneath that.

5 Q Okay. Is it a combination safe or ---

6 A No, it's a time release.

7 Q Time release, okay. And -- but you said your
8 register, the maximum you can keep in there is about \$50?

9 A That's what we're supposed to keep.

10 Q Okay. And did you -- did you see after everybody
11 had gone outside, you and Ms. Benson came out from behind
12 the counter, did you see any money on the -- anywhere in
13 the store?

14 A Yes, I don't remember if it was in the store, but I
15 do remember money in the parking lot.

16 Q Money was in the parking lot?

17 A Yeah, I do remember that.

18 Q Okay. But you don't remember any being in the
19 store?

20 A I don't remember if any was dropped in the store,
21 but the reason I remember about the parking lot is
22 because the wind was blowing it everywhere.

23 MR. FARNSWORTH: Okay. That's all I have of this
24 witness.

25 THE COURT: Mr. Webb?

1 MR. WEBB: Nothing from the State, Your Honor.

2 THE COURT: Thank you, sir. You can come down.

3 MR. WEBB: Your Honor, the State calls April Benson
4 to the stand.

5 THE CLERK: Ms. Benson, if you would step up here,
6 please. Place your left hand on the Bible, raise your
7 right hand.

8 APRIL BENSON

9 Having been first duly sworn, testified as follows:

10 THE CLERK: Thank you. You may be seated. And
11 state your full name for the record, please.

12 THE WITNESS: April Lashawn Benson.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MR. WEBB:

16 Q Good morning Ms. Benson.

17 A Good morning.

18 Q Where do you currently work?

19 A Charter Communications.

20 Q And how long have you worked there?

21 A I've been there since April of this year.

22 Q Is that in Greenville?

23 A Yes.

24 Q Did you ever work for the Spinx gas company?

25 A Yes.

1 Q How long did you work for Spinx?

2 A I worked there for four years.

3 Q What was your -- what did you start out? What was
4 your title when you first started out?

5 A When I first started I was just a cashier.

6 Q And then were you promoted?

7 A Promoted to assistant in a year and then to the
8 store manager.

9 Q How long were you a store manager?

10 A I was a store manager for about two years.

11 Q And as a store manager, what were your duties and
12 your responsibilities?

13 A My duties were to make the bank -- the daily bank
14 deposits, audit the store, do like beer audits, cigarette
15 audits, making sure all the inventory was still there.

16 Q Now, I want to turn to the events on December 13,
17 2005. Were you working at the Spinx on Haywood Road that
18 day?

19 A Yes.

20 Q And were you the manager at the store that day?

21 A Yes.

22 Q Do you remember an incident where you had to call
23 the police?

24 A Yes.

25 Q Can you just run the story from step one and tell me

1 exactly what happened and why you called the police?

2 A Well, when all -- when he first came in, I wasn't up
3 front, I was in the back, in the cooler doing a beer
4 audit, and I just heard some yelling, and cursing, some
5 profanity, telling him -- telling Stephen to cut the pump
6 on. And I went up front to see what was going on, to see
7 what was all the yelling about, to try to calm the
8 customer down.

9 Q And when you went up front what did you see?

10 A Stephen -- I asked Stephen to explain to me what was
11 happening. Stephen said that his credit card outside was
12 declined and ---

13 Q Did you see the individual that was cursing at
14 Stephen at that point?

15 A Yes.

16 Q And is that individual in the courtroom today?

17 A Yes, sir.

18 Q And what is he wearing?

19 A He's wearing a burgundy shirt with a tie.

20 Q Okay. Do you remember what he was wearing that day?

21 A Yes.

22 Q What was he wearing?

23 A A red -- a red jersey.

24 Q Now, do you remember happen after you approached and
25 Stephen explained to you what was going on? Then what

1 happened?

2 A When Stephen explained to me what was going on, I
3 just tried to talk to the customer, to let him know that
4 we couldn't cut the pump on because it's against store
5 policy, to actually have to pay at the pump or give cash
6 inside the store.

7 Q What was the defendant's response to that?

8 A He didn't like that, and I asked him if he could
9 go -- if he had another credit card. I showed him -- I
10 took the same card that he was using outside and swiped
11 the card, and I tried to show him on the register that it
12 was coming up declined, and asked if he had another card
13 that we could use, and I'd try that one.

14 Q And what happened with that other card?

15 A The other card, I don't think he ever brought it
16 into the store.

17 Q Okay.

18 A Because he went back outside.

19 Q So what happened -- I'm sorry to interrupt. What
20 happened when he went back outside? What did you do
21 then?

22 A He went back outside. He went to the truck to look
23 for another credit card. While he was outside in the
24 truck looking for another credit card, I was calling the
25 police.

1 Q And how long were you on the phone with the police
2 before the defendant came back into the store?

3 A Maybe five minutes. It might have been maybe two,
4 three minutes when I was letting them know.

5 Q And why did you call the police?

6 A Because when he went outside the store I heard him
7 when he said that I'm going outside to get another credit
8 card, and if the credit card didn't work, that we would
9 regret it.

10 Q So while you were on the phone with the police, what
11 happened when the defendant came become into the store?

12 A When he came back into the store I was still on the
13 phone giving a description of what the victim's vehicle
14 and him. I believe he heard me when I was giving the
15 description to the police, and that's when I heard the
16 bottle, the wine bottle shatter, and I turned around.

17 Q What did you see when you turned around?

18 A I seen the wine -- the bottle of wine on the floor
19 and Stephen was on the floor.

20 Q So you didn't actually see the defendant throw the
21 wine, you just saw the -- what resulted?

22 A Yeah.

23 Q Okay. So then what happened?

24 A That's when he turned around when I was on the phone
25 he told me, he grabbed another bottle of wine, he told me

1 to put the phone down.

2 Q And do you remember where he grabbed that bottle of
3 wine from?

4 A Yes, he grabbed it from the wine display in front of
5 the store.

6 Q And so he picked up the bottle of wine, and then he
7 told you to hang up the phone, then what happened?

8 A He told me to hang up the phone and give him all the
9 money out of the register.

10 Q Where was the bottle of wine? How was he holding it
11 at that time?

12 A He was holding it above his head. And told me to
13 give him all the money out of the register or he'll hit
14 me with the bottle.

15 Q So did you give the defendant the money?

16 A Yes, after I finally got the register open.

17 Q And how much money approximately did you give the
18 defendant that day?

19 A I'm not sure. I know it was more than what we're
20 supposed to have in the register.

21 Q And was it indeed the policy, you heard the
22 testimony, that it should only carry \$50?

23 A Yes.

24 Q But it was approximately more than that that day?

25 A It was more than that because my boss actually let

1 us know that we was going to get fired if we didn't get
2 the money back.

3 Q Okay.

4 A There was too much in the register in the first
5 place.

6 Q So how was the -- how was the defendant standing --
7 where was the defendant in relation to you? If you don't
8 mind, I'll be the defendant, if you can step down and
9 show me and be you, and tell me how far he was away from
10 you?

11 A Well, the telephone was basically in the corner, and
12 he was about right where you are behind the register.

13 Q Okay. And so when he was holding the bottle of
14 wine over his head, this was the distance about right
15 here?

16 A That was the distance about right there. Then when
17 I turned around to get to the register it was closer.

18 Q How close was the register when you went ---

19 A When I turned around to get to the register it was
20 a -- just one step.

21 Q So maybe approximately like this?

22 A Um-hm.

23 Q And at that point did he still have that bottle of
24 wine over his head?

25 A Yes.

1 Q Okay. And is that the time where he threatened you
2 and said, give me the money or I'm going to hit you?

3 A Yes.

4 Q Okay. Have a seat. Thank you.

5 MR. WEBB: I'm not through.

6 MR. FARNSWORTH: Oh, I'm sorry.

7 BY MR. WEBB:

8 Q I'm going to show you what's been marked as State's
9 Exhibit Number 1. Can you tell me what that is?

10 A That is a picture of the wine display in the front
11 of the store.

12 Q Is that the display that the defendant grabbed the
13 bottle of wine from?

14 A Yes.

15 Q I'm going to hand you State's Exhibit Number 2. Is
16 this the same display?

17 A Yes, sir.

18 Q Are there any bottles missing from that display?

19 A Yes, there is two bottles.

20 Q I'm going back to State's Exhibit 1. Can you tell
21 me the make -- the company that made bottle of wine that
22 he used that day?

23 A Gallow Twin Valley.

24 Q Do you remember what kind of wine it was? Was it a
25 white wine, red wine?

1 A A red wine.

2 Q Okay. What type of red wine was it?

3 A Merlot.

4 Q Can you tell me what this bottle of wine is? What
5 the maker and the type of wine it is?

6 A It's a red wine, Gallow Twin Valley.

7 Q Is this substantially similar to the bottle that he
8 used that day against you?

9 A Yes.

10 MR. WEBB: At this time the State moves State's
11 Exhibit Number 7 into evidence.

12 MR. FARNSWORTH: No objection.

13 THE COURT: All right.

14 (State's Exhibit Number 7 was filed.)

15 BY MR. WEBB:

16 Q Now, you just testified that you handed the
17 defendant the money and it was approximately -- it was
18 over \$50?

19 A Yes.

20 Q Tell me what happened then, after you handed him the
21 money?

22 A As soon as I handed him the money, the police was
23 coming in the door with their guns drawn telling him to
24 freeze and get down on the ground.

25 Q At this point where did the defendant have the

1 bottle of wine?

2 A He had it still above his head.

3 Q And where did he have the money that you gave him?

4 A He had it in his hand.

5 Q Which hand? Do you remember which hand he had it
6 in?

7 A No.

8 Q Now, when the police came in, what did you do?

9 A When the police came in with their guns drawn, I
10 went back behind the cigarette case where Stephen was.

11 Q And why did you do that?

12 A I didn't want to be up front with the guns drawn
13 out.

14 Q And what did you -- did you hear or see anything
15 after you ran back?

16 A Yes.

17 Q What did you hear?

18 A I just heard a lot of yelling, and lot a stuff
19 crashing in the store, just a lot of noise.

20 Q And then at what point did you come back out to the
21 front of the store?

22 A I came back out to the front of the store when it
23 got quiet inside the store to see what was going on
24 outside. I looked outside and I saw some officers on the
25 ground trying to get him out from under the truck.

1 Q And when you walked to the front of the store, did
2 you see any money on the floor?

3 A Yes.

4 Q Was it in one stack, or was it loose, do you
5 remember?

6 A It was loose. It was all over the floor.

7 Q At that point, December 13, 2005, did Spinx gas
8 station have a surveillance monitor system?

9 A Yes.

10 Q And was that on that day?

11 A Yes.

12 Q I'm going to hand you State's Exhibit Number 8. Can
13 you tell me what that is?

14 A This is the DVD.

15 Q Have you viewed this DVD?

16 A Yes.

17 Q And is this a fair and accurate representation of
18 what occurred that day, December 13th of 2005?

19 A Yes.

20 MR. WEBB: Your Honor, at this time the State moves
21 State's Exhibit Number 8 into evidence.

22 MR. FARNSWORTH: No objection.

23 THE COURT: All right, sir.

24 MR. WEBB: Also at this time, Your Honor, the State
25 would like to publish this to the jury.

1 (State's Exhibit Number 8 was filed.)

2 (The video was played.)

3 BY MR. WEBB:

4 Q All right, Ms. Benson. So I want to talk to you
5 about -- and going back a little bit to when he had --
6 when the defendant had the bottle of wine over your head.
7 This bottle of wine, and you said that you were two feet
8 away from him when you were up at the register. Were you
9 scared at that time?

10 A Yes.

11 Q And why were you scared?

12 A I was scared that if he hit me with the bottle, if
13 he hit me it would hurt me.

14 Q Were you afraid for your life that day?

15 A Yes.

16 Q Now, I want to show you some pictures of the store.
17 I've already shown you the -- State's Exhibit 1. What is
18 that again?

19 A That's the wine display in front of the store.

20 Q And that's how it was December 13th of 2005?

21 A Yes.

22 Q And I show you State's Exhibit 2. Again, what is
23 that?

24 A Where the two wine bottles were missing.

25 Q And can you tell me what this picture, State's

1 Exhibit 3 is of?

2 A That's a picture with the money all over the floor.

3 Q And where did that money come from?

4 A From the defendant.

5 Q I'm showing you State's Exhibit Number 4. What is
6 this a picture of?

7 A That's a picture of the wine bottle that was thrown
8 at Stephen and busted all over the floor behind the
9 register.

10 Q And can tell you me what picture number 5 -- State's
11 Exhibit Number 5 is?

12 A That's the bottle that was thrown at Stephen.

13 Q Is this behind the register?

14 A Yes, behind the register.

15 Q Can you tell me what State's Exhibit Number 6 is?

16 A That is in front of -- outside behind -- in front of
17 register where the wine bottle was busted, the second
18 bottle.

19 Q The second bottle that the defendant held over his
20 head over you?

21 A Yes.

22 Q Are these pictures -- are these all a fair and
23 accurate depiction of what the incident looked like, the
24 scene looked like at that day, December 13, 2005?

25 A Yes.

1 MR. WEBB: The State -- at this time, Your Honor,
2 the State moves Exhibits 1, 2, 3, 4, 5 and 6, State's
3 Exhibits, into evidence.

4 MR. FARNSWORTH: Without objection.

5 THE COURT: Okay.

6 MR. WEBB: Permission to publish these to the jury?

7 THE COURT: All right. Y'all can pass those around,
8 but you'll have them back in the jury room when you
9 deliberate.

10 (State's Exhibit Numbers 1 through 6 were filed.)

11 MR. WEBB: Nothing further, Your Honor.

12 THE COURT: Mr. Farnsworth?

13 CROSS-EXAMINATION

14 BY MR. FARNSWORTH:

15 Q Ma'am, your policy was \$50, is that correct? That's
16 what you testified to?

17 A Yes.

18 Q And the amount -- you talked -- the manager over you
19 came out to the store after everything was said and done
20 and the money was found and collected, is that right?

21 A Yes.

22 Q And it was almost \$700 missing, isn't that correct?

23 A That's correct.

24 Q And -- but you would -- if it hadn't been found,
25 let's just say even the wind blew it away, you would have

1 had to pay for that, is that right?

2 A That's correct.

3 Q Or be fired?

4 A Yes.

5 Q Okay. Now, the -- did you see this tape before
6 today that was just shown to the Court?

7 A Yes.

8 Q Okay. And when was the last time you saw it, today?

9 A No, I didn't see it today.

10 Q Okay. When was the last time?

11 A The last time I saw it was about a week ago.

12 Q Okay. Did -- were you aware that when you made the
13 phone call to the police that Mr. Kiser had already
14 pushed the panic button?

15 A Yes.

16 Q Okay. And approximately how long was it before any
17 of the officers arrived?

18 A Maybe -- when I was on the phone, maybe -- maybe
19 five minutes the officers was there.

20 Q Okay. And -- and tell me again when you were on the
21 phone and you said Mr. Thomason has the bottle in his
22 hand, was this about how far he was when he said give me
23 money or -- according to you?

24 A Yes.

25 Q About like this?

1 A Yes, sir.

2 Q And the counter would be -- how wide is the counter
3 there?

4 A The counter was about maybe two widths of this.

5 Q Okay. All right. And you were right up against the
6 counter?

7 A I was over in the corner on the phone.

8 Q All right. But then didn't you come back over to
9 the counter where the register was?

10 A Yes. Yes.

11 Q Is there just one register there?

12 A It's one register there and there's another one on
13 the other side. There's two registers.

14 Q Okay. And you said that you were afraid you were
15 going to be hurt if you got hit with this bottle?

16 A Yes.

17 MR. FARNSWORTH: Okay. No further questions.

18 MR. WEBB: Nothing further from the State, Your
19 Honor.

20 THE COURT: Thank you.

21 MR. WEBB: At this time, Your Honor, the State calls
22 Eric Munoz to the stand.

23 THE CLERK: Mr. Munoz, if you would step up here
24 please. Place your left hand on the Bible, raise your
25 right hand.

1 MR. MUNOZ: I affirm. My religion.

2 ERIC MUNOZ

3 Having affirmed to tell the truth, testified as follows:

4 THE CLERK: State your full name for the record,
5 please?

6 THE WITNESS: Eric Munoz.

7 THE CLERK: Thank you.

8 DIRECT EXAMINATION

9 BY MR. WEBB:

10 Q Good morning, Mr. Munoz. Where do you currently
11 work?

12 A I work at Suncom Wireless.

13 Q And how long have you worked there?

14 A Eight and a half years.

15 Q And what are your jobs duties there?

16 A I'm a warehouse operation technician. We take care
17 of the network around Spartanburg, Greenville and Greer.

18 Q Are you married?

19 A Yes, sir.

20 Q Do you have any children?

21 A Yes, sir.

22 Q I want to turn to the events of December 13, 2005.

23 Do you remember going to the Spinx gas station on Haywood
24 Road that day?

25 A Yes, I do, sir.

1 Q Could you tell me what happened when you walked into
2 the store that day?

3 A That day I was -- I did stop. I didn't get no gas.
4 I was just going to get a drink. I was on my way to
5 North Carolina, so I was going in to get a drink and a
6 snack. I did notice the truck parked in the gas pump.
7 It was a red Dodge. And when I was actually -- when I
8 was entering I saw the defendant exit the store, and I
9 did notice him being mad.

10 Q And when you say mad, was he saying something?

11 A No, well, the expression of the face and the
12 breathing, you know. So I went into the store. So I
13 already had my guard pretty much up, because I notice
14 stuff like that before. I studied human behavior when I
15 was in the military. And I grabbed my -- my drink and
16 the snacks and I proceeded to go to the -- to the
17 register, and that's ---

18 Q What happened when you went up to the register?

19 A Well, that's -- actually I noticed him. He came
20 back into the store, and with -- with the same pulse, so
21 I already was prepared for anything that was going to
22 happen. So I don't know if you recall in the video, I
23 did place myself kind of to the side. I gave the clerk
24 my credit card hoping he can, you know, rush and I can
25 get out of there in case something happened. Which it

1 actually did because that's when he was telling the
2 manager to get off the phone.

3 Q Now, I want to take a step back. That individual
4 that you said that you saw when he was walking out of the
5 store and came back into the store, is that individual in
6 the courtroom today?

7 A Yes, sir.

8 Q And could please identify him?

9 A The burgundy shirt with the tie.

10 Q Okay. Thank you. Now, when the defendant as you
11 just stated told the store clerk, I guess that would be
12 April Benson, to get off the phone?

13 A Um-hm.

14 Q The manager, what did he exactly say, do you
15 remember what he said to her?

16 A He was just yelling, demanding for her to get off
17 the phone.

18 Q And was he mad at this time still?

19 A Oh, by the tone of voice, yes, of course.

20 Q So then what happened?

21 A Then I was kind of on the side just in case
22 something was going to happen. And there was a display
23 of wine behind him at that point -- well, behind us. We
24 were facing the register. And then he happened -- I
25 didn't see him grab it, but I did -- he swung it.

1 Q So you saw it in his hands and then what -- what did
2 he do with it once it was in his hands?

3 A He threw it.

4 Q He threw it at?

5 A Well, at that moment when I knew he threw something,
6 I was taking care of myself and didn't know where exactly
7 it landed. I did hear the shattering and everything.
8 But I just stepped outside. Calmly I just walked out.
9 My intention was to actually call 911, but as soon as I
10 got out to the pumps I saw a patrol car. And I was
11 flagging them down, but I guess they were coming to --
12 for the call of the store. And then I just stood
13 outside.

14 Q Do you remember what the defendant was wearing that
15 day?

16 A Red shirt.

17 Q A red shirt?

18 A Um-hm.

19 Q Why did you leave the store when you did that day?
20 Why did you walk out hurriedly?

21 A I walked out because of the fact that he threw a
22 bottle, and, you know, he was yelling, and I didn't want
23 to be a part of that. I don't know what else could
24 happen.

25 Q Um-hm. So I mean, how did that make you feel when

1 you walked out? Well, before you walked out?

2 A Well, I being cautious from the beginning.

3 Q Um-hm.

4 A So I'm pretty much a calm person. I just stepped
5 outside to be able to react better. Because if I stayed
6 there he probably could have turned his anger towards me.
7 I wanted to call the police or anything like that.

8 MR. WEBB: Nothing further, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. FARNSWORTH:

11 Q Okay. Mr. Munoz, you didn't hear this gentleman
12 make any demands for give me the money out of the cash
13 register, did you?

14 A No, I was outside the store.

15 Q And once you went outside the store, how long did
16 you stay there?

17 A I stayed there and pretty much observed everything
18 from the outside.

19 Q Okay. And you gave the police a statement in this
20 case, is that correct?

21 A Yes, sir.

22 Q Okay. And did you see any money outside?

23 A Yes, sir.

24 Q Where was it?

25 A Well, actually what happened was a struggle. The

1 defendant tried to first initially get in the truck on
2 the passenger side.

3 Q All right. I asked you, did you see any money
4 outside?

5 A Yes, I did, sir.

6 Q Yes or no?

7 A Yes, I did, sir.

8 Q And did you see any inside?

9 A I wasn't inside when that happened.

10 MR. FARNSWORTH: No further questions.

11 MR. WEBB: Nothing from the State, Your Honor.

12 THE COURT: Thank you.

13 MR. WEBB: Your Honor, we ask that Mr. Munoz be
14 excused from court? He has to work today.

15 MR. FARNSWORTH: No objection.

16 THE COURT: Okay. Without objection.

17 MR. WEBB: Your Honor, the State calls Officer
18 Travis Pearson to the stand.

19 THE CLERK: Officer Pearson, if you will place your
20 left hand on the Bible and raise your right hand.

21 TRAVIS PEARSON

22 Having been first duly sworn, testified as follows:

23 THE CLERK: Thank you. You may be seated. And
24 state your full name for the record, please.

25 THE WITNESS: Travis Maurice Pearson.

1 THE CLERK: Thank you.

2 DIRECT EXAMINATION

3 BY MR. WEBB:

4 Q Good morning, Officer Pearson?

5 A Good morning.

6 Q Where do you currently work?

7 A Greenville Police Department.

8 Q And how long have you been with Greenville?

9 A Six years.

10 Q And what is your title with the Greenville Police
11 Department?

12 A Corporal in the traffic bureau.

13 Q What are your duties that go along with being a
14 corporal?

15 A Approval of accident reports, investigation of fatal
16 collisions, serious accidents and selective traffic
17 enforcement.

18 Q Now, do you remember working on December 13, 2005?

19 A Yes.

20 Q Do you remember responding to the Spinx gas station
21 on Haywood Road?

22 A Yes.

23 Q Is that gas station within Greenville County?

24 A Yes, sir, it's within the city limits of Greenville.

25 Q Can tell me why you responded to the store at that

1 time, and why --- and who did you respond with?

2 A I was riding in the car with at the time Corporal
3 Joe Browning, and we -- a call had come out that there
4 was a verbal dispute at the Spinx gas station.

5 Q When you got to the gas station and went inside, did
6 you have your weapon drawn at that time?

7 A As I entered the store I did, yes.

8 Q Why did you have your weapon drawn at that time?

9 A Well, as we neared the front door the dispatch
10 advised that the call was now being upgraded to an armed
11 robbery, that the store clerk was being robbed.

12 Q An so when you entered the store, who did you see?

13 A I saw the defendant standing there, really wild
14 eyed. He had a bottle of wine over his head in his right
15 hand, and he was clutching cash against his body in his
16 left hand.

17 Q And did he see you immediately right when you
18 entered the store?

19 A Yes.

20 Q Did he put that bottle of wine down?

21 A No, sir.

22 Q Did you put your weapon down?

23 A No, sir.

24 Q Why did you not put your weapon down at that time?

25 A He refused to obey our verbal commands to get on the

1 ground, and drop the bottle, get on the ground. And he
2 refused to comply.

3 Q So then tell what happened when he refused to
4 comply?

5 A Corporal Browning at the time had his tazer drawn.
6 Officer Bedford also had his duty weapon unholstered and
7 pointed at the suspect -- or at the defendant, I'm sorry.
8 And we attempted to take him to the ground and at that
9 point he threw the bottle of wine down, and dropped the
10 bottle of wine, and we went around the store and back up
11 the middle isle, at which point he exited the store.

12 Q And did you chase after him after he exited the
13 store?

14 A Yes.

15 Q So you mentioned that the bottle of wine broke?

16 A Yes.

17 Q He dropped it or it was knocked out?

18 A Yes.

19 Q What happened to the money?

20 A Some money went on the floor. I don't recall seeing
21 any outside at that time, but I do know some fell on the
22 floor in the store.

23 Q So tell me at -- while you're chasing -- what
24 happened when you started chasing him outside the store?

25 A He went to the passenger side of the truck.

1 Actually we ran around the truck one time. He then got
2 in the passenger side, attempted to get in the driver's
3 seat. At that point, after refusing verbal commands, he
4 was tazed by Corporal Browning.

5 Q Were you saying anything to the defendant while you
6 were chasing after him?

7 A I was advising him to stop, stop resisting.

8 Q After the defendant was tazed, was he then arrested?

9 A No, sir.

10 Q Then what happened after he was tazed?

11 A After he was tazed he rolled over onto his back and
12 at that point I had disengaged the prongs from the tazer.
13 He then crawled under the pickup truck and grabbed the
14 sides of the pickup truck.

15 Q And so then what happened while he was under the
16 truck? Did you get the defendant out from under the
17 truck?

18 A We attempted to and he continued to grab the -- I'm
19 not familiar with custom trucks, I don't know what you
20 call it, but it's the metal railings on the side of the
21 truck. Foot board I guess you would call it.

22 Q Okay. And how did you get the defendant out from
23 under the truck?

24 A He was tazed again by other officers, at which point
25 in time he finally complied and let go and he was pulled

1 from under the truck.

2 Q Was he then handcuffed?

3 A Yes.

4 Q Now, you've referred to the defendant while telling
5 what exactly happened. Is the defendant in the courtroom
6 today?

7 A Yes, sir.

8 Q Could you please just identify that person?

9 A He's wearing a burgundy dress shirt with a
10 multi-colored tie, red and silver.

11 Q Okay.

12 A Striped.

13 Q Okay. And I just want to go back to one thing one
14 moment here, to exactly what you saw when you entered the
15 store. How was the defendant standing near April Benson
16 that -- at that time, when you entered the store?

17 A He was still facing her when we first entered. And
18 he had the bottle of wine in his right hand over his
19 head. He wasn't -- I didn't hear him saying anything to
20 her at that time. He had money clutched in his left
21 hand.

22 MR. WEBB: All right. Nothing further, Your Honor.

23 MR. FARNSWORTH: We have no questions of this
24 officer.

25 THE COURT: Thank you, officer.

1 MR. WEBB: Your Honor, State calls Lieutenant
2 Browning to the stand.

3 THE COURT: Okay.

4 THE CLERK: Lieutenant Browning, step up here,
5 please. Place your left hand on the Bible and raise your
6 right hand.

7 JOE BROWNING

8 Having been first duly sworn, testified as follows:

9 THE CLERK: Thank you. You may be seated. State
10 your full name for the record please?

11 THE WITNESS: Joseph Brian Browning.

12 THE CLERK: Thank you.

13 DIRECT EXAMINATION

14 BY MR. WEBB:

15 Q Officer Browning, where do you currently work?

16 A I work for the Greenville Police Department.

17 Q How long have you worked there?

18 A I have been there -- just finished my 12th year.

19 Q And what type of training have you had with the
20 police department throughout your 12 years?

21 A I have had extensive training from the academy on,
22 going through the reconstruction program through the
23 University of North Florida, inservice training every
24 year, a considerable amount. I can go into specifics if
25 you need.

1 Q That's okay. What is your title with the Greenville
2 County Police Department?

3 A I currently serve as a Patrol Lieutenant.

4 Q And what did you start out as originally with the
5 Greenville Police Department?

6 A As a private.

7 Q Now, I want to talk to you about December 13, 2005.
8 Were you working that day?

9 A Yes, sir.

10 Q Do you remember going to the Spinx store located on
11 Haywood Road?

12 A Yes, sir, I do.

13 Q And when you went to the store, when you went in the
14 store, did you have your weapon drawn?

15 A Yes, sir.

16 Q And why did you have your weapon drawn?

17 A We were responding to a hold up call. We had also
18 additional information from the dispatcher that there was
19 an assault in progress, in conjunction with that. As we
20 entered the store we could see the defendant still
21 present in the store. He appeared to have a weapon in
22 his hand, and that was the reason we had our weapons
23 drawn.

24 Q And when you say he had a weapon in his hand, what
25 kind of weapon did he have?

1 A A glass bottle.

2 Q And do you remember what hand that was in?

3 A I believe it was his right hand.

4 Q And did he have anything in his left hand?

5 A Yes, sir, he had his left hand clutched up near his
6 chest and had a large amount of what appeared to be cash
7 clutched to his chest.

8 Q Now, when you entered the store, did you lower your
9 weapon at that time?

10 A No, sir.

11 Q Why not?

12 A Because I felt that he was a threat to me, to the
13 additional officers and the other parties in the store.

14 Q Okay. Tell me then what happened once you entered
15 the store with your weapon drawn?

16 A He was given verbal commands to get on the ground.
17 We wanted to take him into custody. He refused to do so.
18 I was approximately several feet away from him, I was
19 about to deploy my tazer in order to subdue him, place
20 him in handcuffs. At that point Officer Pearson
21 attempted to take him into custody. We continued. He
22 basically would not go to the ground. He went around the
23 side of the store. He started turning over racks to keep
24 us from catching up with him. Essentially the two rows
25 we went down and back up everything that was on that he

1 had flipped over onto the floor to slow us down. He
2 continued up through that second row and then out the
3 front of the store.

4 Q So at the time that he went out the store, I want to
5 back up one second. What happened to the bottle of wine
6 and the money at that time?

7 A There was money -- when he attempted to take him
8 down there was money that went flying. There was money
9 on the floor. The bottle was broken on the floor as we
10 started the pursuit inside the store.

11 Q So when he exited the store, then what happened?
12 Did you chase after him?

13 A Yes, sir, I was the lead officer coming out of the
14 store. The racks and everything that he had turned over
15 slowed down Officer Pearson and Officer Bedford. As we
16 came out of the store he immediately tried to get to the
17 truck. Swung open the passenger door, jumped into it,
18 was trying to slide over to the driver's seat. I pulled
19 the door open and deployed my tazer trying to attempt to
20 stop him from being able to get the vehicle in drive and
21 to get back out onto the road. Once I hit him with the
22 tazer, he did react as we would expect with the tazer,
23 body stiffened up. He as able to roll out of the
24 driver's door and get underneath the vehicle.

25 Q And then what happened while he was underneath the

1 vehicle?

2 A He went underneath the vehicle, refused to comply
3 with us still at that point, wouldn't come out, would not
4 cooperate. He was basically moving up under the center
5 of the vehicle, was grabbing onto the under carriage.
6 Essentially we had three officers there at that point,
7 and we were trying to station ourselves on each side of
8 the truck so he couldn't go out one side and escape from
9 us again. At that point we had additional radio cars
10 that were arriving. We were able to get enough officers
11 to surround him and get him out from under the vehicle.

12 Q Now, you referred to the individual and his actions,
13 is that individual in the courtroom today?

14 A Yes, sir, he's -- he would be the defendant,
15 burgundy shirt, multi-colored tie sitting next to Mr.
16 Farnsworth.

17 Q And this Spinx gas station, where was it located
18 again?

19 A 941 Haywood Road. It's the corner of Pelham and
20 Haywood.

21 Q And is that in Greenville County?

22 A Yes, sir, it is.

23 Q Is it also in the Greenville city limits?

24 A Yes, sir, it is.

25 Q Now, you testified that you went in with Officer

1 Pearson and Officer Bedford?

2 A Correct, sir.

3 Q Do you know where Officer Bedford currently is?

4 A Yes, Officer Bedford is in the military and he's
5 currently in training.

6 MR. WEBB: Nothing further, Your Honor.

7 MR. FARNSWORTH: No questions of this witness.

8 THE COURT: Thank you, sir.

9 MR. WEBB: Your Honor, at this time the State rests.

10 THE COURT: All right. That's the State's case. So
11 we'll take just a five or 10 minute recess, and I'll
12 bring you back in and we'll finish. Okay. If y'all
13 would step out.

14 (The jury exited the courtroom at 11:26 a.m.)

15 THE COURT: Mr. Farnsworth, is your client going to
16 testify?

17 MR. FARNSWORTH: Your Honor, I'm going to have to
18 discuss that just a few minutes more with him.

19 THE COURT: All right. Does the State intend to use
20 any prior record to impeach him if he testifies?

21 MR. WEBB: Yes, Your Honor, we do.

22 THE COURT: What's his prior record?

23 MR. WEBB: One moment, Your Honor.

24 THE COURT: Have you provided that to Mr.
25 Farnsworth?

1 MR. WEBB: Yes, Your Honor.

2 MR. FARNSWORTH: He has, Your Honor.

3 THE COURT: Okay. Mr. Farnsworth doesn't have any
4 questions about it. Mr. Thomason, the -- the most
5 important decision that a criminal defendant has to make
6 in a criminal trial is whether to take the witness stand
7 and testify, or to exercise your constitutional right and
8 remain silent.

9 Now, you have to make that decision yourself.
10 And -- but even though you have to make the decision, you
11 should discuss it with your attorney, Mr. Farnsworth, and
12 get his advice and input into that decision.

13 Now, if you choose not to testify and exercise your
14 constitutional right, I would instruct the jury that that
15 could not be held against you in any way. It cannot be
16 entered into their discussions in the jury room. And it
17 cannot be held against you in slightest degree because
18 you're presumed innocent until the State presents
19 evidence that satisfies the jury that you're guilty
20 beyond a reasonable doubt. You don't have to prove
21 yourself innocent. The burden of proof is always on the
22 State.

23 Now, if you have a prior record they cannot -- the
24 jury cannot consider that as to whether you're guilty in
25 this crime or not. It only comes in for a limited

1 purpose and I will instruct them in that regard if that
2 comes up, that they can only consider that as it may bear
3 upon your credibility or believability in this case, and
4 not whether you're guilty or innocent of the crimes
5 charged here today.

6 Mr. Thomason, do you understand your constitutional
7 right to testify or to remain silent?

8 MR. THOMASON: Yes, sir, I do, Your Honor.

9 THE COURT: Okay. And I'm going -- I will give you
10 a little bit more time to discuss that with Mr.
11 Farnsworth on the break here, and then when I come back
12 in I'll ask you what your decision is. Okay?

13 MR. THOMASON: Yes, sir.

14 THE COURT: All right.

15 MR. WEBB: Your Honor, would you like to hear his
16 prior record or just ---

17 MR. FARNSWORTH: Well, we know.

18 THE COURT: No, he knows what it is.

19 MR. WEBB: Okay.

20 THE COURT: All right. We'll take a short recess.
21 I'll let him talk to him.

22 (A short recess was taken, after which, the trial
23 continued as follows:)

24 THE COURT: Mr. Thomason -- Mr. Farnsworth, have you
25 talked to Mr. Thomason?

1 MR. FARNSWORTH: He told me he does not want to
2 testify.

3 THE COURT: Y'all ready for closing arguments?

4 MR. FARNSWORTH: Judge, I'm going to have a short
5 motion for the record.

6 THE COURT: Okay. All right. Mr. Thomason, have
7 you decided whether to testify or not?

8 MR. THOMASON: Yes, sir, I have, Your Honor.

9 THE COURT: Okay. What is your decision?

10 MR. THOMASON: I'm not going to testify.

11 THE COURT: All right, sir. Then we'll proceed with
12 the closing arguments by the State first and then the
13 defendant.

14 MR. FARNSWORTH: Okay. Your Honor, just for the
15 record, I want to make a motion for a directed verdict as
16 to the armed robbery charge. As you're aware the statute
17 reads that armed robbery is when a person armed with a
18 specified thing, a pistol, dirk, sling shot, metal
19 knuckles, razors or other deadly weapons. It's our
20 position that a wine bottle as it is is not a deadly
21 weapon under the armed robbery statute.

22 I do concede that if you broke it on either end and
23 it had a jagged edge like a knife that would be a deadly
24 weapon. But in this case the bottle was intact all
25 during the period of time they alleged the threats were

1 made. The robbery didn't take place when the other boy
2 was hit by the bottle. It was only against the lady who
3 was -- the defendant allegedly made -- demanded money
4 from. That bottle was never thrown.

5 THE COURT: Okay. I think it's a factual question
6 as to whether the bottle would be a deadly weapon or not.
7 Okay. Submit that to the jury. If it's not then I -- do
8 you want me to charge the lesser included offense of
9 robbery?

10 MR. FARNSWORTH: I do, Your Honor.

11 THE COURT: Okay.

12 MR. WEBB: And Your Honor, that is the State's
13 position. We feel that both should be charged. Can
14 we -- can I ask you what your charge is for armed
15 robbery, what is a deadly weapon?

16 THE COURT: No.

17 MR. WEBB: Okay.

18 THE COURT: It's whatever they determine -- if they
19 determine it to be. It's a factual question for them. I
20 just got the standard charge whatever it is. I do not
21 charge them that a bottle is a deadly weapon or can be.

22 MR. WEBB: Okay. I do have a request to charge,
23 Your Honor, if you would like to see it?

24 THE COURT: All right. Let me see it. Well, I
25 don't know if that's a paraphrase or a quote.

1 MR. WEBB: The first one I believe is a quote, Your
2 Honor. I believe they're all quotes.

3 THE COURT: The first one is a quote. I don't think
4 the second one is, but essentially I charge them that --
5 that it's an article or instrument that can cause death
6 or great bodily harm.

7 MR. WEBB: Okay. Thank you, Your Honor.

8 THE COURT: Okay. We're ready to go? Mr. -- ask
9 Mr. Williams to be the foreman and then bring them out.
10 I'm not going to charge simple assault and battery, just
11 assault and battery of a high and aggravated nature.

12 MR. FARNSWORTH: Well, just note my objection for
13 the record on that. Okay.

14 THE COURT: Sorry I brought it up.

15 MR. FARNSWORTH: Sorry you did too.

16 THE COURT: Okay. Maybe I'll charge it anyway.

17 (The jury entered the courtroom at 11:57 a.m.)

18 THE COURT: I'll charge the lesser included offense.

19 MR. FARNSWORTH: All right.

20 THE COURT: Okay. Ladies and gentlemen, we're ready
21 for the closings statements. Mr. Webb.

22 MR. WEBB: Thank you, Your Honor. Members of the
23 jury, I want to thank you for your time. It's been a
24 fairly quick trial, but it is a very important trial.
25 Pretty soon you will be able to go back to your normal

1 lives outside of this courthouse. First you have to hear
2 closing arguments both from the State and the defense,
3 then you will hear instructions, or charges from the
4 judge. And after that, most importantly, you will be
5 able to go back and to consider the evidence in this
6 case, to deliberate on the evidence of this case. I will
7 want to talk to you during my closing argument on this
8 evidence and the charges against the defendant.

9 First I want to talk to you about the burden.
10 You've heard in this case that the State has the burden
11 of proof. The State has to prove beyond a reasonable
12 doubt that the defendant is guilty of armed robbery and
13 assault and battery of a high and aggravated nature.

14 Now, the key word is reasonable, reasonable doubt.
15 That's not all doubt. That's not any doubt. But
16 reasonable. There are very few things in this world that
17 we know with absolutely certainty. And if you're firmly
18 convinced that the defendant is guilty of these two
19 crimes, then you must find him guilty.

20 Now, I want to talk to you about the evidence in
21 this case. And the best way to do this is to break down
22 each charge against the defendant, starting with the
23 assault and battery of a high and aggravated nature. I
24 have written out the charge here and each element of the
25 crime.

1 Assault and battery of a high and aggravated nature.
2 For this crime there must an assault and battery. That's
3 the initial step that the State has to prove. That is
4 the unlawful touching by hitting or throwing of an item,
5 either a fist or an item, against a person. In this case
6 the assault and battery occurred when the defendant
7 picked up that bottle of wine and slung it at Stephen
8 Kiser. So assault and battery.

9 Now, as I mentioned to you in the opening statement,
10 there are aggravators under South Carolina law. The two
11 aggravators in this case are the attempt to commit a
12 felony, or use of a deadly weapon. Now, you as a jury
13 only need to find one to convict the defendant guilty of
14 the assault and battery of a high and aggravated nature.
15 You can pick either one or you can pick both. It's the
16 State's assertion and the State's position that the
17 defendant is guilty of both aggravators.

18 The attempt to commit a felony. When the defendant
19 walked into that Spinx gas station, he picked up that
20 bottle. When he picked up that bottle he was angry. He
21 knew he was going to rob that store. That bottle of wine
22 was a weapon. That was his key to the register. He
23 first threw that bottle at Stephen Kiser. That was step
24 one. And then he picked up another bottle and held it
25 over his head and threatened April Benson. But when he

1 slung that bottle that first time, that was the initial
2 step. He intended to commit a felony when he did that.
3 So that is the first aggravator for assault and battery
4 of a high and aggravated nature.

5 Now, in addition to that, the use of a deadly
6 weapon. That bottle of wine that the defendant picked up
7 and slung at Stephen Kiser is a deadly weapon. A deadly
8 weapon is defined under South Carolina law as an item, or
9 instrument, an object that is likely to cause death or
10 great bodily injury. Likely to cause death or great
11 bodily injury. When he picked that bottle of wine up and
12 threw it at Stephen Kiser, that could have reasonably
13 caused great bodily injury. And it did. It hit the
14 forearm and it shattered. Luckily the -- Stephen Kiser,
15 the store clerk was able to raise his arm up and
16 prevented it from hitting him in the head. So there has
17 been an assault and battery by the defendant grabbing the
18 bottle of wine and throwing it. And each aggravator has
19 been proven by the State. You've heard the testimony of
20 Stephen Kiser to what actually happened, and that the
21 bottle of wine hit him. So both aggravators have been
22 proven in this case.

23 Now, I want to move onto the second charge, the
24 armed robbery. In South Carolina there are two types of
25 robberies. There's what you call your basic robbery,

1 which is called -- often called strong armed robbery.
2 Then there is armed robbery. Two different types of
3 robbery. They're both felonies. They're both felonies.

4 The elements or an armed robbery is that a person,
5 or here the defendant, intended to take goods or money,
6 and that he did. You heard testimony from Stephen Kiser,
7 April Benson that money was given to the defendant after
8 he threatened April Benson with that bottle of wine while
9 he was standing two feet away from her, raised it above
10 his head and said, I'm going to hit you if you don't give
11 me that money.

12 You heard from the officers who testified that they
13 came in and they saw the money in the left arm of the
14 defendant. So the defendant did take money that day from
15 April Benson and the Spinx gas station.

16 By force or intimidation, that's the second element.
17 What I just said, was a holding of a bottle above his
18 head, two feet away from a female. The defendant is a
19 large male. The victim April Benson is a smaller female.
20 She was intimidated. She feared for her life. You heard
21 that testimony today. She got up on that stand and said
22 she was scared. She was scared for her life that day.

23 As I said, that bottle of wine was the key, the key
24 to that money. And the defendant used it and unlocked
25 that key by threats and intimation. He unlocked that

1 register with that bottle of wine.

2 Now, just these two elements would be strong armed
3 robbery under South Carolina law. The third element
4 using a deadly weapon makes it armed robbery. The
5 question is whether or not this bottle of wine used by
6 the defendant raised over his head against April Benson
7 is a deadly weapon. Well, as I mentioned to you earlier,
8 that a deadly weapon is defined as an item, or object
9 that would likely cause death or great bodily injury.
10 Doesn't have to -- or wouldn't have to likely cause death
11 necessarily, but great bodily injury. And if that
12 defendant hit April Benson on the head with this bottle
13 of wine, it could have killed her, or it would definitely
14 have caused great bodily injury. This bottle of wine
15 which you will be able to take back with you, you'll be able
16 to tell how heavy it is. It has substantial weight. It
17 is also made of glass. So when this defendant was two
18 feet away from April Benson saying, I'm going to hit you
19 if you don't give me all that money, this was a deadly
20 weapon.

21 Now, the law under armed robbery, and you will hear
22 from this judge in a moment, states a number of items
23 that are considered deadly weapons. It says a gun, a
24 knife, a dirk, a slingshot, and any other deadly object.
25 The statute -- the general assembly could not put in

1 every object that could be considered a deadly weapon, so
2 at the very end they put in the last phrase, or any other
3 deadly object. But I want to compare this bottle of wine
4 to a slingshot, which they did include as a mandatory
5 deadly weapon. This bottle of wine being heavy and
6 glass, used not only to hit someone, but also to break
7 and then use as a jagged knife is a deadly weapon, much
8 more so than a slingshot, which is included in the
9 statute. Compare this to a slingshot. Both are deadly
10 weapons under the law.

11 Now, I want you to consider also how April Benson
12 felt that day when the defendant had that bottle of wine
13 over her, while he was two feet away, threatening her.
14 She testified, like I said, that she thought it was a
15 deadly weapon. He was hovering over her. A larger male
16 against a smaller female, an innocent victim.

17 Now, I'm the prosecutor. It's my duty to prosecute
18 these violent crimes. And you have a duty as a jury, and
19 as individual jurors to do justice. And justice in this
20 case would be to find that there has been an assault and
21 battery of a high and aggravated nature and an armed
22 robbery, and I ask that you find the defendant guilty of
23 both of these charges. Thank you.

24 MR. FARNSWORTH: Please the Court? Okay. Ladies
25 and gentlemen, we're finished after I get through making

1 a few remarks to you. Judge Patterson will charge you
2 the law, like I told you before, and then you'll go back
3 and try to find a verdict in this case.

4 Let me just tell about you this first since Mr. Webb
5 said our statute on armed robbery, Judge Patterson will
6 charge you what it is, but basically, just like he told
7 you, the solicitor told you, it's robbery while armed
8 with a pistol, dirk, slingshot, metal weapon (sic),
9 razer, or other deadly weapon. There is nothing in the
10 law that specifically says that this wine bottle is a
11 deadly weapon. It's for you, ladies and gentlemen, to
12 decide.

13 Now, Mr. Webb told you in his opinion, he didn't say
14 his opinion, he just told you it was a deadly weapon, if
15 you remember a few minutes ago. And I submit that this
16 bottle is not a deadly weapon. I do concede that if you
17 took either end of it and broke it, either that end or
18 that end, it obviously would leave a jagged point like a
19 knife, and if you were using it when it was in that
20 condition, it would be a deadly weapon.

21 You saw -- you heard Mr. Kiser testify. He said
22 that Mr. Thomason threw that bottle at him real hard from
23 just a few feet away. What did it do? It was a bruise.
24 Didn't even break the skin. How could that bottle have
25 killed that man? And the other lady that testified, Ms.

1 Benson said was afraid she was going to be hurt if the
2 bottle hit her. Well, there is no question the bottle is
3 going to hurt. It hurt the man's wrist. But there's a
4 lot of difference between being hurt and being put in
5 fear of dying. You know, there's just a big difference.
6 It's like night and day. And so it is up to you to
7 decide about this bottle, whether it's a deadly weapon
8 under the statute.

9 You know, when I was a kid and some of you probably
10 remember this, the old cowboy movies back in the 50s,
11 you'd see fights in the bar and they just hit one another
12 over the head with that stuff, shaking, and just keep
13 fighting. So that's my one example of -- to show you
14 that maybe it isn't a deadly weapon. But you've got to
15 decide that. The solicitor or I cannot decide that for
16 you.

17 However if you decide it's not a deadly weapon, Mr.
18 Thomason should be found not guilty of armed robbery.
19 The whole thing keys on this, the weapon.

20 Now, the -- you heard -- you've heard both people
21 testify that were there. Mr. Kiser was really not
22 involved in the -- the alleged armed robbery part of it.
23 He was alleged -- allegedly involved in the assault and
24 battery of a high and aggravated nature when his arm was
25 hit by this wine bottle. If you remember no threats --

1 all Mr. Thomason wanted at that time, and the testimony
2 reflected this, he wanted the credit card to be cleared
3 so he could get his gas and get out of there. That was
4 the only reason he was there. I mean, that's why he was
5 irate as they testified. The -- this bottle came into
6 play with Mr. -- Mr. Lister -- Mr. Lister (sic) came in,
7 and that has nothing to do with the armed robbery charge.
8 There are two separate charges and His Honor will charge
9 you that. You must examine each charge and all evidence,
10 he'll tell you about.

11 And the solicitor says, well, this bottle keyed the
12 armed robbery, that was the reason the intent to commit a
13 felony was involved. Well, at that point he hadn't made
14 any demand for any money at all from anybody. All he
15 wanted was his gas. All he wanted was the credit card
16 clear and get his gas. That's what precipitated his
17 anger and him throwing the bottle. Nothing had been said
18 about any money, cash, give me your money, give me this,
19 give me that, just I want my pump turned on. So anyway,
20 the -- that just applies to him. The armed robbery
21 charge applies to the lady.

22 All right. You've got testimony that -- that she
23 gets on the phone. He comes back in and makes a demand
24 that she get off the telephone. She doesn't. He picks
25 up a wine bottle, puts it over his head, said give me the

1 money out of your cash register. Well, there is only
2 really one other person that saw and heard that happen.
3 And that's Mr. Lister (sic) did it. He said he heard it.
4 He was back, he saw a few things sounded like she was
5 having trouble getting money out.

6 But there's one other thing that will tell what
7 happened in these few seconds in there that day, and
8 that's the tape. You know, these stores spend thousands
9 and thousands of dollars in these video tapes. And this
10 tape, as you can tell by watching it, apparently was just
11 right over the area there, the counter. It showed
12 anybody that was at the counter, this type thing. And
13 that's the reason they have these things is because if
14 something like this they allege happened here occurs,
15 you'll have the tape to look at.

16 So I ask you to look at this tape carefully. You
17 can watch it. You've seen it once. You don't have to
18 watch it again. It will be back in the jury room. You
19 can watch it 10 times, or any amount of times, or none
20 that you want to, but I suggest to you that you look at
21 this tape, and if everything they're saying is true about
22 this armed robbery, why isn't it on that tape? I submit
23 to you it shows no armed robbery taking place, and that's
24 the sole purpose of the State bringing this tape in here
25 to show you people. This is supposed to confirm what

1 their testimony was. And I submit to you, take it back
2 there, it's just not there.

3 Now, again, as the judge has got to tell you, Mr.
4 Thomason has no burden in this case. The State must
5 prove his guilt beyond a reasonable doubt. He's not
6 required to prove innocence. So I ask you to go back
7 there, look at this tape, look at it as many times as you
8 want to, and consider that tape very carefully in your
9 decision in making the verdict in this case. I
10 appreciate everything, your time and your patience today.
11 Thank you.

12 THE COURT: All right. Ladies and gentlemen of the
13 jury, you've heard the evidence and testimony. Now I'll
14 go over the law with you and you'll go back and
15 deliberate until you reach a verdict in this case.

16 This case comes to us on two indictments which I
17 hold in my hand. These indictments contain the charges
18 against the defendant. These indictments are not
19 evidence in the case and should not be considered by you.
20 They are just the vehicles that brings the case to court
21 as I told you at the beginning, and the way we keep up
22 with it. And eventually it will be filed with your
23 verdict on it.

24 Now, to these charges the defendant pleads not
25 guilty. His plea of not guilty places the burden of

1 proof upon the State of South Carolina to prove him
2 guilty of any crime charged beyond a reasonable doubt. A
3 person charged with a crime in South Carolina, no matter
4 how serious it is, is presumed innocent until you the
5 jury hears evidence that satisfied you of his guilt
6 beyond a reasonable doubt.

7 Now, ladies and gentlemen, the presumption of
8 innocence is not a mere legal theory or a legal phrase.
9 It is a substantial right which all of us are entitled
10 to. And that is a defendant is presumed innocent until
11 you are satisfied of his guilt beyond a reasonable doubt.

12 Now, in this case as -- as jurors you have a
13 function and responsibility that's totally different from
14 anyone else in the courtroom. I make rulings on the law.
15 I am prohibited under the Constitution from discussing
16 the facts of the case with you.

17 You, ladies and gentlemen, are the sole judges of
18 the facts. It's my responsibility to make rulings on the
19 law and to give you the law at the conclusion of the
20 case. If I have done anything during the trial to cause
21 you to believe that I have a feeling about the facts of
22 this case, either for the State or for the defendant, you
23 disregard that. If I did anything I did not mean to.
24 You, ladies and gentlemen, are the sole judges of the
25 facts of the case, but you have to accept the law as I

1 give it to you and apply the facts that you find to the
2 law and write a verdict.

3 Now, in determining the facts of this case you have
4 to pass upon the credibility and the believability of all
5 the witnesses and the evidence regardless of who the
6 witnesses are. Ladies and gentlemen, I know you wouldn't
7 do this lightly. The witnesses have testified in court,
8 in your presence, under oath. You were able to observe
9 the demeanor of the witnesses, their facial expressions.
10 You can ask yourself, were they forthright? How did they
11 come to know the facts which they testified? Was there
12 other evidence and testimony in the case to make the
13 testimony of that witness stronger or weaker, or was
14 there any reason for the witness to be biased or
15 prejudiced in the case? In that regard, you can believe
16 everything a witness testified to, or you could
17 disbelieve everything a witness testified to. You can
18 believe part of what a witness testified to and
19 disbelieve part of what a witness testified too. As I
20 explained to you, you have right to -- you pass upon the
21 credibility and the believability of all the testimony
22 and you determine the facts of this case.

23 Now, ladies and gentlemen, the fact that a defendant
24 does not testify in his own behalf cannot and must not be
25 considered against him under any circumstances or in any

1 way. The fact that a defendant does not testify does not
2 create any presumption against him. And that fact cannot
3 enter into your discussions in the jury room. You cannot
4 let the -- that fact weigh in the slightest degree
5 against a defendant. Why? Because under the
6 Constitution of the South Carolina and under the
7 Constitution of the United States it is the prerogative
8 of the defendant to testify or to remain silent, and the
9 burden of proof is always upon the State of South
10 Carolina to establish his guilt by competent testimony
11 beyond a reasonable doubt.

12 Now, ladies and gentlemen, a defendant must -- is
13 entitled to any reasonable doubt. Any reasonable doubt
14 that you have in your deliberations as to any charge must
15 be resolved in favor of the defendant. A reasonable
16 doubt may exist because of the evidence and testimony
17 you've heard, or the lack of evidence and testimony in
18 the case. If you have a reasonable doubt as to the guilt
19 of the defendant, he's entitled to that doubt and would
20 be entitled to a verdict of not guilty, or an acquittal.

21 Now, I'm going to give you the charges on these
22 indictments and lesser included offenses. If you have a
23 reasonable doubt as to whether the defendant is guilty of
24 the greater offense or a lesser offense, you must give
25 him the benefit of that doubt and find him guilty of the

1 lesser included offense.

2 Now, what is a reasonable doubt? A reasonable doubt
3 is the kind of doubt that would cause a reasonable person
4 to hesitate to act. You may have served on juries in
5 civil cases and you would have been told that the burden
6 of proof there is by the greater weight or preponderance
7 of the evidence. In a criminal case the State's proof is
8 more powerful than that. It must be beyond a reasonable
9 doubt.

10 Now, proof beyond a reasonable doubt is proof that
11 leaves you firmly convinced of the defendant's guilt.
12 And there are very few things in this world that we can
13 know with absolute certainty. And in criminal cases the
14 law does not require proof that overcomes every possible
15 doubt. If based on your consideration of the evidence
16 and testimony you are firmly convinced that the defendant
17 is guilty of the crime charged, you must find him guilty.
18 If, on the other hand, you think there is a real
19 possibility that he's not guilty, you must give him the
20 benefit of the doubt and find him not guilty of the crime
21 charged.

22 Now, in this case on the indictment for armed
23 robbery, the State must prove beyond a reasonable doubt
24 that on or about the 13th of December of 2005, the
25 defendant, Melvin Duvall Thomason, did in Greenville

1 County, while armed with a deadly weapon, commit a
2 robbery on April Benson, the clerk of the Spinx station.

3 Now, ladies and gentlemen, section 16-11-33 of our
4 law makes armed robbery a crime. In order to prove this
5 offense the State must prove beyond a reasonable doubt
6 that the defendant took personal property from the
7 person, or the presence of another person. Property is
8 in the presence of a person if it is within the person's
9 reach, inspection, observation or control so that the
10 person could, if not overcome with violence or prevented
11 by fear keep possession of the property.

12 The State must prove beyond a reasonable doubt that
13 the defendant carried the property away, in this case the
14 allegation is money, intending to permanently deprive the
15 owner of the property and to keep the property for the
16 defendant's own use. The slightest removal of the
17 property or the complete possession of the property even
18 for an instant by the defendant is sufficient to show a
19 taking and carrying away of property or money. The
20 taking and carrying away of property must have been done
21 with violence, by putting the owner or the person in
22 control of that property in fear of violence.

23 And finally, the State must prove beyond a
24 reasonable doubt that the defendant was armed with a
25 deadly weapon during the robbery. A deadly weapon is any

1 article, or instrument, or substance which is likely to
2 cause death or great bodily harm. Whether an instrument
3 has been used as a deadly weapon depends upon the facts
4 and circumstances of each case. And that's for you to
5 decide. Examples of instruments which may be deadly
6 weapons is a pistol, shotgun, or a rifle, a dirk, dagger,
7 knife, a slingshot, metal knuckles, a razer, gasoline, or
8 lighter fluid, whatever. Ordinary objects may become
9 deadly weapons when the facts show they have been used to
10 inflict seriously bodily harm or death. Whether an
11 instrument has been used as a deadly weapon is a factual
12 question for you to determine.

13 If you should find that the State has failed to
14 prove armed robbery beyond a reasonable doubt, you may
15 consider the lesser included offense of robbery. Robbery
16 includes all the elements I have given you except that
17 the State would have failed to prove the defendant was
18 armed with a deadly weapon.

19 Now, if the State has failed to prove either armed
20 robbery or robbery, then your verdict as to this charge
21 would be not guilty. So there would be three possible
22 verdicts for the armed robbery charge, guilty of armed
23 robbery, guilty of robbery, or not guilty. And again, if
24 you have any reasonable doubt as to the -- as to whether
25 the State has proven a greater offense or a lesser

1 offense or no offense at all, you must give the defendant
2 the benefit of the doubt and find him guilty of the
3 lesser included offense.

4 Now, the second indictment charges the defendant
5 with assault and battery of a high and aggravated nature.
6 And assault and battery of a high and aggravated nature
7 is an unlawful act of violent injury to the person of
8 another accompanied by circumstances of aggravation.
9 Assault occurs when a person unlawfully attempts or
10 offers to commit a violent injury upon another person and
11 had the present ability to complete the attempted injury.
12 Drawing back your fist, or maybe firing a gun at someone
13 else, or attempting to hit someone with your fist, that's
14 just an example of an assault. The actual contact with
15 another person using force is the battery.

16 Now, the State must prove beyond a reasonable doubt
17 that the defendant did, in Greenville County, on or about
18 the 13th of December of 2005, willfully and unlawfully
19 commit an assault and battery upon Stephen Kiser. And
20 for assault and battery of a high and aggravated nature,
21 they must prove beyond a reasonable doubt that the
22 assault and battery was accompanied by circumstances of
23 aggravation. And that the allegations are that while he
24 was intending to commit a felony, or by the use of a
25 deadly weapon.

1 Now, if the State has proven to you beyond a
2 reasonable doubt that an assault and battery occurred
3 upon Stephen Kiser, and if they have proven to you that
4 it was accompanied by circumstances of aggravation, the
5 commission of a felony, and armed robbery is a felony, or
6 by the use of a deadly weapon, and I have explained to
7 you what deadly weapons maybe under the armed robbery
8 charge, if they've proven each of those elements beyond a
9 reasonable doubt your verdict would be guilty of assault
10 and battery of a high and aggravated nature.

11 If the State has failed to prove circumstances of
12 aggravation, but they have proven assault and battery,
13 you may find the defendant guilty of a lesser included
14 offense which we call simple assault and battery. If the
15 State has failed to prove assault and battery beyond a
16 reasonable doubt your heard would be not guilty.

17 So the possible verdicts on this indictment would be
18 assault and battery of a high and aggravated nature,
19 simple assault and battery, or not guilty. So there are
20 three possible verdict on each one as I have explained to
21 you.

22 Whatever verdict you reach on each charge, and I
23 would ask you to consider each indictment separately,
24 must be unanimous. All 12 of you have to agree. Every
25 person on the jury has an equal voice and equal input

1 into this verdict and what it should be, and the
2 discussion. But someone has to preside and that would be
3 your responsibility, Mr. Williams, okay.

4 Now, when you reach a unanimous verdict on each
5 charge, write that on the back and the foreman signs it
6 and dates it. Then we'll bring you back out and take the
7 verdicts. I'll send all the evidence back. And if you
8 want to view the DVD, the disk then I'll send the TV back
9 in the room with you.

10 Your lunch should be there. It should be on the
11 table, maybe they've had time to set it out for you. I
12 don't know. But then you can begin having your lunch and
13 begin your deliberations while you're having lunch. But
14 if anybody has to leave, or go to the restroom, or
15 something do not deliberate while that person is not in
16 the room. Okay.

17 I'll let you step back to the jury room and if the
18 attorneys have nothing else they want me to say about the
19 law you can begin your deliberations. Okay. If y'all
20 would step back to the jury room at this time.

21 (The jury exited the courtroom at 12:32 p.m.)

22 THE COURT: Any additions or exceptions, Mr. Webb?

23 MR. WEBB: Your Honor, just one thing. I believe if
24 I recall correctly that when you were instructing on
25 ABHAN and the aggravators for intent to commit a felony

1 you said armed robbery. I believe strong armed robbery
2 is also a felony, so that's the only thing I believe that
3 I would have to add.

4 THE COURT: I think -- I thought it may be too,
5 but I was not absolutely sure so I did not charge it.
6 And ---

7 MR. WEBB: Your Honor, I mean, I can look it up real
8 quick.

9 THE COURT: I'm still not sure because the -- we
10 have common law -- strong armed robbery is a common law
11 offense. Armed robbery -- just robbery is a statutory
12 offense. I don't know. I've never seen -- maybe they
13 got strong armed in the statute now. I don't know. But
14 robbery was a common law offense for 15 years too, I
15 think.

16 MR. WEBB: Your Honor under 16-11-325, common law
17 robbery, the statute states that the common law offense
18 of robbery is a felony. Upon conviction a person must be
19 imprisoned not more than 15 years.

20 THE COURT: Okay. I hope you're not overly
21 concerned with that making or breaking your case.

22 MR. WEBB: No, Your Honor. I just wanted to point
23 that out, Your Honor.

24 THE COURT: I'm glad you pointed that out. I did
25 think about that when I was charging it, but I don't

1 think that's going to have any effect on the outcome of
2 this case.

3 MR. WEBB: Fair enough, Your Honor.

4 THE COURT: Mr. Farnsworth?

5 MR. FARNSWORTH: No objection to the charge, Your
6 Honor.

7 THE COURT: Okay. And those -- those items that you
8 mentioned are not mandatory deadly weapons at the -- I
9 think the law says they may be considered deadly weapons.

10 MR. WEBB: Yes, Your Honor.

11 THE COURT: All right. I didn't want to correct you
12 on the law but Mr. Farnsworth -- okay. Thank you. But
13 none of them were used in this case so it's not going to
14 effect the outcome. It's a question of fact for them
15 whether that wine bottle was used as a deadly weapon.
16 All right. We'll be in recess until they reach a
17 verdict.

18 MR. WEBB: Thank you, Your Honor.

19 THE COURT: I tell you if y'all want to run to lunch
20 and get a sandwich or something, be back in about 35 or
21 40 minutes, 45 minutes.

22 MR. WEBB: We'll do that. Thank you.

23 THE COURT: We got to get the alternate out.

24 THE CLERK: Do you want me to just bring her out?

25 THE COURT: Yeah, just bring her out.

1 (The jury began their deliberations at 12:36 p.m.)

2 (A recess was taken while the jury deliberated,
3 after which, the trial continued as follows:)

4 THE COURT: All right. Okay. Bring them in.

5 (The jury entered the courtroom at 1:55 p.m.)

6 THE COURT: Okay. Mr. Foreman, you've reached a
7 verdict?

8 MR. WILLIAMS: Yes, sir, we have.

9 THE COURT: All right, sir. Would you give it to
10 the bailiff? Thank you. All right. Madam Clerk, would
11 you publish the verdicts, please?

12 THE CLERK: Your Honor, this is indictment number
13 2006-GS-2308, the State versus Melvin Thomason. He's
14 indicted for armed robbery. The verdict is guilty of
15 armed robbery. 2006-GS-2307, he's indicted for assault
16 and battery of a high and aggravated nature. The verdict
17 is guilty of assault and battery of a high and aggravated
18 nature. This is your verdict so say y'all? Signed by
19 Sherwood Williams. Thank you.

20 THE COURT: Any question about the form of the
21 verdict, Mr. Farnsworth?

22 MR. FARNSWORTH: No, Your Honor.

23 THE CLERK: Ladies and gentlemen, thank y'all so
24 much for your service in this case. I appreciate it and
25 I'm sure the attorneys do. Y'all are excused for the

1 week. Y'all can go back out this back way. Thank you.

2 (The jury exited the courtroom at 1:56 p.m.)

3 THE COURT: Do y'all want to come up for the
4 sentencing? Okay.

5 MR. WEBB: One second, Your Honor.

6 THE COURT: Has he been in jail since the ---

7 MR. FARNSWORTH: December 13th, '05, Your Honor.

8 MR. WEBB: He has a total of 658 days, Your Honor.

9 THE COURT: How much -- what's his prior record?

10 MR. WEBB: 1987, two counts of shoplifting; 1988,
11 assault and battery with intent to kill, shoplifting;
12 1999, shoplifting, third offense; 2000, assault and
13 battery; 2001, shoplifting, third offense, false
14 information to police; 2004, shoplifting.

15 THE COURT: Mr. Farnsworth?

16 MR. FARNSWORTH: Yes, Your Honor. May it please the
17 Court? Your Honor, as we just told you, December 13,
18 '05, he's been in jail continuously since then. His
19 record, there was I think an assault and battery with
20 intent to kill back in 1988, but since then really it's
21 just been shoplifting, hasn't been anything with the
22 severity that that 1988 charge has.

23 He's from the Spartanburg area, Your Honor. He's --
24 when he got arrested on this date I think he had done
25 just different types of work, and you know, that's it

1 basically. And he's been cooperative with me the whole
2 time.

3 THE COURT: Okay. Mr. Thomason, anything you want
4 to say before I sentence you?

5 MR. THOMASON: I apologize for the crimes I did
6 commit. And the crimes I didn't commit I apologize for
7 them too, for being convicted for crimes I didn't do.

8 THE COURT: They had some pretty strong evidence
9 with the testimony of the officers and everybody saying
10 you had the money in your possession. That's ---

11 MR. THOMASON: Well, the video tape shows otherwise,
12 but you know, it's up to the jury. They decide, so ---

13 THE COURT: Okay. I'm going to sentence him to the
14 State Department of Corrections for 17 years on the armed
15 robbery and 10 years on the ABHAN, and that is an 85
16 percent sentence. Thank you.

17 MR. WEBB: Thank you, Your Honor.

18 MR. FARNSWORTH: Thank you, Your Honor.

19 THE COURT: All right. Thank you.

20 - - -END OF TRANSCRIPT OF RECORD- - -
21
22
23
24
25

C E R T I F I C A T E

I, the undersigned Mary E. DiGirolamo, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 3rd day of October, 2007.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 11, 2008



Mary E. DiGirolamo

Official Court Reporter

FORM 5

STATE OF SOUTH CAROLINA

County of

Lancaster

IN THE COURT OF COMMON PLEAS

Thomason, Melvin D.

Full name and prison number (if any) of Applicant

2010-CP-23-2300

v.

State of South Carolina

Melvin Devale

Thomason

280112

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Pratt Correctional Institution
430 N. V. Loring Rd. Pelzer S.C. 29669
2. Name and location of Court which imposed sentence Court of
General Sessions Greenville S.C.
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) # 2006- J.S. - 23-2308 "General Robbery"
 - (b) # 2006- J.S. - 23-2307 "ABHAA"

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 3, 2007 "17 years Armed Robbery"
- (b) Concurrent
- (c) October 3, 2007 10 years ABHAN
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Yes
- (c) after a plea of nolo contendere Yes
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed - SC Court of Appeals
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. January 25, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Without Opinion - SCACR, Rule 215
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel
- (b) The Trial Court Instructions were Prejudicial
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) "See Attached"
- (b) "See Attached"
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

i.

N/A

ii.

iii.

iv.

(d) the date of each such disposition:

i.

N/A

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

N/A

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

Whether The Wine Bottle Constituted Deadly-Weapon

ii.

iii.

(b) the proceedings in which each ground was raised:

i.

Direct Appeal To S.C. Court of Appeals

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) I Have No Experience In Legal Matters
 (b) Must Rely Upon Others To Assist.
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Daniel Farnsworth Sr. Esquire
P.O. Box 10196 Greenville S.C. 29603
 ii. Kathrine H. Hudgins Appellate Defender
" P.O. Box 11589 Columbia S.C. 29210-1589

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Mr. Farnsworth Sr. At Trial
 ii. Ms. Hudgins At Direct Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

Vacate Sentence, Demand For Special
Performance

20. Are you now under sentence from any other court that you have not challenged?

N/A

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Melvin D. Thomason, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Melvin D. Thomason

SWORN to and subscribed before me this 16th
day of April, 2010.

[Signature] (L.S.)
Notary Public

My Commission Expires: May 12th, 2014

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Melvin D. Thomas, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Melvin D. Thomas
Applicant

SWORN or affirmed to and subscribed before me this
16th day of June, 2010.

[Signature]
Notary Public

My Commission Expires: May 17th, 2014

ATTACHMENT OF 3A

1.) State Concisely And In The Same Order The Facts Which Support Each Ground Set Out In (10).....

A. Ineffective Assistance of Trial Counsel....

① Counsel's Failure To File A Timely Motion To Quash A Defective Indictments....

Note: See Attachments of: 1A:B:C and 2A:B....

② Counsel's Failure To Object To Prejudicial Comments In The Solicitor's Closing Argument.

Note: See Attachments of: 3A:B:C....

③ Counsel's Failure To Object To Improper Jury Instruction Which Constitute Error of Law Was Prejudicial....

Note: See Attachments of: 4A:B and 5A:B....

B. The Trial Courts Instruction Was Prejudicial...

① Trial Court Erred By Giving A Defective Instruction on Reasonable Doubt....

Note: See Attachment of: 6A:B

② The Trial Court Erred In Refusing To Direct A Verdict When The State Fails To Produce Evidence of The Offense... See Attachments of: 7A,B,C

State of South Carolina
County of Greenville

Melvin D. Thomason

- V S -

State of South Carolina
Respondant

1 Certificate of Mail
1 of P.C. & Application
1 And Request For A
1 Stamp Filed Copy
1 From Clerk of Court
1 Enclosed Into Copies
1 Application P.C. &

ONE

This Is To Certify That ~~Two~~ ^{ONE} Copies of The
Forgoing P.C. & Application Have Been Sent
V I A Regular U.S. Mail With Adequate
Postage Affixed To The Clerk of Court....
For First Class Delivery To Address Below
Applicant Has Also Enclosed Pre Paid Self
Addressed Envelope For A Return Stamp Filed
Copy of P.C. & Application and Attachment To
Applicate Above From Clerk of Court Thank
You Respectfully: S / Melvin D. Thomason
Applicate

Mr. Paul B. Wickensimer
Greenville Clerk of Court
305 East North Street
Greenville, S.C. 29601

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
C.A. No. 2010-CP-23-2300

COUNTY OF GREENVILLE)

Melvin Devale Thomason,
S.C.D.C. No. 280112,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)
_____)**RETURN**

In response to the post-conviction relief application filed March 23, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the March 2006 term of General Sessions for assault and battery of a high and aggravated nature (ABHAN) (2006-GS-23-2307) and armed robbery (2006-GS-23-2308). Daniel J. Farnsworth, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On October 3, 2007, the Honorable Larry R. Patterson sentenced the Applicant to concurrent terms of ten (10) years for ABHAN and seventeen (17) years for armed robbery.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the

form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Thomason, Op. No. 2010-UP-017 (S.C. Ct. App. filed January 25, 2010).

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failure to file a timely motion to quash indictments.
 - b. Failure to object during solicitor's closing argument.
 - c. Failure to object to improper jury instruction.
2. Trial court error:
 - a. Court issued a defective reasonable doubt charge.
 - b. Court refused to direct a verdict of not guilty.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984).

The proper measure of performance is whether the attorney provided representation

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent notes the Applicant also raised issues regarding the trial judge's jury

instructions. The Respondent submits the Applicant has not raised issues that are cognizable in a PCR action. Rather, these allegations raise direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993).

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

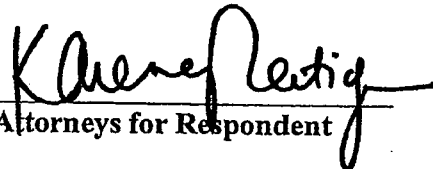
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

August 20, 2010

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

MELVIN DEVALE THOMASON, 280112

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

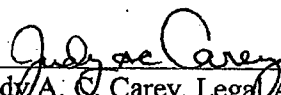
2010-CP-23-2300

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Melvin Devale Thomason, 280112
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

DATED this 20th day of August, 2010.


 Judy A. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS
2010-CP-23-02300

ORIGINAL

MELVIN DEVALE THOMASON)

APPLICANT)

vs.)

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA)

RESPONDENT)

May 12, 2011

Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD WELMAKER, Judge.

A P P E A R A N C E S:

ALEX KORNFELD, ESQ.
Attorney for the Applicant

KAREN C. RATIGAN, ESQ.
Attorney for the Respondent

APRIL HERRON
Official Court Reporter

INDEX OF WITNESSES

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Redirect By Mr. Kornfeld 12

DAN FARNSWORTH

Direct By Mr. Kornfeld 13

Cross By Ms. Ratigan 21

» > ○ < «

Certificate of Reporter 23

1 MS. RATIGAN: Your Honor, we call the case of
2 Melvin Thomason vs. The State of South Carolina. Docket
3 number is 2010-CP-23-2300. Mr. Thomason was indicted for
4 assault and battery of high and aggravated nature and
5 armed robbery. He was represented on these charges by
6 Mr. Farnsworth. The case was called to trial in October
7 of 2007 before Judge Patterson. The jury found the
8 Applicant guilty of the charges as indicted. On
9 October 3rd, 2007, Judge Patterson sentenced him to
10 concurrent terms of 10 years for assault and battery of a
11 high and aggravated nature and 17 years for armed robbery.
12 He did file an appeal. It was perfected in the nature of
13 Anders brief at the Court of Appeals. The Court dismissed
14 it in January of 2010 and the State is ready to proceed.

15 THE COURT: Mr. Kornfeld.

16 MR. KORNFELD: May it please the Court, the
17 Applicant calls Melvin Thomason to the stand.

18 THE COURT: All right, sir, if you'd come around
19 and be sworn, please.

20 THE CLERK: Step up here, please, to the Bible.
21 Place your left hand on the Bible, raise your right hand.

22 MELVIN THOMASON, after being duly sworn,
23 testified as follows:

24 THE CLERK: Thank you, you may be seated.

25 MR. KORNFELD: Good morning, Mr. Thomason.

1 MR. THOMASON: Good morning.

2 THE CLERK: State your name for the record,
3 please.

4 THE WITNESS: Melvin Devale Thomason.

5 THE CLERK: Thank you.

6 DIRECT EXAMINATION

7 BY MR. KORNFELD:

8 Q Mr. Thomason, how long were you in jail before your
9 trial?

10 A Approximately 22 months.

11 Q And during those 22 months, how many times did
12 Mr. Farnsworth see you prior to your case?

13 A Three times.

14 Q And how long did you meet for during those times?

15 A Fifteen minutes at the most.

16 Q What did you talk about during those 15 minute times,
17 those three?

18 A I basically talk to him about the pictures. Asking
19 him where was the picture. Forensics say they took
20 pictures and where was the money and that's basically
21 it. We didn't never set up no defense strategy or
22 talk about no strategy.

23 Q Okay. How did you know about pictures or this
24 evidence you're talking about?

25 A I wasn't aware of any pictures until 10 minutes

1 before we got ready to go to trial. And the
2 Solicitor gave him six still frame pictures and gave
3 them to me. And I tried to discuss with him about
4 these pictures but he been like -- well he told me to
5 be quiet, the Judge was talking.

6 Q Okay. During those meetings with him did he ask you
7 your side of the story, any input from you about what
8 happened on the date of the incident?

9 A No, he didn't ask me my side of the story. I tried
10 to explain to him what happened. And we came and saw
11 DVD video tape. A when we saw it together, me, him
12 and the solicitor, he said he didn't see any armed
13 robbery taking place on a DVD.

14 Q Okay. And you testified that there was six
15 photographs that you saw on the date of trial but you
16 never saw those before the date of the trial?

17 A Correct.

18 Q Okay. Were those photographs admitted into evidence?

19 A Yes, they was.

20 Q Okay. Specifically, do you remember Judge
21 Patterson's jury instructions about the armed
22 robbery, high and aggravated nature?

23 A Yes, I do.

24 Q Do you remember him, when he gave the jury charge,
25 about a greater or lesser included offense?

1 A Yes, I do.

2 Q What did the Judge say in your own words?

3 A He said if you found the defendant guilty of a
4 greater offense or lesser offense, you must find him
5 guilty of the lesser offense.

6 Q Okay. He said so either you're guilty of a greater
7 offense or lesser offense?

8 A Lesser offense.

9 Q Did he ever said that you could be not guilty when he
10 stated during that jury charge?

11 A He never said I could be not guilty of no offense at
12 all.

13 Q Okay. Do you remember him saying that if they found
14 you guilty of the greater offense or the lesser
15 offense that he had to give you the benefit of the
16 doubt and found you guilty of the lesser--

17 A Lesser included offense.

18 Q Okay. Do you think that you were prejudiced by that
19 statement?

20 A Yes, I do. Because I felt that the jury would have
21 had a chance to deliberate about no offense at all
22 instead of just lesser offense or greater offense. I
23 felt like by him saying that it prejudice me because
24 the jury didn't have no option or they probably
25 wasn't aware of no offense at all.

1 Q Okay. Now, you've seen the indictment for armed
2 robbery, high and aggravated nature; is that right,
3 Melvin?

4 A Yes, I did.

5 Q Okay. You don't believe that it apprized you of the
6 elements of the offense that you were charged with,
7 is that correct?

8 A Yes, sir.

9 Q Explain how it could have apprized you of the
10 elements more effectively?

11 A Well the indictment it had -- could have been made
12 more effective if it would have had Subsection A or
13 Subjection B, it just had 16-11-330. Well without a
14 stipulation of either Subsection A or Subsection B.

15 Q Okay.

16 A Subjection A gives a description of armed robbery
17 while armed with a deadly weapon. Subsection B gives
18 a description of attempted armed robbery while armed
19 with a deadly weapon.

20 Q Are there different penalties between Subsection A
21 and subsection B?

22 A Yes, sir, there is. Subsection A, armed robbery
23 carries mandatory 10 to 30. Subsection B carries
24 zero to 20. Okay.

25 Q And are there different probationary periods --

1 A Yes.

2 Q -- for Subsection A as opposed to Subsection A?

3 A Subsection A is seven years. But now under the new
4 law, no probation is mandatory 10.

5 Q Okay. The alleged deadly weapon in this case was a
6 wine bottle. Mr. Farnsworth -- a wine bottle is a
7 question of fact for the jury, how could
8 Mr. Farnsworth represented you better in explaining
9 how the wine bottle was used?

10 A Well, like I said, we looked at a DVD about me,
11 Solicitor and him in August of '06. And it shows,
12 plain as day shows, that I didn't have a wine bottle
13 in my hand. You can see that I had 10 fingers, you
14 know. In his closing arguments to the jury, you
15 know, he said that this bottle -- I'm not quite sure
16 how it goes because I left my notes on the table.
17 Could you get them for me, please? Thank you.
18 According, to the armed robbery statute, the state
19 failed to constitute the bottle of wine being a
20 deadly weapon.

21 Q Okay. And -- okay. And you felt like Mr. Farnsworth
22 should have conveyed that to the Judge, is that
23 right?

24 A Yes, I do.

25 Q Okay.

1 MR. KORNFELD: Okay, no further questions for
2 you Melvin -- Mr. Thomason, please answer any questions
3 Ms. Ratigan has.

4 CROSS-EXAMINATION

5 BY MS. RATIGAN:

6 Q Just a few quick questions. So you testified you met
7 with Mr. Farnsworth three times in jail, is that
8 correct?

9 A Yes.

10 Q Did you have any other meetings with him at the
11 courthouse?

12 A Me, him and the Solicitor came over here and looked
13 at a DVD.

14 Q Okay. That was one more meeting at the courthouse,
15 were there any other meetings aside from that?

16 A I think one more, another, I'm not sure.

17 Q And during these meetings what did you talk about?

18 A He basically did all the talking. I kept asking him
19 about the pictures. When we saw the DVD he stated
20 himself that he didn't see no armed robbery taking
21 place. So I'm thinking, you know, he's seeing the
22 same thing I'm seeing, he's my lawyer, I'm thinking
23 that we was going to set up a good defense strategy.
24 So I basically was leaving it up to him.

25 Q Did he tell you the State's evidence, what they were

1 going to show at trial?

2 A No, he didn't. I wasn't aware.

3 Q You didn't discuss the charges that were pending like
4 the possible punishments, anything like that?

5 A I know I had a armed robbery charge, you know what
6 I'm saying? But as far as -- I'm looking at the
7 incident, the police incident report and forensic
8 incident report and I couldn't see how they were
9 going to charge armed robbery with a bottle of wine
10 that I was really trying to purchase with a credit
11 card.

12 Q So you had a copy of the discovery materials, police
13 reports --

14 A Right.

15 Q -- things of that nature?

16 A Right.

17 Q And you knew you were going to trial for armed
18 robbery, not attempted armed robbery, correct?

19 A I didn't know what I was going to trial for.

20 Q Well you just said a second ago you knew you were
21 charged with armed robbery?

22 A Well I knew I was charged with armed robbery and
23 attempted, well had both charges. I didn't know.

24 Q So your testimony is that you were charged with both
25 armed robbery and attempted armed robbery?

1 A According to the indictment, yes.

2 Q Did Mr. Farnsworth tell you which you were charged
3 with both of these things?

4 A Mr. Farnsworth did not tell me I was charged with
5 both of them, Mr. Farnsworth said that -- well
6 actually Mr. Farnsworth told me I had armed robbery
7 charge.

8 Q Okay.

9 MS. RATIGAN: That's all I have, Your Honor.

10 MR. KORNFELD: One question on redirect.

11 REDIRECT EXAMINATION

12 BY MR. KORNFELD:

13 Q In any those meetings with Mr. Farnsworth, did he ever
14 introduce a plea agreement to you?

15 A No.

16 MS. RATIGAN: I'm going to object, that's
17 outside the scope of redirect, Your Honor.

18 THE COURT: I sustain the objection.

19 All right, thank you, sir, you may step down.

20 You may call your next witness.

21 MR. KORNFELD: The Applicant calls Mr. Daniel
22 Farnsworth.

23 THE COURT: Come around and be sworn

24 Mr. Farnsworth.

25 THE CLERK: Place your left hand on the Bible,

1 raise your right hand.

2 DAN FARNSWORTH, after being duly sworn,
3 testified as follows:

4 THE CLERK: Thank you, please be seated. State
5 your name for the record.

6 THE WITNESS: Dan J. Farnsworth.

7 THE CLERK: Thank you.

8 DIRECT EXAMINATION

9 BY MR. KORNFELD:

10 Q Mr. Farnsworth, do you have your file for this case?

11 A No, I told you on the phone, we talked I think this
12 week or last week, I can't remember which, that we --
13 I moved my office in March of '09 from Stone Avenue
14 to Pettigru Street. And 13 months later I moved my
15 office back from there, back to Stone Avenue and
16 we're still missing files. It would have to be from
17 that move and we haven't been able to locate them and
18 this is one of them.

19 Q Okay. Did you meet Mr. Thomason before the case?

20 A Yeah, I met with Mr. Thomason.

21 Q How many times you say?

22 A Well I don't know exactly how many times. He said I
23 met with him two or three times plus meeting with him
24 to see the video. So that would be four at least.
25 So I don't know exactly I would have met.

1 Q Okay.

2 A I do know it was after it was determined that this
3 case was going to be on the trial docket. I would
4 have met with him subsequent to that and at least
5 once or more.

6 Q Okay. During those meetings do you remember on
7 average how long the meetings were?

8 A I wouldn't have any idea. Even if I had my file with
9 me, I don't designate how long I was there or
10 anything.

11 Q Okay. Was -- do you remember if there was ever a
12 plea offer in this case?

13 A If there was, there usually are, I don't recall what
14 it was. Apparently it wasn't one that Mr. Thomason
15 wanted so we didn't take it if there was one.

16 Q Okay. What was the defense theory or strategy in
17 this case?

18 A Well, the -- the defense strategy was to -- to try to
19 show that it -- that this was not an armed robbery.

20 Q Okay. Did you discuss this strategy with
21 Mr. Thomason?

22 A I'm sure I did. I would think that I would have
23 anyway.

24 Q Okay. Did you receive, through request of discovery,
25 approximately six still frame pictures from the

1 Solicitor's Office?

2 A Okay, not having my file I can't say whether I did.
3 Usually they will send those photographs out with the
4 discovery. Or if it's one where it hadn't been sent
5 and the trial is imminent, they will send them. Now
6 ordinarily those are not every case, probably half
7 and half, I guess, are not the -- you know, they're
8 just the black images that are really not good to
9 see. Sometimes they send the color. In this
10 instance I don't remember which they would have sent.

11 Q Okay. So your testimony is that on this particular
12 case, you don't remember whether or not there were
13 photographs or not?

14 A I know there were photographs because they were
15 introduced at trial, yes.

16 Q Okay. Do you remember if you got those before --
17 when you got those pictures?

18 A Obviously -- no, I can't tell you when I got them, I
19 don't remember.

20 Q Okay. Did Mr. Thomason see those photos prior to the
21 day of trial?

22 A All I can say is what he said that he didn't see them
23 before trial.

24 Q Okay.

25 A Until the trial.

1 Q Okay. And why did you not show Mr. Thomason those
2 pictures before trial?

3 A If I didn't have them, would be the reason that I
4 wouldn't have shown them. If I did have them, I
5 don't know why I wouldn't have shown them to him.

6 Q Okay. The Indictment for armed robbery, do you
7 remember reading that Indictment?

8 A Yeah, I'm sure I read it probably when the
9 discovery -- when I first read the discovery, they
10 sent me that.

11 Q Okay. And you may remember that it didn't state
12 whether there was -- he was being charged with the
13 violation of 16-11-330(A)?

14 A Okay. I don't remember about the section. I do know
15 that he was indicted for armed robbery and that's
16 what we were going to trial on. Was armed robbery
17 and assault and battery of high and aggravated
18 nature.

19 Q Okay. Is there a reason why you didn't motion to
20 quash the indictment for whether to -- so you could
21 have it more particular so it would say either
22 Subsection A or Subsection B of that particular
23 statute?

24 A No, I didn't do that. As I say, he was -- my
25 understanding he was indicted and charged with armed

1 robbery and I knew that and he knew that well ahead.
2 And also with the assault charge.

3 Q Okay. Mr. Farnsworth, you do have a copy of the
4 transcript, correct?

5 A I do.

6 Q Okay, I direct your attention to page 86 of the
7 transcript, lines five through seven. Can you read
8 lines five through seven starting with, This bottle?

9 A Okay. This bottle of wine being heavy and glass,
10 used not only to hit someone but also to break and
11 then used as a jagged knife is a deadly weapon.

12 Q Okay. And that was stated by the Solicitor, correct?

13 A That's correct.

14 Q Okay. In the previous testimony of the witnesses and
15 the victims in this case, they never stated that this
16 wine bottle was used as a jagged knife. Why didn't
17 you object to the Solicitor's statement?

18 A Okay, well I think that was during his summation, I
19 believe, wasn't it?

20 Q Yes.

21 A Okay. I would assume it was -- because it was a
22 matter -- whether or not, talking about the bottle,
23 that was that my whole argument. And I argued that.
24 That the bottle itself was not -- was not a, you
25 know, a deadly weapon. But unless you broke either

1 end and it had a jagged end like a knife, it becomes,
2 you know, a deadly weapon then. I think what the --
3 the reason I didn't object, I think he's just arguing
4 on the facts. It was a factual question for the jury
5 as to whether or not the bottle was a deadly weapon.
6 My argument was that it was not and if you'll see
7 there in the transcript, I moved for directed verdict
8 on that very ground. It was not a deadly weapon.

9 Q Yes, I did see that, Mr. Farnsworth. But here on
10 lines five through seven, the Solicitor specifically
11 states, It was used as a jagged knife. There was no
12 testimony to that. Did you agree?

13 A I agree that -- well it says that used not only to
14 hit someone but also to break and then used as a
15 jagged knife as a deadly weapon. He didn't say it
16 was used as one, he said it could be used as one.

17 Q Well, it says, But also to break and then used as a
18 jagged knife--

19 A To break and then used. It was never -- there was
20 never any testimony that Mr. Thomason or anybody used
21 it as a deadly weapon.

22 Q Okay. And then again, if I could direct your
23 attention, on the same page, 86, lines 14 and 15.

24 Can you read lines 14 and 15, just that one sentence?

25 A Okay. She testified, I assume that's Ms. Benson,

1 Like I said that she thought it was a deadly weapon.
2 She was hovering over her -- he was hovering over
3 her--

4 Q Okay. Mr. Farnsworth, from the testimony, she never
5 stated that it was a deadly weapon, did she?

6 A I don't recall her ever stating that it was a deadly
7 weapon but I do recall from reading the transcript
8 just this morning, where on page 54 in the
9 transcript, he asked her, Were you scared at the
10 time?

11 She said, Yes.

12 Why were you scared?

13 I was scared if he hit me with the bottle it
14 would hit me -- it would hurt me.

15 Were you afraid of your life that day?

16 Yes.

17 So...

18 Q Okay. And then also if we could direct our attention
19 to page 97 of the transcript.

20 A Okay.

21 Q And lines 10 and three through line three on page 98,
22 if you could read that and start with line 23.

23 A Okay. And again?

24 Q And again, yes.

25 A And again, if you have any reasonable doubt as to

1 whether the State has proven a greater offense or
2 lesser offense or no offense at all, you must give
3 the defendant the benefit of the doubt and find him
4 guilty of the lesser included offense.

5 Q Okay. Mr. Farnsworth, do you see any problem with
6 that jury charge?

7 A Yeah, I think it probably meant to say the last line,
8 they could find him not guilty of the lesser included
9 offense.

10 Q Right. And here he says -- so in your opinion now it
11 should have said, you should find him -- you could
12 either find him guilty, guilty of the lesser included
13 offense or not guilty?

14 A Or not guilty, correct.

15 Q Okay.

16 A I think that's probably what -- he didn't say that
17 but I think that's probably what he meant to say but.
18 I did not catch that when he was charging.

19 Q Okay.

20 A And I didn't catch it until you brought it to my
21 attention this morning.

22 Q Okay. Okay. So and that's the reason that you
23 didn't object to that jury charge, is that correct?

24 A That's correct.

25 Q Do you think that that prejudiced the jury?

1 A It would be hard for me to say. I don't know whether
2 it would or not. I mean, I didn't hear it as he was
3 doing it so it wouldn't -- I cant say what it would
4 have done to the jury.

5 MR. KORNFELD: Thank you, Mr. Farnsworth, no
6 further questions. Please answer any questions that
7 Ms. Ratigan has.

8 MS. RATIGAN: Very briefly.

9 CROSS-EXAMINATION

10 BY MS. RATIGAN:

11 Q Basically the State's argument in this case was going
12 to be that the defendant threw an unopened bottle of
13 wine at one individual and then used the second
14 bottle to threaten the second individual, is that
15 correct?

16 A That's correct.

17 Q So your strategy at trial was to argue that these
18 unopened wine bottles were not deadly weapons?

19 A That's correct.

20 Q And did you discuss this strategy with your client
21 prior to trial?

22 A I -- if I didn't I should have. I -- I don't
23 specifically remember whether I did or not. My
24 practice would be to tell him what the strategy was,
25 I think.

1 Q In your opinion, did you make an effective argument
2 in regard at trial, about the deadly weapon?

3 A I think I did. Of course, the Judge didn't buy it
4 and the jury didn't buy it, so.

5 Q Mr. Thomason testified that you and he and the
6 Solicitor watched a video, do you recall that?

7 A I vaguely remember that, yes.

8 Q Do you recall whether the video showed him with the
9 wine bottle?

10 A I can't remember that. That's been four or five
11 years ago, I think. Four years ago, maybe.

12 Q In your opinion, did the armed robbery indictment
13 give you adequate notice of the charge to defend
14 against?

15 A I had notice from the day I got the discovery with
16 the indictment for armed robbery.

17 MS. RATIGAN: That's all I have, Your Honor.

18 MR. KORNFELD: No redirect, Your Honor.

19 THE COURT: All right, thank, you, sir, you may
20 step down.

21 Mr. Kornfeld, let me just verify I have the
22 transcript right. On the charge about lesser included,
23 was that at the top of page -- bottom of 97, top of 98, is
24 that where your issue was?

25 MR. KORNFELD: Yes, sir. Page 97 through page

1 98. I specifically referenced lines 23 on page 97 and
2 through line three on page 98.

3 THE COURT: Okay. You may call your next
4 witness.

5 MR. KORNFELD: No further witnesses, Your Honor.

6 THE COURT: Anything from the defense? Or from
7 The State?

8 MS. RATIGAN: The State would rest on the record
9 before, Your Honor, and Mr. Farnsworth's testimony.

10 THE COURT: All right. I'll review the
11 transcript and the pleadings, try to issue an Order in the
12 next couple of weeks.

13 MS. RATIGAN: Thank you, Your Honor.

14 (WHEREUPON, the proceedings were concluded.)
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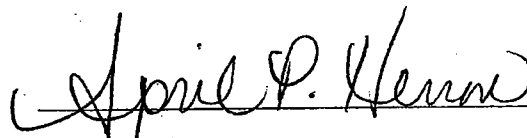
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 12th day of May, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 18, 2011



APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Melvin Devale Thomason,)
 S.C.D.C. No. 280112,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2010-CP-23-2300

ORDER OF DISMISSAL

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 PAUL B. SIFERT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 23, 2010. The Respondent made its return on August 20, 2010. An evidentiary hearing into the matter was convened on May 12, 2011 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Alex Kornfeld, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Daniel J. Farnsworth, Esquire. The Court had before it the trial transcript, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the Respondent's return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the March 2006 term of the Greenville County Grand Jury for assault and battery

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of a high and aggravated nature (ABHAN) (2006-GS-23-2307) and armed robbery (2006-GS-23-2308). He was represented by Daniel J. Farnsworth, Esquire.

After the State called the case to trial, the Applicant was found guilty. On October 3, 2007, the Honorable Larry R. Patterson sentenced the Applicant to concurrent terms of ten (10) years for ABHAN and seventeen (17) years for armed robbery.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Thomason, Op. No. 2010-UP-017 (S.C. Ct. App. filed January 25, 2010).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failure to file a timely motion to quash indictments.
 - b. Failure to object during solicitor's closing argument.
 - c. Failure to object to improper jury instruction.
2. Trial court error:
 - a. Court issued a defective reasonable doubt charge.
 - b. Court refused to direct a verdict of not guilty.

At the evidentiary hearing, the Applicant proceeded solely upon several allegations of ineffective assistance of trial counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

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credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had approximately four (4) meetings with trial counsel before the trial. The Applicant stated he told trial counsel his version of what happened and that they reviewed the pictures, videotape, and forensic evidence. The Applicant stated they did not review the charges or the defense strategy. The Applicant argued trial counsel should have challenged the armed robbery indictment because it did not advise him of the elements of the offense and did not indicate whether he was charged under subsection (A) or (B). The Applicant

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argued trial counsel should have objected to the portion of the trial judge's jury charge about armed robbery (and its lesser-included offense).

Trial counsel testified he had several meetings with the Applicant prior to trial. Trial counsel testified the facts of this case were that the Applicant brandished an unopened wine bottle as a weapon in robbing a store. Trial counsel testified there was a videotape (and still photographs) of the robbery. Trial counsel testified his trial strategy was to argue the unopened wine bottle was not a deadly weapon under the armed robbery statute. Trial counsel testified he reviewed the armed robbery indictment as part of the discovery materials in this case. Trial counsel testified he did not move to quash the indictment because it gave adequate notice of the charge he had to defend against. Trial counsel testified he did not object to the solicitor's closing argument because it was based on trial testimony. Trial counsel testified he did not catch the trial judge's misstatement in the armed robbery jury charge, but could not say the jury charge prejudiced the jury.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately review or discuss his case with him prior to trial. This Court notes both the Applicant and trial counsel testified they had several meetings in preparation for trial. This Court further notes trial counsel articulated that the defense strategy in this case was to show that the object used in the robbery – a full and corked wine bottle – would not qualify as a deadly weapon. The Applicant failed to present any evidence of what trial counsel could have discovered or what

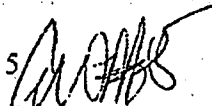
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defenses could have been pursued if trial counsel had been more fully prepared. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding the failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have challenged the armed robbery indictment. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). This Court further notes that indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. at 102, 610 S.E.2d at 500. The indictments in this case were true-billed and clearly sufficient to put the Applicant on notice of the charges he was facing. See State v. Tumbleston, 376 S.C. 90, 95-96, 654 S.E.2d 849, 852 (Ct. App. 2007).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected during the State's closing argument when the solicitor stated the wine bottle could have been broken and used as a jagged edge.² This Court notes that trial attorneys have been held to be ineffective for failing to object to closing arguments that are not supported by evidence in the record. See Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). In this case, however, the solicitor did elicit the testimony (that the victim was afraid of the Applicant using

² Trial transcript, p.86.

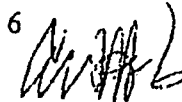
5 

the bottle to hurt her) that provided the basis for his closing argument.³ Therefore, as the solicitor's closing argument was a proper view of the facts in evidence, trial counsel was not ineffective in failing to object.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to a portion of the jury charge. This Court finds the trial judge misspoke when he said that if the State failed to meet its burden of proving either armed robbery or robbery then the jury must give the defendant the benefit of the doubt and find him "guilty of the lesser included offense." (Trial transcript, p.98). While trial counsel did not object to this error, it did not constitute ineffective assistance. When reviewing a jury charge for alleged error, the charge must be considered as a whole in the light of the evidence and issues presented at trial. Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). If the jury charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error and the charge is considered correct if it contains the correct definition and adequately charges the law. Id. "The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." State v. Benjamin, 345 S.C. 470, 474, 549 S.E.2d 258, 260 (2001). This Court finds that, taken as a whole, the trial judge's charge was more than sufficient under our case law and, therefore, the Applicant suffered no prejudice from trial counsel's failure to object to one specific portion of that charge.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant.

³ Trial transcript, p.54.

⁶ 

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

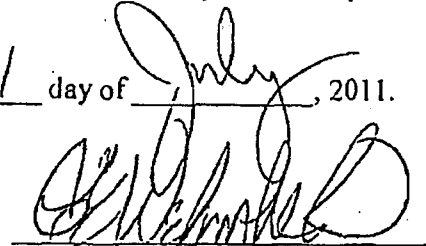
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

7/2/17

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1 day of July, 2011.



G. Edward Welmaker
Resident Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.Melvin Thomason

AKA: _____

Race: B Sex: M Age: 38DOB: 09-07-1969 SS#: 220-11-11Address: Snartanburg SC 29303

DL#: _____ SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS2302308A/W#: 1816469Date of Offense: 12/13/2005S.C. Code § : 16-11-0330(A)CDR Code #: 0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: ARMED ROBBERY

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC) ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST

Attorney
Solicitor:

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 17 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35.13 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ _____

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.Paul B. Wickens
Clerk of Court/ Deputy ClerkCourt Reporter: M. Sprague

PRESIDING JUDGE

Judge Code: 21011315Sentence Date: 10/3/07

SCCA/217 (9/2006)

WITNESSES

WC Bruce

Conroy/S

Greenville Police Department

12/13/2005

ARREST WARRANT NUMBER

1816469

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

FOREMAN GRAND JURY

VERDICT

Guilty of Armed Robbery

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-23-

KBH

002308

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MARCH TERM 2006

10/3/07

GUILTY THE STATE
vs.

MELVIN DEVALE THOMASON

Indictment for

0139

ARMED ROBBERY

VIOLATION § 16-11-0330

444

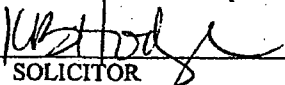
STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ARMED ROBBERY

At a Court of General Sessions, convened on MARCH 21, 2006 the Grand Jurors of Greenville County present upon their oath:

That MELVIN DEVALE THOMASON did in Greenville County, on or about the 13th day of December, 2005, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon, that April Benson, the clerk at the Spinx Station reasonably believed to be a deadly weapon, attempted to and/or did take by means of force or intimidation, goods or monies described as: money from the person or presence of April Benson, the clerk at the Spinx Station. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.Melvin Thomason

AKA: _____

Race: B Sex: M Age: 38DOB: 09-07-1969 SS#: _____

Address: _____

Snartanburg, SC 29303

DL#: _____

SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2006GS2302307A/W#: 1816470Date of Offense: 12/13/2005S.C. Code § : C/LCDR Code #: 0009

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: A.B.H.A.N.in violation of § C/L of the S.C. Code of Laws, bearing CDR Code # 0000 13 Now
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____

Solicitor: _____

Defendant _____

Attorney for Defendant _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____

§ 14-1-206 (Assessments 107.5 %) _____

§ 14-1-211(A)(1) (Conv Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35.13 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ _____

Clerk of Court/ Deputy Clerk: Carl B. WickhamCourt Reporter: M.S. prague

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE [Signature]Judge Code: 2Sentence Date: 10/3/07

SCCA/217 (9/2006)

WITNESSES

W Bruce / 11-12-07 / 5

Greenville Police Department

12/13/2005

ARREST WARRANT NUMBER

1816470

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty of Assault &
Battery of a High and
Aggravated Nature

Foreperson of Petit Jury

Date

DOCKET NO. 2006-GS-23-2307

KBH

The State of South Carolina

AMENDED INDICTMENT
County of Greenville

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2007

12/3/07
GUILTY

THE STATE

VS.

MELVIN DEVALE THOMASON

Indictment for

0013

ASSAULT AND BATTERY OF A HIGH AND
AGGRAVATED NATURE

VIOLATION § C/L

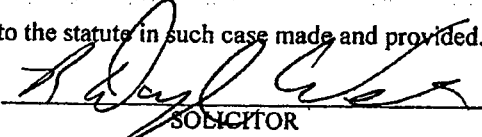
71

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE) INDICTMENT FOR
 ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED
 NATURE

At a Court of General Sessions, convened on SEPTEMBER 26, 2007 the Grand Jurors of Greenville County present upon their oath:

That MELVIN DEVALE THOMASON did in Greenville County, on or about the 13th day of December, 2005, willfully and unlawfully commit an assault and battery upon STEPHEN KISER constituting an unlawful act of violent injury to STEPHEN KISER, accompanied by circumstances of aggravation, to wit: the intent to commit a felony and/or use of a deadly weapon. This is in violation of the Common Law of the State of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR