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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

KEVIN HARBIN,

PETITIONER,

V.

THE STATE,

RESPONDENT

APPELLATE CASE NO. 2021-000362

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

TAYLOR Z. SMITH
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Suite 519
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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Dear Clerk,

Please find enclosed my pro-se Motion For DNA Testing to be considered by the Circuit Court Judge for the next Greenville County term of Circuit Court for Greenville County.

Please find also, copy of the Motion enclosed. Please file the original copy, clock stamp the other copy and return to me in the envelope enclosed for that purpose.

Thank you most kindly.

RESPECTFULLY:

Kevin L. Harbin #303214
Kevin L. Harbin, #303214
B.R.C.I. Murry-146
4460 Broad River Road
Columbia, South Carolina
29210

- copy ret. to duf 11/2/10
- emailed to AT/50

IN THE STATE OF SOUTH CAROLINA
FOR GREENVILLE COUNTY CIRCUIT COURT
13th JUDICIAL CIRCUIT

Kevin L. Harbin, # 303214,
Petitioner,
Vs.
The State,
Respondent.

Case No. 2004-GS-23-6122;6123;6124

MOTION FOR DNA TESTING:

I 340767
766
768

I, the Petitioner in the above referenced matter do hereby request this Circuit Court to grant my Motion For Dna Testing in the above case for the following stated reasons:

- (1) My fingerprints were not found at the crime scene in this case. However; several different sets of fingerprints were found at the crime scene. None matched me and those prints were not sent to the National Data Base for a match, nor; was any DNA testing done on those prints.
- (2) I am innocent of the crimes charged against me and DNA testing of those prints will prove that very fact. I've been in prison for about six (6) years for crimes I did not commit.
- (3) In support of this Motion I would respectfully call this Court's attention to the following facts;
At a PCR Hearing in the case of Steve Randall Bagwell, # 304273 on November 25th, 2009 in which Judge Alexander S. Macaulay issued an order in the amount of \$5,000 dollars to do DNA testing. SEE: SLED CASE NO.: 03135749.
- (4) Also, SEE: Greenville Newspaper Article hereto attached and Marked Page 1 and 2.

Wherefore, Petitioner respectfully request Motion be granted.

RESPECTFULLY SUBMITTED BY:

Kevin L. Harbin #303214
Kevin L. Harbin, #303214
B.R.C.I. Murry-146
4460 Broad River Road
Columbia, South Carolina
29210

PRESIDING JUDGE: _____

JUDGE CODE: _____

MOTION GRANTED: _____, OR: DENIED: _____

THIS DAY OF _____, _____.

P.1.) DNA (P.1) FROM PAGE 1A

was once on course to begin testing by August, but an unexpected retirement caused a delay, said Capt. Jackie Kellett of the Public Safety Department.

The hope now is that the lab will soon be accredited and that a DNA technical leader and analyst will begin working cases by the end of the year, she said.

"We've just got to get that stamp of approval," Kellett said.

Violent crimes will be the focus at the start, she said.

Richland County started its DNA lab in 2004 and turns around evidence in a month, forensics lab director Demi Garvin said. Greenville authorities expect to do the same, Kellett said.

Beaufort County opened its own lab this year, and York County plans to open one next year.

Agencies with no local lab are left with the option of adding to SLED's 2,300-case backlog or paying a fee to have another lab do the job. While authorities said wait times can stretch beyond a year, SLED puts a rush on emergencies, such as when a killer is on the loose.

SLED receives about 3,000 samples a year from about 300 law enforcement agencies statewide, said Todd Hughey, the agency's forensics lab services director.

Thirteen analysts, six technicians and one DNA supervisor handle the cases, he said.

Greenville County's lab will be open to the Sheriff's Office and all of the county's municipal police departments. It might also take on work from Pickens County for a fee, Kellett said.

Pickens County Assistant Sheriff Tim Morgan said he didn't know of any specific plans to shift DNA analysis duties from SLED



PATRICK COLLARD / Staff

DNA evidence lead investigators to arrest Jerry Buck Inman, shown here in 2006, for the murder of Tiffany Marie Souers.

to Greenville County.

But such an arrangement would have precedent. Pickens County has computer forensic work done in Anderson County and sends suspected drugs to Greenville County for analysis, Morgan said.

In some drug cases, defendants are ordered to repay the county for the testing, he said.

"Having more DNA labs would only help the situation," Morgan said. "I can't see where it would hurt anything."

SLED has whittled its backlog by 10 percent this year and hopes that new hires and outsourcing some work to private labs — made possible by a federal grant — could help reduce wait times further, Hughey said.

While it is clear that SLED can't meet the entire state's needs, it is too early to tell if the counties' new DNA labs will help lighten the load, he said.

Hughey cited what happened when about 10 counties around the state opened their own drug analysis labs. The decrease in SLED's caseload was slight, as agencies that still depended on SLED sent more evidence, Hughey said.

"Unfortunately, there is a lot of crime in South Carolina," Hughey said. "There is a lot of evidence to be proc-

essed and to be analyzed."

The state's rate of 670.8 violent crimes for every 100,000 residents placed it third in the nation in 2009, behind the District of Columbia and Nevada, according to recent FBI numbers.

Start-up costs for Greenville County's DNA lab are running around \$500,000, including \$225,000 in federal money paying for the equipment, Kellett said.

The lab is on Greenville Tech's main campus and falls under the Public Safety Department, a county agency that also oversees the jail, an evidence room and drug analysis.

The technology has its limits, Hughey said.

About half of SLED's backlog comes from "touch DNA," or swabs taken from door handles and other surfaces that can help identify suspects in property crimes when no other physical evidence is available.

Taking such samples has proven successful in some cases, he said.

But in many cases, there isn't enough DNA available to get a usable profile, Hughey said.

In some cases, several people's DNA is mixed together, making the sample worthless, he said.

"Typically, DNA alone does not solve the case," Hughey said. "We can iden-

tify an individual. We can place them at the crime scene. But it still takes that investigative lead — that investigative work — to determine if they were ones that perpetrated the crime."

7-27 DNA labs may reveal crucial clues quicker



PATRICK COLLARD / Staff

DNA technician Jagannatha Kandala works at his Greenville lab. DNA evidence has become increasingly important in unlocking many cases, such as the horrific slaying of Tiffany Souers by Jerry Buck Inman.

Greenville's \$500,000 facility close to opening

By Paul Alongi
STAFF WRITER
palongi@greenvillenews.com

A backlog at the State Law Enforcement Division has led Greenville County and three other counties to start their own DNA labs with the hope of shaving months off the time it takes to analyze samples that can be crucial in identifying suspects.

The impact on the state's other 42 counties remains less clear. The hope is that removing four of the state's most populous counties from SLED's caseload will reduce the backlog, but a key agency lab director has doubts.

DNA has proven critical to solving

some Upstate crimes, including the 2006 slaying of Clemson University student Tiffany Marie Souers in her off-campus apartment. DNA was key in identifying Jerry Buck Inman, who has admitted in court to killing Souers.

A DNA sample taken at the scene matched DNA from Inman that had previously been put into a national database, authorities said.

However, starting a DNA lab costs hundreds of thousands of dollars — money that some counties don't have to spare.

"It's mainly budgetary issues," Sheriff Ricky Chastain said about why Laurens County isn't planning one.



While DNA evidence can't be used to solve every crime, it's a powerful tool in many cases. In the case of the slaying of Tiffany Marie Souers, DNA evidence was crucial in identifying the killer, Jerry Buck Inman.

See DNA on page 3A

IN THE STATE OF SOUTH CAROLINA
FOR GREENVILLE COUNTY CIRCUIT COURT
13th JUDICIAL CIRCUIT

Kevin L. Harbin, # 303214, Case No. 2004-GS-23-6122;6123;6124:
Petitioner,
Vs. CERTIFICATE OF SERVICE:
The State, Respondent.

I, the Petitioner in the above referenced matter, do hereby certify under oath and penalty of perjury that I have served exact copies of these documents upon the below listed parties upon this same exact date by United Postal Service.

- (1) Clerk of Court for Greenville County
305 East North Street
Greenville, South Carolina 29601
- (2) Mr. Henry D. McMaster; Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211-1549

RESPECTFULLY SUBMITTED BY:

Kevin L. Harbin #303214
Kevin L. Harbin, #303214
B.R.C.I. Murry-146
4460 Broad River Road
Columbia, South Carolina
29210

SWORN TO BEFORE ME THIS 20 DAY OF 2010; MONTH OF OCT.
MY COMMISSION EXPIRES: Eugene Beatty

My Commission Expires April 4, 2018

STATE OF SOUTH CAROLINA

COUNTY OF GreenvilleKevin L. Harbin, #303214
Name of applicant and Inmate number (if applicable)

OR

IN THE INTEREST OF

Juvenile

v.

State of South Carolina) IN THE COURT OF (Select one)
) ☒ GENERAL SESSIONS
) ☐ FAMILY COURT
) 13th JUDICIAL CIRCUIT) APPLICATION FOR
) FORENSIC DNA TESTING

) ORIGINAL INDICTMENT NO.

) 2004 -GS- 23 - 6122-6124) 1340767) 66 OR) 68

) ORIGINAL PETITION NO.

) -JU-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 continue an 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 end 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 or adjudicated.

I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

1. Identify the proceedings in which the applicant was convicted or adjudicated:

Greenville County Court of General Sessions ON
September 6-8, 2005

2. Give the date of the entry of the judgment and sentence: September 8, 2005

and current place of incarceration: Broad River Corrections

3. Identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:

- (a) Direct Appeal - Withdrawn by Appellant
- (b) Post-Conviction Relief - Ineffective Assistance
- (c) Certiorari - Ineffective assistance of Counsel

4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested: All fingerprints, Palm Prints, And Sweat from prints taken from crime scene

Identify the specific type of DNA testing being sought:
Finger and Palm print comparison at NATIONAL DATA BASE
Sweat from all Prints at a Forensic Lab

5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:

Prints taken from crime scene were Not a match to me
And Not Compared to anyone else through the NATIONAL DATA
BASE - "That evidence is very material to my INNOCENCE
or Guilt.

6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result:

No DNA testing was done even though A Application had been

for Forensic DNA Testing on August 11, 2009 - the clock in time for that Application on August 18, 2009 by C.R.D. Another application was file on December 1st, 2010 And decline for no Funds to implement.

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

That evidence would prove my innocence my innocence of the offenses charged And that is not at all merely Cumulative or impeaching.

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.
9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:
- (a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
 - (b) The Court may assess the cost of any DNA testing against me;
 - (c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
 - (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

Kevin L. Harbin
Print Applicant Name

Kevin L. Harbin
Signature of Applicant

STATE OF SOUTH CAROLINA

County of Greenville

VERIFICATION

I Kevin L. Harbin, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.

Kevin L. Harbin #303214
Signature of Applicant

SWORN to and subscribed before me this 18th
day of September, 2014.

Susan H. Frye (L.S.)
Notary Public

My Commission Expires: March 5, 2018

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

I, Kevin L. Harbin, 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.

Kevin L. Harbin

Signature of Applicant

SWORN to and subscribed before me this 18th
day of September, 2014.

Susan H. Frye (L.S.)

Notary Public

My Commission Expires
March 5, 2018

My Commission Expires: _____

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
))
))
Kevin L. Harbin #303214)
Applicant) DEFAULT
V.)
STATE OF SOUTH CAROLINA,)
Respondents)

This matter comes before the court by way of an application for Post-Conviction DNA Testing pursuant to SC Code §17-28-10, et seq. For the following reasons, this application should proceed to hearing and Default should be entered upon the Calender,

"Requirements of the Forensic DNA Statute"

The Act requires that within ninety days after the forwarding of the Application, or upon any further time the Court may fix, the Solicitor of the Circuit in which the Applicant was convicted or adjudicated, or the Attorney General if the Attorney General prosecuted the case, shall respond to the Application. Within ninety days after the docketing of the Application, or within any further time the court may fix, the victim may respond as provided in Article 15, Chapter 3, Title 16. The Court may proceed with a hearing if the solicitor or Attorney General, as applicable, or the victim does not respond to the Application. See, SC Code 17-28-50(B):

The Applicant filed application in September of 2014, the

Court has jurisdiction to proceed with a hearing pursuant to statutory interpretation. See, Exhibit (A)

This Court is requested to appoint Counsel if it determines that the Application is sufficient to proceed to a hearing.

See, SC Code 17-28-60 See, Exhibit (B) & (C)

Conclusion

WHEREFORE, based on the foregoing, the Applicant requests that the Application for Post-Conviction DNA Testing proceed to to hearing, for failure to meet requirements of S.C. Code 17-28-50(B); and Rule 55 Default.

Respectfully Submitted,

Kevin L. Harbin

Kevin L. Harbin

B.R.C.I. Murray 237

4460 Broadriver Road

Columbia S.C. 29210

September 8th, 2015

Exhibit (A)

State of South Carolina
Solicitor, Thirteenth Judicial CircuitTelephone: 864-467-8847
Telefax: 864-467-8810Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185Solicitor
Robert M. Ariail

June 16, 2005

Caroline Horlbeck
Public Defender's Office
Greenville County Courthouse
Greenville, SC 29601Re: State v. Kevin Harbin
CSC, Kidnapping, STAR

Dear Caroline:

Per your request I checked on the circumstances surrounding the questioning of Mr. Harbin. Investigator Mike Fortner has indicated that the questioning of the defendant was not recorded via audio tape or video tape. I have also had Sgt. Sherbert, with the Greenville County Forensics Division, compare the fingerprints lifted from the crime scene with those of Mr. Harbin. The latent prints lifted do not match those of Mr. Harbin. Sgt. Sherbert has notified me that a palm print was lifted from the crime scene, but she does not have the defendant's palm print to compare with the print lifted from the crime scene. I am going to have her take the defendant's palm print and then make a comparison. I have also requested the victim's medical records from St Francis Women's Hospital; I will make you a copy when I receive those records.

I know you need the medical records and the results from the palm print to make any final decision on how to advise your client, but do you have any indication of whether he wants to accept my plea offer? If you have any questions, do not hesitate to contact me at 467-8638.

I am,

Sincerely,

John D. Newkirk
Assistant Solicitor

How and why would a Solicitor make a PLEA OFFER without
Never having the Allege victims medical Records, nor had the print
been compared to my prints. Is this justice? Plus the
Prints were never compared to anyone else whose
Prints are these sense the Alledge Victim show them
Everywhere the Suspect touch and they process clean
identifiable prints from the crime scene.
The Alledge Victim refuse A lie detector test!!

was once on course to begin testing by August, but an unexpected retirement caused a delay, said Capt. Jackie Kellett of the Public Safety Department.

The hope now is that the lab will soon be accredited and that a DNA technical leader and analyst will begin working cases by the end of the year, she said.

"We've just got to get that stamp of approval," Kellett said.

Violent crimes will be the focus at the start, she said.

Richland County started its DNA lab in 2004 and turns around evidence in a month, forensics lab director Demi Garvin said. Greenville authorities expect to do the same, Kellett said.

Beaufort County opened its own lab this year, and York County plans to open one next year.

Agencies with no local lab are left with the option of adding to SLED's 2,300-case backlog or paying a fee to have another lab do the job. While authorities said wait times can stretch beyond a year, SLED puts a rush on emergencies, such as when a killer is on the loose.

SLED receives about 3,000 samples a year from about 300 law enforcement agencies statewide, said Todd Hughey, the agency's forensics lab services director.

Thirteen analysts, six technicians and one DNA supervisor handle the cases, he said.

Greenville County's lab will be open to the Sheriff's Office and all of the county's municipal police departments. It might also take on work from Pickens County for a fee, Kellett said.

Pickens County Assistant Sheriff Tim Morgan said he didn't know of any specific plans to shift DNA analysis duties from SLED



DNA evidence lead investigators to arrest Jerry Buck Inman, shown here in 2006, for the murder of Tiffany Marie Souers.

to Greenville County.

But such an arrangement would have precedent. Pickens County has computer forensic work done in Anderson County and sends suspected drugs to Greenville County for analysis, Morgan said.

In some drug cases, defendants are ordered to repay the county for the testing, he said.

"Having more DNA labs would only help the situation," Morgan said. "I can't see where it would hurt anything."

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"Unfortunately, there is a lot of crime in South Carolina," Hughey said. "There is a lot of evidence to be proc-

essed and to be analyzed."

The state's rate of 670.8 violent crimes for every 100,000 residents placed it third in the nation in 2009, behind the District of Columbia and Nevada, according to recent FBI numbers.

Start-up costs for Greenville County's DNA lab are running around \$500,000, including \$225,000 in federal money paying for the equipment, Kellett said.

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"The technology has its limits, Hughey said.

About half of SLED's backlog comes from "touch DNA," or swabs taken from door handles and other surfaces that can help identify suspects in property crimes when no other physical evidence is available.

Taking such samples has proven successful in some cases, he said.

But in many cases, there isn't enough DNA available to get a usable profile, Hughey said.

In some cases, several people's DNA is mixed together, making the sample worthless, he said.

"Typically, DNA alone does not solve the case," Hughey said. "We can iden-

tify an individual. We can place them at the crime scene. But it still takes that investigative lead — that investigative work — to determine if they were ones that perpetrated the crime."

Attachment A, 78-
Exhibit C 1-4)

IN THE STATE OF SOUTH CAROLINA
FOR GREENVILLE COUNTY CIRCUIT COURT
13th JUDICIAL CIRCUIT

15

Kevin L. Harbin, # 303214,
Petitioner,

Case No. 2004-GS-23-6122;6123;6124;

Vs.
The State,

MOTION FOR DNA TESTING:

Respondent.

I, the Petitioner in the above referenced matter do hereby request this Circuit Court to grant my Motion For Dna Testing in the above case for the following stated reasons:

- (1) My fingerprints were not found at the crime scene in this case. However; several different sets of fingerprints were found at the crime scene. None matched me and those prints were not sent to the National Data Base for a match, nor; was any DNA testing done on those prints.
- (2) I am innocent of the crimes charged against me and DNA testing of those prints will prove that very fact. I've been in prison for about six (6) years for crimes I did not commit.
- (3) In support of this Motion I would respectfully call this Court's attention to the following facts;
At a PCR Hearing in the case of Steve Randall Bagwell, # 304273 on November 25th, 2009 in which Judge Alexander S. Macaulay issued an order in the amount of \$5,000 dollars to do DNA testing. SEE: SLED CASE NO.: 03135749.
- (4) Also, SEE: * Greenville Newspaper Article hereto attached and Marked Page 1 and 2.

Wherefore, Petitioner respectfully request Motion be granted.

RESPECTFULLY SUBMITTED BY:

Kevin L. Harbin #303214
Kevin L. Harbin, #303214
B.R.C.I. Murry-146
4460 Broad River Road
Columbia, South Carolina
29210

PRESIDING JUDGE: _____

JUDGE CODE: _____

MOTION GRANTED: _____, OR: DENIED: _____

THIS _____ DAY OF _____, _____.

Kevin L. Harbin	)	IN THE COURT OF COMMON PLEAS
Applicant	)	
	)	
	)	
v.	)	Notice of Service
	)	
State of South Carolina	)	
<u>Respondents</u>	)	

The undersigned pro se Applicant Kevin Harbin, does hereby certify that service of the, DEFAULT Motion pursuant to RULE 55 in the above captioned matter was made upon, Greenville Clerk of Court, and Chief Administrative Judge for General Session, Honorable D. Garrison Hill, by placing copies in the United States mail, thru Broad River mailroom, at the below listed address the day of: September 8th, 2015

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

Chief Administrative
Judge/General Session
I/Co Honorable D. Garrison Hill
305 East North Street (Suite 213)
Greenville, S.C. 29601

Kevin L. Harbin
Kevin L. Harbin 303214
Murray 237 BRCI
4460 Broadriver Rd.
Columbia S.C. 29210

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
Kevin L. Harbin #303214	)	Affidavit of Kevin Harbin
Applicant	)	
	)	
v.	)	
	)	
State of South Carolina	)	
Respondents	)	

PERSONALLY APPEARED BEFORE ME, Kevin L. Harbin, who being duly sworn, deposes and states:

1) I am an inmate in the South Carolina Department of Corrections. I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann §17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense.

2) I filed an application for Forensic DNA Testing in the Greenville County Clerk of Court, that was notarized on September 18 2014, and clock-stamped and filed on September 23, 2014 in the clerk's office. But I never received a copy, until I wrote the clerk of court of the Supreme Court who forwarded letter to Greenville clerk of court. See, Exhibit(A)

3) I received a letter dated 10-16-2014, from Greenville County clerk of court, and copy of DNA Application, informing me that a copy was forwarded to the Solicitor's office and to the Administrative Judge, and no further information was available

from the clerk until a ruling has been filed by the judge.

See, Exhibit(B)

4) After six (6) months and receiving no response from anyone I wrote a letter to the "South Carolina Court Administration," and a response came on May 14th, 2015, from Staff Attorney Section informing me of statutes addressing any relevant time frames as well as the procedures to be followed after filing of an application where found in SC Code of Laws 17-28-10 et. seq. Exhibit (C)

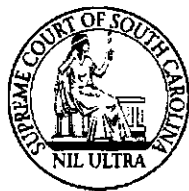
5) I have not received any kind of response or acknowledgement from the Solicitor or Attorney General, as applicable or the victim, and it has surpass the ninety days (90) require by, SC Code 17-28-50(B)

6) Applicant has learned, that Entry of Default is a ministerial act which a clerk is required to perform once Default is made to appear by the Affidavit of the moving party. "Stark Truss Co., Inc. V. Superior Const. Corp. (S.C. App. 2004) 360 S.C. 503,602 S.E. 2d 99."

FURTHER, AFFIANT SAYETH NOT.

Kevin L. Harbin
Kevin Harbin

SWORN TO BEFORE ME THIS 8th
DAY OF SEPTEMBER 2015
Sutton H. Fry Seal
Notary Public For South Carolina
My Commission Expires
March 5, 2018

Exhibit (A)

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

TO: Kevin Harbin #303214

FROM: Daniel E. Shearouse, Clerk *DES*

DATE: October 10, 2014

This Court has received your recent correspondence.

____ This Court cannot provide legal advice or assistance. Therefore, we will not be able to respond to your legal questions and you should consult an attorney.

____ Since you are represented by counsel in this matter, no action will be taken on your pro se filing. Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010); Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

____ If you believe you have good cause to seek to have your current counsel relieved then you should file a motion in the lower court in which this matter is pending.

____ Since you are represented by counsel in this matter, we are forwarding a copy of your letter to counsel for any assistance he/she can give you.

____ Your remedy is in the lower court where this matter is pending.

X Your letter is being forwarded to the clerk of the lower court.

Cc: Honorable Paul B. Wickensimer, Clerk of Court, Greenville County
(with enclosure)



Office of the Clerk of Court

Greenville, South Carolina

Paul B. Wickensimer
Clerk of Court

Exhibit (B)

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

October 16, 2014

Kevin Harbin #303214
B.R.C.I.
4460 Broad River Rd.
Columbia, SC 29210

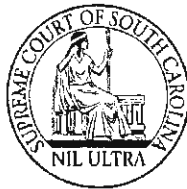
Dear Mr. Harbin:

Your letter postmarked 10/8/2014 was forwarded to our office by the South Carolina Supreme Court. Your Forensic DNA Testing Application was received and filed by our office on 9/23/2014. As requested, a clocked copy of that application was mailed back to you on 9/23/2014. A copy of your application was forwarded to the Solicitor's Office and to the Administrative Judge.

No further information is available from the Clerk of Court until a ruling has been filed by the judge.

Sincerely,
Clerk of Court
Greenville County General Sessions

I-340-766
I 340-767
I-340-768

Exhibit ~~(b)(7)(C)~~

South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN W. FRIERSON
DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1800
FAX: (803) 734-1355
E-MAIL: rfrierson@sccourts.org

May 14, 2015

Mr. Kevin L. Harbin, #303214
BRCI - Murray #237
4460 Broad River Road
Columbia, SC 29210

Re: Your correspondence received May 12, 2015

Dear Mr. Harbin:

Your recent correspondence requested information relating to your Application for Forensic DNA Testing. The statutes addressing any relevant time frames as well as the procedures to be followed after filing of an application are found in SC Code of Laws §17-28-10 et seq.

The Greenville County Clerk of Court has filed your application and provided a copy of the same to the Solicitor as well as the Chief Administrative Judge. Pursuant to your request, the current Chief Administrative Judge for General Sessions is the Honorable D. Garrison Hill. His mailing address is 305 E. North St., Suite 213, Greenville, SC 29601. It is my understanding that the Solicitor is generally responsible for scheduling these hearings. You may wish to contact that office at 305 E. North St., Suite 325, Greenville, SC 29601.

Sincerely,

Staff Attorney Section/tbr

Acknowledge Receipt

Please Return Clock-Stamped Copy to Applicant.

Thank You,

04-6122 #340767
6123 I340766
6124 I340768

Kevin L. Harbin

Kevin Harbin #303214

BRCI Murray 237

4460 Broadriver Rd.

Columbia S.C. 29210

2015 SEP 17 PM 3:24
BRIAN L. HARBIN
4460 BROADRIVER RD
COLUMBIA, SC 29210

-see attached reply



Office of the Clerk of Court
Greenville, South Carolina
Paul B. Wickensimer
Clerk of Court

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

COPY

September 17, 2015

Kevin L. Harbin #303214
B.R.C.I.
4460 Broadriver Rd.
Columbia, SC 29210

Re: Filing "Default" & "Affidavit of Kevin Harbin"

Dear Mr. Harbin:

Your filings postmarked 9/8/2015 was received 9/14/2015. Enclosed please find a clocked copy of your filings as you requested. As a courtesy to you, a copy of your filings have been forwarded to the Solicitor's Office and to the Administrative Judge.

Please note that the Clerk of Court for General Sessions is a filing office and we do not set the motion docket, therefore we cannot provide motion status updates or information, nor do we have the authority to make any sort of ruling in the matter.

Sincerely
Clerk of Court
Greenville County General Sessions

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
STATE OF SOUTH CAROLINA)
vs)
KEVIN L. HARBIN,)
DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS

2004 GS 23 6122 -24
I340766-68

**STATE'S RESPONSE TO
DEFENDANT'S APPLICATION
FOR FORENSIC DNA TESTING**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JUL B. WICKES-SIMMER
OCT 21 PM 4:21

This matter comes before the Court by way of Defendant's Application for Forensic DNA Testing pursuant to Section 17-28-10 *et seq.* of the South Carolina Code of Laws. Defendant was tried by jury and convicted on September 8, 2005, of kidnapping, strong arm robbery and criminal sexual conduct in the first degree and sentenced to thirty years in prison by the Honorable Larry R. Patterson.

The Access to Justice Post-Conviction DNA Testing Act (Section 17-28-10 *et seq.*) authorizes the application by qualifying convicted defendants for forensic DNA testing that may affect their conviction. The Act describes, *inter alia*, the form and content of the defendant's application, the factors the applicant must establish at the hearing, and the manner in which the testing results may be used.

The Act requires that the applicant make a reasonable attempt to identify the physical evidence that should be tested and the specific testing sought. On the application, Defendant lists "[a]ll fingerprints, [p]alm [p]rints, [a]nd [s]weat from prints taken from crime scene" as the physical evidence or biological material he requests to be tested. The State is not aware of any scientific process by which DNA or "sweat" can be extracted from a latent print lift for purposes of developing a DNA profile. To the extent that any of these items can be subjected to DNA

analysis, Defendant has not described the specific testing sought. Defendant requests “[f]inger and [p]alm print comparison at National Data Base” [sic] and “[s]weat from all [p]rints at a [f]orensic [l]ab” as the specific type of DNA testing he seeks. If Defendant is requesting that recovered latent prints in this case be submitted to the Automated Fingerprint Identification System (AFIS) database, such a request is not authorized under the Act.

The Act requires that the applicant explain why the identity of the applicant was or should have been a significant issue during the original proceedings. Defendant explains in his application that “[p]rints taken from crime scene were not a match to me [a]nd [n]ot [c]ompared to anyone else through the National Data Base” [sic] and alleges that such a comparison would be “very material to my innocence of [g]uilt.” Defendant’s application fails to indicate how additional DNA testing would inculcate anyone other than Defendant. Specifically, at trial, the State presented testimony regarding the processing of the crime scene and collection of latent prints that did not belong to the Defendant. Should it be possible to extract DNA from the recovered latent print lifts to create a profile, this profile (much like the latent print itself) would neither match the Defendant nor provide the jury with any additional or “new evidence” inculcating or exculcating the Defendant. Moreover, if DNA results were to demonstrate that other individuals had been inside the retail store that day, or another day, that information would not provide evidence inconsistent with the State’s theory of the case or suggest anyone other than Defendant was responsible for the crimes against the victim.

Defendant does not describe how DNA testing would exclude Defendant to the extent that it would change the outcome of the trial. At trial, the victim, and at least one witness who was in the store shortly before the attack, positively identified the Defendant. Also, the Defendant made a comment to investigators regarding the race of the victim, when no mention of

the victim's race had been revealed to him. Interestingly, Defendant, in his application, seems to be requesting a latent print comparison to identify possible contributors to these latent prints recovered from the crime scene.¹ The identification of the contributor of these prints, through DNA or latent print comparison, would not inculcate anyone or exculpate the Defendant since the jury's verdict necessarily rendered the identity of the contributors of these prints immaterial to the Defendant's guilt.

The Act also requires that the applicant explain why material to be tested was not previously subjected to testing or why additional testing would provide a substantially more probative result. Defendant indicates in his application that, post-trial, a request for DNA testing filed on December 1, 2010, was "decline for no [f]unds to implement" [sic]. Defendant's remarks are not responsive as to why additional testing would provide probative results.

Finally, the Act requires that the applicant explain why, if the testing were to produce exculpatory results, the results will constitute new evidence that would change the results of the applicant's conviction. Again, Defendant has not explained why the results of this test would constitute new evidence or why the results would exonerate him or implicate someone else. Defendant's application alleges that evidence gleaned from DNA testing of the material he identifies "would prove my innocence of the offenses charged". The mere presence of other DNA at the crime scene or the identification of the contributors of the latent prints recovered therefrom would not change the evidence presented at trial.

At the hearing, the Act requires the applicant to establish that the physical evidence or biological evidence to be potentially in a condition permitting DNA testing and to be material to the identity of the applicant as the perpetrator of the crime or to constitute new evidence sufficient to

¹ It bears mentioning that the crime scene, in this case, was a retail store many people entered on a daily basis, including the day the Defendant attacked the victim.

change the result of the applicant's conviction. The State believes that Defendant will be unable to establish that any material could be extracted from a latent print lift in such a condition as to allow the development of a DNA profile. Moreover, as previously referenced herein, the Defendant will be unable to establish the materiality of the evidence to his identity as the perpetrator in this incident since the jury was informed he was not the contributor of the recovered latent prints and the jury convicted him without knowing the identity of the contributor(s). Finally, for the reasons articulated herein, the Defendant will be unable to establish that DNA testing will result in any new evidence that will change the result of his conviction, as the identity of the latent print contributors was not material to the jury's verdict.

The State respectfully asks that the Court deny Defendant's Application for Forensic DNA Testing due to the failure of the Defendant to articulate how DNA testing could be performed on the evidence he identifies or why DNA testing would prove probative or change the outcome of his trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Allen Fretwell", written over a horizontal line.

Allen Fretwell
Assistant Solicitor
S.C. Bar No. 17016

October 21, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
)
 COUNTY OF GREENVILLE) 2004 GS 23 6122

I340766-68

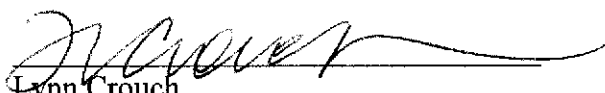
STATE OF SOUTH CAROLINA)
)
 vs)
)
 KEVIN L. HARBIN,)
)
 DEFENDANT.)

AFFIDAVIT OF PROOF OF SERVICE

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL WICKENS
 2015 OCT 21 PM 4:20

The undersigned hereby certifies that he/she has this date served upon Defendant in the above-referenced case: State's Response to Defendant's Application for Forensic DNA Testing by depositing same in the United States Mail, with sufficient postage affixed thereto, regarding the above matter to the following address:

Inmate Kevin L. Harbin, #303214
 Broad River Corr. Inst.
 4460 Broad River Road
 Columbia, SC 29210


 Lynn Crouch
 Legal Investigator

On Behalf of:

Allen Fretwell
 Assistant Solicitor, 13th Judicial Circuit
 305 E. North Street, Suite 325
 Greenville, SC 29601

Greenville, S. C.

Dated: OCT. 21, 20 15

30
04-6122-6124
I340767

68 STATE OF SOUTH CAROLINA)
66 COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Kevin L. Harbin #303214)
Applicant)

REPLY TO BELATED RESPONSE

v.)

State of South Carolina)
Respondents)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 NOV 17 PM 3 46

The matter comes before the Court by way of an Default Motion filed on September 17, 2015 against Solicitor's office in regard to Post-Conviction DNA Testing pursuant to S.C. Code 17-28-10, et seq. For the following reason, their belated response should be disregarded and the Court should proceed in accordance with statutory procedure.

First the Act requires, S.C. Code 17-28-50(B) that the Solicitor has 90 days to respond, three hundred and seven days(307) later, a response was received that has no merit in accordance with The Access to Justice Post-Conviction DNA Testing Act Statutory Procedure.

Second the Act requires, see S.C. Code 17-28-50(C) at any time prior to entry of Judgment the Court may, when appropriate issue orders for amendment of the Application and for any documents related to the application including, but not limited to, pleadings, motions, and request for extensions of time. In considering the application and related documents the Court shall take account of substance, regardless of defects of form.

-emailed to AJ/50
-ret. copy to def

Third the Act requires, S.C. Code 17-28-60, that the Court must appoint Counsel for an indigent Applicant after the Court has determined that the Application is sufficient to proceed to a hearing but prior to the actual hearing. This Court informed Applicant on October 26th 2015 at a hearing in accordance with statute that an attorney would be appointed, but applicant has not been notified or contacted by any Attorney. Applicant has received a belated response from Solicitor requiring this motion to be filed Pro-Se in response to their belated and pre-mature response.

Finally, the Act requires S.C. Code 17-28-70(A)(B) that the Court shall order a Custodian of Evidence to preserve all physical Evidence and Biological material related to the Applicant's conviction or adjudication pursuant to the provision of Article 3, Chapter 28, Title 17. B.) The Custodian of Evidence shall prepare an inventory of the physical Evidence and biological material and issue a copy of the inventory to the Applicant, the Solicitor of Attorney General, as applicable, and the Court.

Conclusion

Based on the aforementioned reasons, Applicant respectfully requests that state be barred from responding for not adhering to statutory requirements regarding time and extensions. State's delay also violates Applicant's right to Due Process.

Kenneth D. Harbison

Kevin L. Harbin	)	In The Court of Common Pleas
Applicant	)	
	)	
	)	
v.	)	Notice of Service
	)	
	)	
State of South Carolina	)	
Respondent	)	

The undersigned pro-se Applicant Kevin Harbin, does hereby certify that service of the, Reply To Belated Response in conjunction with Default motion previously filed, in the above captioned matter was made upon, Greenville Clerk of Court, and Chief Administrative Judge for General Session, Honorable D. Garrison Hill, by placing copies in the United States mail, through Broad River mailroom, at the below listed address the day of November 5th, 2015.

Kevin L. Harbin
B.R.C.I. Murry-237
4460 Broadriver Road
Columbia S.C. 29210

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

Chief Administrative
 Judge/General Session
 I/Co Honorable D. Garrison Hill
 305 East North Street (Suite 213)
 Greenville, S.C. 29601

on the 5th day of November, 2015
Susan H. Frye

My Commission Expires
 March 5, 2018

W. Walter Wilkins, Solicitor
Thirteenth Judicial Circuit
305 E. North Street, Suite 325
Greenville, SC 29601
AOF

MU 237B

RETURN SERVICE REQUESTED

PRECEDENT
FIRST CLASS



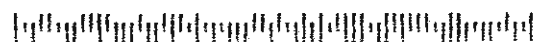
UNITED STATES POSTAGE
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0008006352 OCT 25 2015
MAILED FROM ZIP CODE 29687

Inmate Kevin L. Harbin, #303214
Broad River Correctional Institute
4460 Broad River Road
Columbia, South Carolina 29210

RECEIVED

NOV 04 2015

BRCI
MAILROOM



34
04-6122-6124
I340767
66
68

State of South Carolina)
County of Greenville)
Kevin L. Harbin #303214)
Applicant)
v.)
State of South Carolina)

In The Court of Common Pleas

Amendment of Reply To Related
Response

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS, CLERK
2015 NOV 17 PM 3:42

This matter comes before the Court by way of Solicitor's Office
related response to Application for Forensic DNA Testing pursuant
to Section 17-28-10 et seq. of the South Carolina Code of Laws.

The Access to Justice Post-Conviction DNA Testing Act (Section
17-28-20(6) et seq.) defines "DNA sample" means the tissue,
saliva, blood, or any other bodily fluid taken at the time of
arrest from which identifiable information can be obtained.
(Section 17-28-20(9) et seq.) defines "Physical evidence" means
an object, thing, or substance that is or is about to be produced
or used or has been produced or used in a criminal proceeding
related to an offense enumerated in (Section 17-28-30, and that
is in the possession of a Custodian of evidence. The State
claims to not be aware of any scientific process by which DNA
or "sweat" can be extracted from a latent print for purposes
of developing a DNA profile. The Testimony of the State's Expert
in fingerprint science Sergeant Rene Sherbert on page 202 of
Trial Transcript "Line 12 through 18" (See Exhibit A), will
disregard State's claim.

The Act requires explanation of why material to be tested was
not subjected to testing or why additional testing would provide

- emailed to AJ/SO
- not copy today

a substantially more probative result. State's Expert in fingerprint science Sergeant Rene Sherbert on page 213 of Trial Transcript "Line 13 through 18" (See Exhibit B), testified that the presence of sweat on a fingerprint that was lifted, would have to go to a Lab to be able to determine a DNA profile and this procedure was not followed in this case.

The Act also requires at the hearing explanation of why results of testing would constitute new evidence or why results would exonerate him or implicate someone else. Officer Darwin Shaw Sergeant with the Greenville County Forensics Division, testified on page 187 of Trial Transcript "Line 14 through 21" (See Exhibit C) that he processed the breaker box which had been switched off by perpetrator and was able to lift fingerprints and forward them to latent Examiner Expert in fingerprint science Sergeant Rene Sherbert. (See also Exhibit D) Greenville County DPS Forensic Investigation Report. Latent Print Examiner Expert in fingerprint science testified on page 209 and 210 of Trial Transcript "Lines 15 through 25 and Lines 1 through 7" (See Exhibit E and F) that she did not receive any prints to be examined from the doorknob, breaker panel, sink or toilet.

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by improper execution through duly constituted agents. "Village of Willowbrook Vs.

Olech, 528 U.S. 562, 564 (2000)(gouting Sioux City Bridge Co.
V. Dakota County, 260 U.S. 441, 445 (1923)).

See S.C. Code of Law 17-28-90. Hearing; Factors to be proved;
orders relating to DNA samples.

A). The application must be heard in , and before a judge of,
the general sessions court or family court in which the
conviction or adjudication took place. A record of the proceed-
ings must be made and preserved, All rules and statutes
applicable in criminal proceedings are available to the Applicant
and the Solicitor or Attorney General, as applicable.

D). The Court shall order that the Applicant's DNA sample and
the Physical evidence or biological material be tested by SLED,
a local combined DNA Index System (CODIS) laboratory, or prior
to any testing, any other laboratory approved by SLED, in an
effort to ensure that the results may be entered into the State's
DNA Database and combined DNA Index System. Any other type
of DNA testing ordered by the Court shall be conducted in cons-
ultation with SLED or a local CODIS laboratory.

Conclusion

Based on the aforementioned reasons, Applicant respectfully
requests statutory procedure be adhered to in accordance with
constitutional challenge made on equal protection grounds that
a statute will be found to violate equal protection only when
it results in discrimination against a certain class and the
classification is not rationally related to any state policy
or interest.

Kevin L. Harlin

Kevin L. Harbin	)	In The Court of Common Pleas
Applicant	)	
	)	
V.	)	AFFIDAVIT of Proof of Service
	)	
State of South Carolina	)	
Respondent	)	

The undersigned Pro-Se Applicant Kevin Harbin, does hereby certify that service of the Amendment of Reply To Belated Response in conjunction with Default motion previously filed, in the above captioned matter was made upon, Greenville clerk of Court, and Chief Administrative Judge for General Session, Honorable D. Garrison Hill, by placing copies in the United States mail, through Broad River mailroom, at the below listed address the Day of November 9th, 2015.

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

Chief Administrative
Judge/General Session
I/Co Honorable D. Garrison Hill
305 East North Street (Suite 213)
Greenville, S.C. 29601

Kevin L. Harbin
Kevin L. Harbin #303214
B.R.C.I. Murray-237
4460 Broadriver Rd.
Columbia S.C. 29210

1 hundreds to close to a thousand that I have processed, if
2 not more.

3 Q Have you ever been qualified as an expert before?

4 A I have been qualified as an expert witness in the
5 field of fingerprint science, in both general sessions
6 court and federal court.

7 Q And approximately how many times have you been
8 qualified?

9 A I have been qualified three times.

10 Q Have you ever not been qualified?

11 A No, sir, I have never not been qualified.

12 → MR. NEWKIRK: Your Honor, at this time the State
13 → would move the Court to qualify Sergeant Sherbert as an
14 → expert in fingerprint science.

15 → THE COURT: I will.

16 → MS. HORLBECK: Without objection.

17 → THE COURT: I would permit her to express her
18 → opinion in regard to fingerprints. Okay.

19 BY MR. NEWKIRK:

20 Q Did you -- Sergeant Sherbert, did you compare the
21 prints in this case?

22 A Yes, sir, I did.

23 Q And where did you get those prints from?

24 A The latent prints were submitted to our office by
25 Sergeant Dar Shaw and Forensic Technician Joey Hornsby.

1 Q And did you compare those prints that you received
2 from Sergeant Shaw with the defendant's prints?

3 A Yes, I did.

4 Q And did any of those prints match the defendant's
5 prints.

6 A They did not match.

7 Q Sergeant Sherbert, let me show you what has been
8 marked as State's Exhibit Number 5. Have you ever
9 processed a cash register similar to that, what is
10 depicted in State's Number 5?

11 A Yes, sir. The cash register that's depicted in this
12 photograph marked State's Exhibit 5 appears to be of a
13 plastic form with beige and grey keys that also appear to
14 be plastic.

15 Q Is there any instance where someone would touch a
16 cash register such as that and not leave a latent print?

17 A It is possible. Cash registers are something that
18 are handled quite frequently. And often times on the
19 keys they're dipped in in the center and we don't lay our
20 fingers completely flat on them. So often times all you
21 get is a tip, and then you use this same key over and
22 over again, and the type of pressure that you use when
23 touching objects a lot of times dictates whether or not
24 a -- you know, a comparable print may be left on that
25 type of surface. If there's -- if they've pushed or slid

(Exhibit B)

1 powder and then the fingerprint card. I have no way to
2 determine whether there was oil there. A lot of times in
3 looking at the prints, and in this case there are some
4 areas in the tape where you have those blobbing
5 formations, so I don't know if that's the presence of oil
6 or other contaminants. I have no way of telling that.

7 Q And you're not -- so you're not able to test for the
8 presence of oil on a fingerprint lifted?

9 A That's correct.

10 Q You're not able -- you're not able to test for the
11 presence of water on a fingerprint that was lifted?

12 A That's correct.

13 → Q You're not able to test for the presence of sweat on
14 → a fingerprint that was lifted?

15 → A That's correct. It would have to go to a lab to be
16 → able to determine those types of things.

17 → Q And that wasn't done in this case?

18 → A No, ma'am.

19 Q Okay. You mentioned that you also analyzed
20 footprints. No footprints were submitted to you in this
21 case?

22 A No, ma'am, not in this case.

23 Q And you have analyzed literally hundreds of
24 thousands of fingerprints in your experience, correct?

25 A Yes, ma'am.

1 Q Every type of fingerprint training there could be,
2 ridgology, advanced palmology, I'm know I'm not using the
3 correct terms, but all of that, all the advanced,
4 looking at hand and fingerprints and seeing if there is
5 a match?

6 A Yes, ma'am, I've had advanced ridgology, and
7 ridgology and palm printing and all those ---

8 Q Okay.

9 A --- latent print schools.

10 Q Okay. And when you analyze fingerprints all you
11 need is one, all you're looking for is one match,
12 correct?

13 A We don't stop at one.

14 Q You don't stop at one, but in this case you didn't
15 even find one that matched Kevin Harbin?

16 A That's correct.

17 Q All right. And at some point recently you even
18 analyzed Kevin Harbin's palm print, didn't you?

19 A Yes, ma'am, that's correct.

20 Q And there was no match?

21 A That's correct.

22 Q Okay. Now, when you analyzed his fingerprints, did
23 you analyze them for the presence of oil?

24 A I don't have any way to determine whether oil is
25 there, because I have the lift tape and then the black

1 was, how many people were involved, what the business --
2 where the business was. And then I went in, kind of
3 walked around the interior, just to see what the inside
4 looked like.

5 Q Did you dust for fingerprints?

6 A I did. Originally the victim was there at the
7 scene. I requested she escort me inside to show me areas
8 which may have been touched by the suspect.

9 Q And which areas did you dust?

10 A Did the interior and the exterior of the front door,
11 the counter tops, the cash register drawer. There were
12 two tables that had been pushed -- reportedly pushed in
13 front of the bathroom door. I processed those two

14 → tables. I noticed there was no air-conditioning on and
15 → no lights on in the business. I went back to the breaker
16 → box, which was on the very back wall, and saw that the
17 → breakers had been switched off and processed the breaker
18 → box as well.

19 → Q And were you able to lift fingerprints?

20 → A I did lift fingerprints and sent fingerprints to our
21 → latent examiner.

22 Q Did you do anything else at the Silver Closet?

23 A Took photographs. Took photographs of the scene and
24 primarily then processed for latent prints.

25 MR. NEWKIRK: Okay. No further questions.

1 in Greenville County.

2 Q And what are your duties with the forensics?

3 A We responds to scenes with all agencies within
4 the -- within Greenville County. We process scenes for
5 latent fingerprints, photographic documentation of
6 scenes, the collection of evidence and preparing reports
7 for court purposes.

8 Q Were you on duty on May 12th of 2004?

9 A Yes, I was.

10 Q On that date did you respond to the Silver Closet?

11 A Yes, I did.

12 Q And why did you respond to the Silver Closet?

13 A Dispatch gave me a call of a -- of an armed robbery
14 that had occurred at that location.

15 Q Did any other forensic officers arrive -- respond
16 with you?

17 A Technician Hornsby had shown up after I did. I was
18 the first technician on scene.

19 Q And is Technician Hornsby here today?

20 A No, sir, he passed away in February.

21 Q And when you arrived at the Silver Closet, what did
22 you do?

23 A When I got to the scene I went -- I tried to find
24 out who the officer was actually taking the report. Got
25 information from that deputy as to what the situation

Exhibit (D)

GREENVILLE COUNTY DPS FORENSIC INVESTIGATION REPORT



Requesting Agency: Greenville County Sheriff's Office		Response Date: 5/12/04		Case #: 1-04-070901	
Offense: Armed Robbery		Secondary Offense: CSC Investigation		Area: 03	
Location: 260 B CONGAREE RD.		City: GREENVILLE		State: SC	
Secondary Location:		City:		State:	
Recd: 1750	En Route: 1750	Arrived: 1800	Cleared: 1900	LEC	1810
Investigating Officer: BALLENGER		Officer Unit #: C-24		On scene upon arrival: Yes ☒ No ☐	
SCENE SECURED? SEARCHED? INDEXED?					
Scene Secured: Yes ☒ No ☐		Method: On Scene Officer		If other, explain:	
S/W - Consent Obtained: Yes ☒ No ☐		Key Holder Present? Yes ☒ No ☐		Describe: EMPLOYEE	
VICTIM/COMPLAINANT INFORMATION					
Last Name: [REDACTED]		First Name: [REDACTED]		Middle: [REDACTED]	
Address: [REDACTED]		City: MAULDIN		State: SC Phone #: [REDACTED]	
VICTIM INFORMATION (BUSINESS)					
Business Name: THE SILVER CLOSET		Business Phone #: 258-0923			
Address: 260 B CONGAREE RD.		City: GREENVILLE		State: SC Rep: TURCOTTE, MARC	
INCIDENT SYNOPSIS					
Synopsis of Incident: Upon arrival, the R/O was advised that a black male entered the business and had the employee show him some rings. After a short time of looking at rings, the suspect grabbed the victim and had her go behind the counter, open the cash register as well as cash box, and the suspect removed cash from both.					
The suspect then reportedly forced the employee into the bathroom, made her pull her pants down, penetrated her vagina with his finger, and then used the cord from the vacuum cleaner and tied the victim's hands behind her back.					
Upon the employee getting untied, she had to force her way out of the bathroom, as the suspect had placed two wooden tables in front of the bathroom door prior to leaving.					
The R/O spoke with the victim and had her go through the business to show all areas known to her as being touched by the suspect.					
The victim was then transported from the scene.					
Technician Hornsby arrived on the scene and assisted the R/O with processing numerous areas within the business that were possibly touched by the suspect.					
The R/O observed the light in the bathroom did not work and no air conditioning was on, and upon checking the breaker box, found two switches in the breaker box had been switched off.					
LOCATION, TYPE OF STRUCTURE, CONDITION OF SURROUNDINGS					
Building Type: Commercial Business		If other, explain: N/A		Number of Affected Rooms: 2	
POE: Door		POE Description: SEE NARRATIVE			
Extent of Damage: None					
Evidence Of Robbery/Theft: YES		Not Including POE, Condition Of Doors & Windows: Normal/Undisturbed			
Did perpetrator alter lights? YES		Switches/Controls checked? YES		Bulbs broken / loosened? NO	
Smells (Gas, Tobacco, Alcohol, Other) Are smells unusual? NO		Type Smell: N/A			
Pets/Animals Present: NO		Is Perpetrator suspected to have had contact with pets/animals? N/A			
Unusual debris or discarded items? If Yes, describe:					
Security videotape available? Yes ☐ No ☒ Tape viewed by R/O? Yes ☐ No ☒ Tape collected by R/O? Yes ☐ No ☒					
Notes:					
SCENE PROCESSING					
Items Processed For Latent Prints: Yes ☒ No ☐		Latent Results: Yes ☒ No ☐		Elimination Prints: Yes ☐ No ☒	
General Areas of Latent Processing: INTERIOR AND EXTERIOR SIDE OF ENTRANCE DOOR; GLASS COUNTERS; DOOR KNOB TO					
Notes: THE TOILET; SINK; BREAKER PANEL					
PHYSICAL EVIDENCE RECOVERY					
Blood: ☐	Fibers: ☐	Soil / Dirt: ☐	Liquid: ☐	Footwear: ☐	Location:
Hair: ☐	Stains: ☐	Tool Marks: ☐	Glass: ☐	Tire Tracks: ☐	
Evidence Recovered At The Crime Scene: Yes ☐ No ☒ Describe:					
DISPOSITION					
Photographs ☒		Photo I.D. #10481		Photo I.D. #	
Collected Items Processed: ☐		Results: N/A		Remarks: N/A	
Forensic Investigation Disposition		Latents forwarded to DPS Latent Division: ☒		Elimination prints forwarded to DPS Latent Division: ☐	
Evidence items packaged and placed in DPS P&E: ☐ Total evidence items placed into P&E:					

REPORTING OFFICER	Shaw-Sgt. D. L. [Signature]	STAR #	8581	UNIT #	921	DATE	5/13/04
REPORTING OFFICER	Hornsby, J	STAR #	8728	UNIT #	926	DATE	
APPROVING SUPERVISOR	Sgt. D. L. Shaw	STAR #	8581	UNIT #	921	DATE	5/13/04

Exhibit (A)

DS-4046

MAY 19 12:23

1 just lift that up and pull the door open, and that small
2 rounded D ring is too small of a surface to get any print
3 that would be comparable.

4 MR. NEWKIRK: Nothing further.

5 CROSS-EXAMINATION

6 BY MS. HORLBECK:

7 Q All right. Officer, in this case you reviewed
8 the -- you reviewed prints that were pulled from the
9 interior entrance and the exterior of the entrance,
10 correct?

11 A Yes, ma'am.

12 Q All right. And prints that were pulled from the
13 counter tops?

14 A Glass counter tops inside the business, yes, ma'am.

15 → Q And prints that were pulled from the doorknob to the
16 → bathroom?

17 → A I do not have any prints that were submitted to me
18 → from a doorknob.

19 → Q Prints from the sink and the toilet?

20 → A No prints were submitted to me from the sink or the
21 → toilet.

22 → Q Prints from the breaker panel?

23 → A I have no prints from a breaker panel.

24 → Q How about fingerprints from the cash register?

25 → A I have no prints that were submitted from a cash

1 Q Yes.

2 A Yes, sir, I have.

3 Q And is there an instance where a toilet -- an
4 individual can touch a toilet or a sink and not leave a
5 latent fingerprint?

6 A Yes, sir. If the surface is dusty or dirty then
7 that could be a barrier that blocks. A lot of times
8 people think in dust, oh, there's fingerprints there in
9 the dust, but all you see is the outline of the fingers.
10 What happens when you come in contact with something like
11 dust is -- and then you see oh, there was fingers there,
12 well, what they did is they touched the dust and carried
13 the dust away. Their hands didn't -- or their skin
14 didn't actually come in contact with the surface itself,
15 it picked up the dust and carried it off. And a lot of
16 times you have dust, or dirty surfaces, or excessively
17 dry skin.

18 Q In your experience as a crime scene officer, did you
19 process an indoor breaker box for fingerprints?

20 A Yes, I have processed indoor breaker boxes.

21 Q And is there an instance where a person can touch an
22 indoor breaker and not leave a fingerprint?

23 A It's possible, depending on -- you know, how they
24 touch the breaker box, or how they touch the door to it.
25 Often times they have those like a little D ring and you

(Exhibit F)

1 → register.

2 → Q So all that testimony regarding the possibility of
3 → leaving a print on a sink, or a toilet, or breaker panel,
4 → or the cash register has nothing to do with this case,
5 → because you didn't even analyze any prints from those
6 areas?

7 → A I did not analyze any prints from those areas you
8 just mentioned.

9 Q All right. So the plastic -- the possibility of
10 leaving a print on a plastic register has nothing to do
11 with this case?

12 A I didn't examine any print submitted from a cash
13 register.

14 Q You didn't even analyze anything off of a register
15 at all?

16 A There were no prints submitted off of a register.

17 Q So the possibility -- or the ability of a person to
18 leave a print on a plastic register has nothing to do
19 with this case?

20 A I didn't have any submitted to me, no, ma'am.

21 Q The possibility of a whether or not somebody can
22 leave a print on a toilet, or a sink has nothing to do
23 with this case because you didn't analyze prints from a
24 sink or a toilet?

25 A I did not analyze any prints from a sink or a

1 toilet.

2 Q And whether or not dust is a barrier between a
3 finger and leaving a print on a dusty area has nothing to
4 do with this case?

5 A I don't know if there was any dust on any of the
6 surfaces at the crime scene because I did not respond
7 directly to the crime scene.

8 Q But you did testify that a toilet area could be
9 dusty?

10 A Yes, ma'am, I did.

11 Q And you didn't even analyze a print from that area?

12 A That's correct.

13 Q It has nothing to do with this case, correct?

14 A I didn't analyze any prints from a toilet.

15 Q And the prints you did analyze, you used a magnifier
16 to look at those prints?

17 A That's correct.

18 Q They're magnified to a higher degree so that you
19 could see what you had in front of you and make a match
20 if possible?

21 A Right. The magnifiers allow you to see the
22 intricate detail of the print.

23 Q You had over 600 hours of training?

24 A In excess of 600 hours of advanced forensic
25 training, yes, ma'am.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

KEVIN L. HARBIN,
APPLICANT

-VS-

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
THE THIRTEENTH JUDICIAL CIRCUIT

WARRANT # 2014-GS-23-6123-24
I340766-68

APPLICANT'S REPLY TO STATE'S RESPONSE
AND REQUEST FOR A DNA HEARING

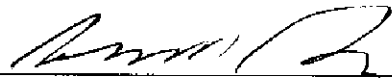
COMES NOW the Applicant, by and through his undersigned counsel, who moves for a hearing following a *pro se* Application for Forensic DNA Testing pursuant to the Access to Justice Post Conviction DNA Testing Act, S.C. Code Ann. § 17-3-10, *et. seq* filed September 23, 2014. The applicant submits that the court should proceed with the hearing because the State's response was filed on October 21, 2015, and failed to comply with S.C. Code Ann. § 17-3-50(B) requiring a response within ninety days.

Furthermore, the applicant argues that physical evidence from numerous fingerprint cards, palm prints, a vacuum cord allegedly used, and from a hair clip torn from the victim's hair by the perpetrator during the crimes for which Mr. Harbin was convicted can and should be tested for a DNA profile. On page 213 of Mr. Harbin's trial transcript State witness Sergeant Rene Sherbert testified that that she did not test for the presence of sweat on fingerprints which were lifted from the scene. Mr. Harbing asks that this "touch DNA" be tested. No attempts were made to obtain a DNA profile or test the evidence for DNA Mr. Harbin's trial and scientific advances in the ability to isolate and test for touch DNA allow for such testing. In its closing, the Solicitor explained sweaty or oily hands could explain the lack of a matching fingerprint from the many taken from the scene where the victim showed technicians all areas

she knew to be touched by the suspect could be explained by. (transcript p. 224, l. 14)

Exculpatory results from DNA testing would exonerate Mr. Harbin by showing the presence of another suspect at the scene.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
330 E. Coffee St,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina

This 25 day of January, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	2004 GS 23 6122-24
	)	1340766-68
KEVIN L. HARBIN,	)	
	)	
APPLICANT	)	
	)	
v.	)	STATE'S SUR-REPLY TO APPLICATION
	)	FOR FORENSIC DNA TESTING
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	
_____	)	

19 MAR 6 AM 11:42
Paul Wickensimer COC 604L SC

5L

This matter comes before the Court by way of an Application for Forensic DNA Testing pursuant to Section 17-28-10 *et seq.* of the South Carolina Code of Laws. Applicant was tried by jury and convicted on May 5, 2006, of two counts of murder and sentenced to fifty years in prison by the Honorable G. Edward Welmaker. Following the State's response to the application, Applicant filed a reply to which the State now offers its sur-reply.

In Applicant's reply, he requests testing or swabbing of (1) latent lifts, (2) the victim's hairclip and (3) a vacuum cord (used to bind the victim) for the presence of "sweat" or "touch" DNA. No cord was collected during the investigation, so testing that item is not possible.

With respect to the (1) latent print lifts and (2) the victim's hairclip, DNA analysts indicate that using a non-sterile brush (in conjunction with fingerprint powder) may result in cross-contamination for DNA purposes.¹ Additionally, the State's DNA analysts are not aware of any situation in Greenville County where DNA has been successfully extracted from latent print cards in such a way as to allow the creation of a DNA profile.

¹ As the sole intent of the forensic technicians is capturing the latent print, no measures were in place to preserve the integrity of the biological material.

Moreover, assuming *arguendo* a reliable DNA profile was developed, the profile would belong to the contributor of the latent print. Therefore, no “new” evidence would be generated upon which the Applicant’s conviction could be overturned, as the jury was aware that Applicant was not the contributor of the collected latent prints when finding him guilty beyond a reasonable doubt. As indicated in the State’s response, Applicant fails to indicate how additional DNA testing on the latent print lifts would inculcate anyone other than Applicant.

Specifically, at trial, the State presented testimony regarding the processing of the crime scene and collection of latent prints that did not belong to the Applicant. Should it be possible to extract DNA from the recovered latent print lifts to create a profile, this profile (much like the latent print itself) would neither match the Applicant nor provide the jury with any additional or “new evidence” inculcating or exculpating the Applicant. Moreover, if DNA results were to demonstrate that other individuals had been inside the retail store that day, or another day, that information would not provide evidence inconsistent with the State’s theory of the case or suggest anyone other than Applicant was responsible for the crimes against the victim.

As also indicated in the State’s Response to the Application, Applicant does not describe how DNA testing would exclude him to the extent that it would change the outcome of the trial. At trial, the victim, and at least one witness who was in the store shortly before the attack, positively identified Applicant. The State also introduced Applicant’s comment to investigators regarding the race of the victim—when no mention of the victim’s race had been revealed. As the incident location was a retail store where many people entered and exited on a daily basis, identification of the contributor of these prints would not inculcate anyone or exculpate Applicant since the jury’s verdict necessarily rendered the identity of the contributors of these prints immaterial to the Applicant’s guilt.

Finally, with respect to the hairclip or “barrette” (which is actually broken and exists in two parts), both of these pieces were processed for latent prints at the time of the initial investigation—introducing the same concerns regarding the possible contamination by use of a non-sanitary brush.

The State respectfully asks that the Court deny the Application for Forensic DNA Testing due to Applicant’s failure to articulate how reliable DNA testing could be performed on the evidence he identifies or why DNA testing would prove probative or change the outcome of his trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Allen Fretwell", written over a horizontal line.

Allen Fretwell
Assistant Solicitor
S.C. Bar No. 17016

March 6, 2019
Greenville, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF GREENVILLE

2004 GS 23 6122-24
I340766-68

KEVIN L. HARBIN,

APPLICANT

v.

**STATE'S AMENDED SUR-REPLY
TO APPLICATION FOR
FORENSIC DNA TESTING**

STATE OF SOUTH CAROLINA,

RESPONDENT.

This matter comes before the Court by way of an Application for Forensic DNA Testing pursuant to Section 17-28-10 *et seq.* of the South Carolina Code of Laws. Defendant was tried by jury and convicted on September 8, 2005, of kidnapping, strong arm robbery and criminal sexual conduct in the first degree and sentenced to thirty years in prison by the Honorable Larry R. Patterson. Following the State's response to the application, Applicant filed a reply to which the State now offers its sur-reply.

In Applicant's reply, he requests testing or swabbing of (1) latent lifts, (2) the victim's hairclip and (3) a vacuum cord (used to bind the victim) for the presence of "sweat" or "touch" DNA. No cord was collected during the investigation, so testing that item is not possible.

With respect to the (1) latent print lifts and (2) the victim's hairclip, DNA analysts indicate that using a non-sterile brush (in conjunction with fingerprint powder) may result in cross-contamination for DNA purposes.¹ Additionally, the State's DNA analysts are not aware of any situation in Greenville County where DNA has been successfully extracted from latent print cards in such a way as to allow the creation of a DNA profile.

FILED
2004 MAR 22 AM 8:50
PAUL WICKENBARGER, CLERK
COURT OF GENERAL SESSIONS
GREENVILLE, SOUTH CAROLINA

Moreover, assuming *arguendo* a reliable DNA profile was developed, the profile would belong to the contributor of the latent print. Therefore, no “new” evidence would be generated upon which the Applicant’s conviction could be overturned, as the jury was aware that Applicant was not the contributor of the collected latent prints when finding him guilty beyond a reasonable doubt. As indicated in the State’s response, Applicant fails to indicate how additional DNA testing on the latent print lifts would inculcate anyone other than Applicant.

Specifically, at trial, the State presented testimony regarding the processing of the crime scene and collection of latent prints that did not belong to the Applicant. Should it be possible to extract DNA from the recovered latent print lifts to create a profile, this profile (much like the latent print itself) would neither match the Applicant nor provide the jury with any additional or “new evidence” inculcating or exculpating the Applicant. Moreover, if DNA results were to demonstrate that other individuals had been inside the retail store that day, or another day, that information would not provide evidence inconsistent with the State’s theory of the case or suggest anyone other than Applicant was responsible for the crimes against the victim.

As also indicated in the State’s Response to the Application, Applicant does not describe how DNA testing would exclude him to the extent that it would change the outcome of the trial. At trial, the victim, and at least one witness who was in the store shortly before the attack, positively identified Applicant. The State also introduced Applicant’s comment to investigators regarding the race of the victim—when no mention of the victim’s race had been revealed. As the incident location was a retail store where many people entered and exited on a daily basis, identification of the contributor of these prints would not inculcate anyone or exculpate

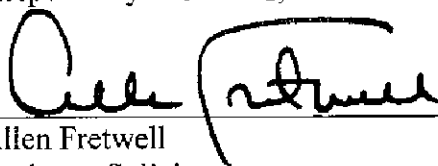
¹ As the sole intent of the forensic technicians is capturing the latent print, no measures were in place to preserve the integrity of the biological material.

Applicant since the jury's verdict necessarily rendered the identity of the contributors of these prints immaterial to the Applicant's guilt.

Finally, with respect to the hairclip or "barrette" (which is actually broken and exists in two parts), both of these pieces were processed for latent prints at the time of the initial investigation---introducing the same concerns regarding the possible contamination by use of a non-sanitary brush.

The State respectfully asks that the Court deny the Application for Forensic DNA Testing due to Applicant's failure to articulate how reliable DNA testing could be performed on the evidence he identifies or why DNA testing would prove probative or change the outcome of his trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Allen Fretwell", written over a horizontal line.

Allen Fretwell
Assistant Solicitor
S.C. Bar No. 17016

March 22, 2019
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	2004-GS-23-6122-24
	)	1340766-68
KEVIN HARBIN,	)	
APPLICANT	)	
	)	
v.	)	STATE'S RESPONSE TO
	)	"MOTION FOR DEFAULT"
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	
	)	

This matter concerns an Application for Forensic DNA Testing ("Application") pursuant to Section 17-28-10 *et seq.* of the South Carolina Code of Laws filed with the Greenville County Clerk of Court ("Clerk") on September 23, 2014. Applicant was convicted on September 8, 2005, of Kidnapping, Strong Arm Robbery and Criminal Sexual Conduct in the First Degree and sentenced to 30 years in prison by the Honorable Larry R. Patterson.

The State became aware of this Application on September 17, 2015, when the Clerk provided the Thirteenth Circuit Solicitor ("Solicitor") a copy of Applicant's "Motion for Default" pursuant to Rule 55 of the South Carolina Rules of Civil Procedure. Accordingly, the State filed a response to the Application on October 21, 2015, 35 days after receiving a copy of Applicant's Motion for Default from the Clerk.

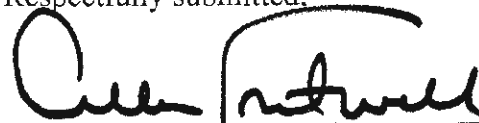
First, the State is unaware of any applicability of Rule 55 in the criminal context. *See also United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) (holding there is no summary judgment in criminal cases). In fact, Rule 55(e) expressly states, "No judgment by default shall be entered against the State . . . unless the claimant establishes his claim to relief by evidence satisfactory to the Court." Rule 55(e), SCRCF. Therefore, even in civil matters, the Court must always consider the merits of an action against the sovereign. *Gadoury v. U.S.*, 187 B.R. 816, 822 (1995) (holding claimant seeking default against government must first provide evidence to establish entitlement to relief ultimately sought).

Second, the State responded to the Application within the statutory timeframe, even though the statute does not appear to require a response. Upon receipt of an application, the Clerk is required “promptly” to notify the Court and Solicitor. S.C. Code Ann. § 17-28-50(a) (2009). Upon the Clerk “forwarding” the application, the State has 90 days in which to respond. S.C. Code Ann. § 17-28-50(b) (2009). Ultimately, Section 17-28-50(b) authorizes the Court to proceed with a hearing if the State does not respond to the application within the 90-day window. *Id.*

The Application was filed on September 23, 2014. Thereafter, the State became aware of the Application only after research into Applicant’s Motion for Default, which the Clerk received, filed and forwarded to the Solicitor on September 17, 2015.¹ The State responded to the Application 35 days after becoming aware of the Application, which is well within the time period allotted in Section 17-28-50(b). Since the statute authorizes the Court to hold a hearing, if appropriate, in the absence of a response from the State (or victim), any such response is clearly optional and the absence of a response does not frustrate the Applicant’s efforts to seek relief.

Wherefore, the State respectfully asks the Court to deny Applicant’s “Motion for Default.”

Respectfully submitted,



Allen Fretwell
Assistant Solicitor
S.C. Bar No. 17016

July 10, 2019
Greenville, South Carolina

¹ To date, the State has not formally received notification about the filing of this Application. Arguably, therefore, the 90-day period in which the State may respond to the Application has not begun pursuant to Section 17-28-50(b).

Dear Clerk,

I Am Humbly requesting A Clock-Stamp
Copy in Return.

15 AUG 15 PM 12:55
Paul H. Hensler COO SCL SC

Thanking You In Advance

8/13/2019

Kevin Harbin #303214
Tyger River

- filed + emailed to AS/SO
- emailed copy of order filed 8/12 Denying
Mort for Default
- net copy of this mot. to def as req.

STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL
SESSIONS

COUNTY OF Greenville

KEVIN L. HARBIN
APPLICANT

2004 GS 23 6122-24
1340766-68

19 JUN 15 PM 12:57
PAUL NICKENBARGER COC.GUL.SC

✓
STATE OF SOUTH CAROLINA
RESPONDENT

MOTION FOR DEFAULT
TO APPLICATION FOR
FORENSIC DNA TESTING

This matter comes before the Court by way of AN Application for FORENSIC DNA Testing pursuant to Section 17-28-10 et seq. of the South Carolina Code of Laws.

Further, the Applicant is informed and believes that pursuant to Section's 17-28-50(B) and 17-28-50(C) of South Carolina Code of LAWS Annotated, he is entitled to hearing.

Additionally, the Applicant furthers that Rule 501, SCACR Code of Judicial Conduct, (B) (7), states A Judge shall accord to every person who HAS A legal interest in A proceeding, or or that person's lawyer, the right to be heard according to law.

Failure to Meet the Requirements Set Forth in the Statute 61

Respondent's belated response must be disregarded and applicant have the opportunity to make known the clear language of Statute. Sec S.C. Code 17-28-40(F)(D)

CERTIFICATE OF SERVICE

ON this Tuesday day of 13th, 2019, I declare, under the penalties of perjury, that I served the forgoing Motion for Default Hearing on all parties to this action, by placing copies in the United States Mail, through Tyger River mailroom, at the below listed address's,

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

1/c Chief Administrative Judge
1/c Honorable Letitia Verdine
Greenville County Courthouse
305 East North Street, Suite 318
Greenville, S.C. 29601

1/c Solicitor Alan Fretwell
Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, S.C. 29601

Respectfully Submitted,

Kevin L. Harbin
Tyger River Cor./Km 8/ Rn. 215
200 Prison Road
Enoree, S.C. 29335

SHARON G. HARDOON, CSR
Official Circuit Court Reporter, III

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1 MR. SMITH: May it please the Court,
2 Your Honor? Just for the Court's information. We're
3 here on the State vs. -- I'm sorry -- on the
4 application of Mr. Kevin Harbin for post-conviction
5 forensic DNA testing. This was originally
6 2004-GS-23-6122, 23, 24. Mr. Harbin was convicted by
7 jury trial in September of 2005 for kidnapping,
8 strong-armed robbery, and criminal sexual conduct in
9 the 1st degree. He received a 30-year sentence on the
10 kidnapping and CSC 1st, and 15 years on the
11 strong-armed robbery.

12 Your Honor, this is the defendant's
13 motion, so I'll turn it over to Miss Ross.

14 THE COURT: All right. Yes, ma'am.

15 MR. MCCORD: Thank you, Your Honor. May
16 it please the Court? We would just ask to go
17 through Section 17-28-9(e) and try to get some DNA
18 materials retested.

19 Do you have the reply to the motion to
20 dismiss in your file?

21 THE COURT: I don't think I've got it.

22 MR. MCCORD: This is my copy.

23 MR. SMITH: Judge, I'm a little confused.
24 The motion to dismiss? Is that what you're
25 talking about, Susannah?

1 MR. MCCORD: No, that was the applicant's
2 motion to dismiss. I don't join in that. So I
3 would -- I was going to go forward just on the
4 actual DNA hearing today, so we can go ahead and
5 have that heard. If that's all right.

6 MR. SMITH: You said you passed up the
7 response to the motion to dismiss.

8 THE COURT: It's just a reply to the
9 State's response and request for DNA hearing.

10 MR. SMITH: I'm sorry.

11 THE COURT: All right. And, yes, I have
12 definitely seen this.

13 Is there anything from the State about
14 this?

15 MR. SMITH: Well, I expected, of course,
16 to respond to whatever evidence Miss Ross puts up
17 in the form of satisfying the requirements of the
18 statute, but I certainly have witnesses here and
19 prepared to respond. But I really don't know what
20 her position is going to be at this point.

21 THE COURT: Yes, ma'am.

22 MR. MCCORD: Judge, Mr. Harbin is talking
23 to me about -- I'm not sure what he wants.

24 Do you want a hearing on the default
25 motion?

1 MR. HARBIN: No, she already ruled. I'm
2 trying to figure out what's going on with you.

3 When I was in here the last time, I
4 explained to Judge Miller, and he never gave her a
5 chance to speak or him, that I talked to her about
6 some issues in the case. And before I could get
7 to court, he, Mr. Fretwell, filed the cert reply
8 argument. She done took the information and gave
9 it to him, and he gone and filed the cert reply to
10 counter before we could even get the hearing.

11 THE COURT: Okay.

12 MR. HARBIN: So I filed a complaint on
13 her because I truly don't believe she's in my
14 interest. Every attorney I've had was like that.

15 So now she's up here just like -- you
16 know. Because I asked her about the vacuum
17 cleaner cord that they claimed she was tied up
18 with. I was like, there has to be touch DNA on
19 it. And if we get to section 17-28-70, which
20 requires you to get the custodian of evidence to
21 inventory everything they got. You know? And the
22 next thing I know, I get a cert reply from him and
23 he's arguing the vacuum cleaner cord.

24 Now, am I just that ignorant or is that
25 not right? Why would she go give that to him when

1 this is going to be something that's going to be a
2 tactic to try to help me achieve what I filed this
3 application for?

4 THE COURT: Well, she has to tell the
5 State what the basis is for this motion. This
6 isn't just -- as you understand, this is not just
7 that you come in and because you've been convicted
8 of something, and because there's something that
9 can be tested, that that carries the day and you
10 get all this stuff tested. That's not exactly how
11 that runs.

12 MR. HARBIN: I understand that.

13 THE COURT: So she has to, as an officer
14 of the court, talk to the other side and let the
15 other side know what you all intend to argue about
16 this. This is not a hide the wall situation.

17 MR. HARBIN: No. I understand that,
18 ma'am.

19 The point I'm trying to make is, Section
20 17-28-70 says that you order the custodian of
21 evidence to inventory to see what all they got in
22 evidence.

23 She takes him the information, and he's
24 arguing it ain't even in there. Why is that
25 procedure there if it's not going to be -- that's

1 your job according to that statute.

2 THE COURT: All right. I got you,
3 Mr. Harbin.

4 Your attorney is wanting to say
5 something.

6 Mr. Harbin, I know that -- and I'm not trying
7 to be rude to you in any way.

8 MR. HARBIN: I know that.

9 THE COURT: I know that this is very
10 important to you, and I know you feel like you
11 understand the law from reading it in the books.
12 I understand that.

13 But this lawyer is extremely well versed
14 in this area. So just -- if you just give her an
15 opportunity. She couldn't even respond to what
16 Mr. Fretwell was saying because you were in her
17 ear talking. She couldn't even hear what he was
18 saying. So let's give her an opportunity to talk.
19 Okay?

20 Miss Ross.

21 MR. MCCORD: Thank you, Your Honor. May
22 it please the Court? This has been an issue with
23 Mr. Harbin and myself from the beginning where he
24 feels like the statute has not been followed. He
25 did file a grievance against me. Normally, I just

1 go ahead and ask to be relieved, but I do not
2 think that's in his best interest. Mills Arial
3 was relieved two and a half years ago on this
4 case. I'm prepared to go forward.

5 However, if he does not want me to, I'll
6 be happy to step aside. But I think it's in his
7 best interest to go ahead and have this hearing.

8 THE COURT: You're not getting another
9 lawyer for this, okay? Now, we're not talking
10 about -- we're talking about you had two very good
11 lawyers. If you're trying to get rid of Miss Ross
12 here today -- and like I said, she appears in this
13 court representing folks on these kinds of cases
14 time and time and time again.

15 So, I'm -- you know, I'm just telling
16 you, Mr. Harbin, we're all trying to work with
17 you, but, at a point, I feel like you're working
18 against yourself.

19 MR. MCCORD: And I responded to his
20 allegation. I'm sorry.

21 THE COURT: No.

22 MR. MCCORD: To his allegation that I
23 have somehow shared confidential information about
24 this vacuum cord. It's all in discovery talking
25 about the vacuum cord. I did not do that. I

1 addressed that with disciplinary counsel in my
2 letter responding to them. They found that there
3 was no violation because there is none, because
4 it's not confidential attorney/client information.
5 So that's where we are with that.

6 So I feel like I'm prepared to go forward
7 if you are, Mr. Harbin.

8 MR. HARBIN: I'm just here. Go ahead.

9 MR. MCCORD: Okay.

10 THE COURT: All right. Miss Ross.

11 MR. MCCORD: So, in my reply, I put down
12 his main arguments. Evidence does exist
13 permitting DNA testing. And I refer to the
14 fingerprints. I can hand you up an article that
15 Mr. Harbin provided to me that touch DNA does
16 exist. It's just an old newspaper article. That
17 is where there is a fingerprint card taken from
18 where there was a fingerprint. Powder is put on
19 it and a sample was taken, and then that contains
20 some DNA that, in some cases, can be tested.

21 About the touch DNA, I contacted DNA
22 expert Ron Ostrowski. He left me a voice message
23 that I have kept on my phone for two years
24 where -- that I can play for you, where he says,
25 it's just one of those things, you have to look at

1 the fingerprint card and see if they can get DNA
2 off of it. Sometimes it can be done. Sometimes
3 it can't. And that was his opinion that he left
4 on a voicemail that's, sort of, one way or the
5 other.

6 We would ask that that just be tested to
7 see if there is some kind of DNA on those
8 fingerprint cards.

9 Also, there's the vacuum cord we referred
10 to.

11 And then there was a barrette. In the
12 incident report, the victim alleged that her
13 attacker grabbed her hair and grabbed a barrette
14 and pulled it out of her hair, and that barrette
15 is still in evidence and we'd ask that it be
16 tested for DNA evidence.

17 The print DNA, while the prints were not
18 attributed to Mr. Harbin. They were not a match
19 to him. If they were someone else who was, per
20 chance, in the DNA database -- this was a sex
21 crime -- that would certainly be relevant in his
22 case. So that's why we would ask for that, and
23 say that it is relevant and material to the
24 identity of the perpetrator.

25 The exculpatory results certainly could

1 change the outcome of the case. We would argue if
2 it was someone else's DNA that would change the
3 outcome of the case.

4 DNA was not tested or searched for
5 before.

6 Mr. Harbin has got a long sentence. He's
7 been in jail for a long time. He's maintained his
8 innocence from the beginning. I've advised him
9 clearly about the negative repercussions this
10 could have on him if he -- if it's wrong. I mean,
11 he gets in trouble. He just said, I want to go
12 forward with this because I'm innocent.

13 So we would ask for that at this time.

14 And if there's anything else you would
15 like to ask me, I'd be happy to respond.

16 THE COURT: No. I think you laid it very
17 well. I appreciate it.

18 Mr. Fretwell, from the State.

19 MR. SMITH: Judge, what the statute
20 requires is not just that there be physical items
21 of evidence. It specifically requires that the
22 defendant establish, more so than just some
23 article in a magazine or some voicemail, that
24 there is DNA that would be free from contamination
25 and could be tested for purposes of some material

1 result.

2 I've spoken with Sergeant Hamilton.
3 Dr. Candela is here. The original investigator on
4 the case, Investigator Mike Fortner is here.
5 There is no way the defendant can establish.

6 And I offer these witnesses to Miss Ross
7 if she wants to bring them up, swear them in, and
8 ask them questions to try to establish what the
9 defendant must establish in this particular case
10 to ask this Court and to get the relief that he is
11 seeking; is that, on these latent print cards and
12 on this barrette that there is contamination free
13 DNA that would be admissible in a court of law.

14 Number 1, I don't think he can establish
15 that it's even there. But if it's there, the
16 process by which the technicians collect these
17 prints and process that particular barrette -- and
18 they processed it because it was determined to be
19 something that may be might have probative
20 evidence on it. They processed it at the time
21 back in 2004 for latent prints. That
22 contamination that is attached to that item, as
23 well as all of those prints, leaves absolutely no
24 possibility that there can be reliable DNA results
25 that could be used in any capacity.

1 I'm happy to address the materiality of
2 if we could come up with reliable DNA on those
3 fingerprints that was free from contamination,
4 which cannot be done based on my conversation with
5 these witnesses, that you would, in essence, be
6 authorizing this defendant, although the statute
7 does not, to take all the fingerprints they had at
8 one time, run them that back through AFIS to come
9 up with possible new suspects.

10 The fingerprints were compared to this
11 defendant in this particular case. The jury knew
12 that he was not the contributor of these
13 fingerprints, and he was convicted.

14 It is not new evidence. It would not
15 make a difference. It's in no way exculpatory or
16 inculpatory of anyone else, Judge.

17 THE COURT: Okay.

18 MR. MCCORD: And, Judge?

19 THE COURT: Yes.

20 MR. MCCORD: I think that's misstating
21 the DNA evidence. Clearly, part of the statute
22 says that the State has to hold evidence and care
23 for it for this time.

24 We would be in no position or expected to
25 prove that it's somehow not contaminated. That

1 would not be for us to prove. I think the only
2 way to find out is to test it and see if it's
3 possible to get a swab or whether any DNA exists
4 on the barrette or the vacuum cord or on these
5 print cards. And then have it -- if there is DNA,
6 then test it. And that's what we ask for.

7 MR. SMITH: Judge, I just respectfully
8 disagree. There is an obligation for this
9 defendant to establish that there is contamination
10 free DNA on these items.

11 I offer these witnesses to Miss Ross if
12 she wants to call them and put testimony before
13 the Court, but that is not going to be possible,
14 Judge.

15 This process by which the technicians use
16 a brush used over and over, powder that's used
17 over and over, in a container that they take to
18 every single crime scene, that, if DNA were to be
19 recovered on any of these items, it would so
20 contaminated there is no court that would allow
21 the results of that DNA into evidence in any
22 capacity.

23 THE COURT: All right. Well, I want to
24 take a look at the statutes once again, take a
25 look at the things that have been submitted in

1 this case to me. I don't have them, admittedly,
2 in front of me here today. I just got your reply,
3 but I need to get the State's reply and take a
4 look at everything.

5 I'll be issuing a decision, I anticipate,
6 within two weeks.

7 MR. SMITH: Thank you, Judge.

8 MR. MCCORD: Thank you, Your Honor.

9 (The hearing was concluded.)

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1 CERTIFICATE OF REPORTER

2
3 I, SHARON G. HARDOON, Official Circuit
4 Court Reporter, III for the State of South Carolina at
5 Large, do hereby certify that the foregoing is a true,
6 accurate and complete Transcript of Record of the
7 proceedings had and evidence introduced in the hearing
8 of the captioned case, relative to appeal, in General
9 Sessions, for Greenville County, Greenville, South
10 Carolina.

11
12 I do further certify that I am neither kin,
13 counsel, nor interest to any party hereto.

14
15 May 14, 2021

16
17 

18 _____
19 Sharon G. Hardoon, CSR
20 Official Circuit Court Reporter, III
21
22
23
24
25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	2004-GS-23-6122-24
	)	1340766-68
KEVIN HARBIN,	)	
APPLICANT	)	
	)	
v.	)	ORDER DENYING DEFENDANT'S
	)	APPLICATION FOR DNA TESTING
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	

21 MAR 25 AM 10:39
Paul Wickensimer CCC 614 SC

This matter was before the Court on September 6, 2019, on Applicant's request for DNA testing pursuant to Section 17-28-10 *et seq.* of the South Carolina Code of Laws filed with the Greenville County Clerk of Court ("Clerk") on September 23, 2014. Applicant was convicted on September 8, 2005, of Kidnapping, Strong Arm Robbery and Criminal Sexual Conduct in the First Degree and sentenced to 30 years in prison by the Honorable Larry R. Patterson.

The Court finds Defendant has failed to establish that (1) biological material is available in a condition permitting DNA testing; (2) biological material to be tested or DNA results from the testing of biological material would be material to the issue of Applicant's identity as the perpetrator of or accomplice to the offenses of which he has been convicted; (3) DNA testing, were it to produce exculpatory evidence, would constitute new evidence that would probably change the result of Applicant's conviction(s) if a new trial were granted; and (4) the application is made to demonstrate innocence and not solely to delay the execution of his sentence or the administration of justice.

Defendant's request that this Court require SLED to conduct additional testing is DENIED. Any further testing pursuant to Defendant's Application is DENIED.

IT IS SO ORDERED.



LETITIA H. VERDIN
CIRCUIT COURT JUDGE

RECEIVED

Dated: 3/25/21
Greenville, South Carolina

APR 05 2021
SC Court of Appeals

Copy mailed to def 3/25/2021

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-

: TRANSCRIPT OF RECORD

8 :

9 KEVIN HARBIN. :

10
11 September 6-8, 2005

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 JOHN NEWKIRK, ESQ.

19 Attorney for the Plaintiff

20 CAROLINE HORLBECK, ESQ.

21 Attorney for the Defendant

22
23
24 MARY E. SPRAGUE

25 Court Reporter

	<u>I N D E X</u>			
	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u> <u>RECROSS</u>
1				
2				
3	MEGAN GEORGE			
4	Mr. Newkirk	20,73		115
5	Ms. Horlbeck		31,95	
6	DENISE HENDERSON			
7	Mr. Newkirk	35,117		128
8	Ms. Horlbeck		41,123	129
9	MIKE FORTNER			
10	Mr. Newkirk	44,149		177
11	Ms. Horlbeck		57,160	
12	GINA TURCOTTE			
13	Mr. Newkirk	129		
14	Ms. Horlbeck		123	
15	MARK TURCOTTE			
16	Mr. Newkirk	137		
17	Ms. Horlbeck		141	
18	ROBERT BALLENGER			
19	Mr. Newkirk	141		
20	Ms. Horlbeck		143	
21	ROLAND DESHAEIS			
22	Mr. Newkirk	179		
23	Ms. Horlbeck		184	
24				
25				

	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2	DARWIN SHAW				
3	Mr. Newkirk	185			
4	Ms. Horlbeck		188		
5	RENE SHERBERT				
6	Mr. Newkirk	194			
7	Ms. Horlbeck		209		
8	JOE GEORGE				
9	Mr. Newkirk	215			
10					
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13	S2 - Lineup		40		122
14	S3 - Waiver		51		157
15	S4 - Barrette		82		82
16	S5 - Photo		83		83
17	S6 - Photo		83		84
18	S7 - Photo		83		85
19	S8 - Photo		83		86
20	S9 - Sketch		89		N/A
21	S10- Aerial Photo		182		183
22					
23	D1 - Photo		105		N/A
24	D2 - Photo		105		N/A
25	D3 - Photo		105		N/A

1	<u>EXHIBITS</u>	<u>MARKED</u>	<u>FILED</u>
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3	C2 - Question	257	257
4	C3 - Question	258	258
5	C4 - Question	264	264
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1 THE COURT: Y'all got any special voir dire for the
2 jury?

3 MR. NEWKIRK: None from the State, Your Honor.

4 MS. HORLBECK: None from the defense.

5 THE COURT: Okay.

6 MS. HORLBECK: I do have a few motions at the proper
7 time and I'll list them now. I wanted to do a Jackson v.
8 Deno motion, also wanted to do a motion to suppress the
9 in court identification, and just a motion to sequester
10 the witnesses.

11 THE COURT: Okay. I usually sequester the witnesses
12 anyway.

13 MS. HORLBECK: That -- that would be fine, Your
14 Honor.

15 THE COURT: Okay. And then we'll take up everything
16 else after we draw the jury.

17 MS. HORLBECK: Yes, Your Honor.

18 THE COURT: Okay. Bring them in.

19 (Jury selection began at 11:12 a.m.)

20 THE COURT: Okay. Ladies and gentlemen of the jury,
21 we're going to now select a jury in a criminal case
22 between the State of South Carolina and Kevin Lamar
23 Harbin. Mr. Harbin, would you stand up and face the
24 jury? If you would just turn around. Do any of you
25 ladies and gentlemen on the jury panel, do you know Mr.

1 Harbin? If you do, would you please stand?

2 (No response from the jury panel.)

3 THE COURT: Okay. Thank you. The allegations in
4 this criminal case -- and Mr. Harbin pleads not guilty to
5 all three of these charges. The allegations are criminal
6 sexual conduct in the first degree, kidnapping, and
7 strong armed robbery on May the 12th of 2004. And the
8 alleged victim was Megan E. George. And this allegedly
9 occurred at the Silver Closet, is that right?

10 MR. NEWKIRK: Yes, sir.

11 THE COURT: That's what the indictments say. Have
12 any of you heard anything about the allegations in this
13 case, or do you know anything about this case that we are
14 about to try between the State, Mr. Harbin, and the
15 alleged victim is Ms. Megan A. George? If you know
16 anything about this case, or if you've heard anything
17 about this case, would you please stand?

18 (No response from the jury panel.)

19 THE COURT: Okay. Do any of you know Megan,
20 M-e-g-a-n, E. George, if so would you please stand?

21 (No response from the jury panel.)

22 THE COURT: All right. Trying this case will be Ms.
23 Horlbeck and Mr. Newkirk, N-e-w-k-i-r-k. Is that the way
24 you pronounce that, Mr. Newkirk?

25 MR. NEWKIRK: Yes, Your Honor.

1 THE COURT: Okay. Y'all stand up and face the jury.
2 Do any of you know these lawyers?

3 (No response from the jury panel.)

4 THE COURT: Okay. Thank you. Ms. Horlbeck is now
5 working with the law firm of Brown, Massey, Evans and
6 McCloud.

7 MS. HORLBECK: And Haynsworth.

8 THE COURT: And Haynsworth. Do any of you know
9 anybody in her law firm? Okay. Of course Mr. -- yes,
10 sir, if you would stand, please? Your name?

11 MR. ROBINSON: Bill Robinson.

12 THE COURT: Yes, sir, Mr. Robinson, you know someone
13 in her firm?

14 MR. ROBINSON: Yes, sir.

15 THE COURT: Who do you know there?

16 MR. ROBINSON: John McCloud.

17 THE COURT: John McCloud. The fact that you know
18 Mr. McCloud, and she works there, would that affect your
19 ability to be fair and impartial in this case?

20 MR. ROBINSON: No, sir.

21 THE COURT: Thank you. Do any of you have any close
22 friends or relatives who work in the circuit solicitor's
23 office?

24 (No response from the jury panel.)

25 THE COURT: Okay. All right. Ladies and gentlemen,

1 I have a long list of witnesses. First of all, let me
2 ask you this question, have any of you been the victim of
3 a violent crime, such as kidnapping, robbery or criminal
4 sexual conduct, or have you been accused of that? I'm
5 not -- you don't have to tell me which one, either have
6 you been a victim or accused of any of these crimes and
7 that would affect your ability to be fair and impartial,
8 if so, would you please stand? Come down and tell me
9 about it. Okay.

10 MS. CHEEK: Victim of a robbery, a small business
11 downtown.

12 THE COURT: How long ago?

13 MS. CHEEK: Two years ago.

14 THE COURT: Okay. During the day, night time?

15 MS. CHEEK: It was the night time, broke into the
16 business.

17 THE COURT: And you were there?

18 MS. CHEEK: I wasn't there.

19 THE COURT: Do you think that would affect your
20 ability to be fair and impartial?

21 MS. CHEEK: I'm pretty strong in my opinions about
22 robbery.

23 THE COURT: Okay. You would take an oath to be fair
24 and decide ---

25 MS. CHEEK: I would take an oath to be fair.

1 THE COURT: And you would follow that oath?

2 MS. CHEEK: (Nodded her head.)

3 THE COURT: Okay.

4 COURT REPORTER: I need your name, ma'am?

5 MS. CHEEK: Patricia Cheek, C-h-e-e-k.

6 THE COURT: Cheek, yeah. Okay. She was a victim of
7 a robbery, has some business down. She wasn't there,
8 happened at night. She said she could be fair and
9 impartial.

10 MS. HORLBECK: Okay. Just for the record I would
11 ask that she just be stricken for cause, just for the
12 record.

13 THE COURT: Okay. If she had been present I
14 probably would do it. She's moved -- but since she was
15 not there at the time and she said she could follow the
16 oath.

17 MS. HORLBECK: Okay.

18 THE COURT: Okay. Ladies and gentlemen, I'm going
19 to read out a lengthy list of witnesses. Now, they all
20 may be witnesses and some of them may not, but they could
21 be. There's a possibility and I know that many on this
22 list will be witnesses. Listen to the names. Let me
23 read the entire list. If you recognize anybody who may
24 be a witness, I need for you to stand up and tell us how
25 you know these folks so these attorneys can hear what you

1 have to say and how you know the witnesses. I don't have
2 a clue what they're going to testify to, but the -- the
3 lawyers have a pretty good idea.

4 Now, let me read the entire list and if you know
5 anyone, after I read the list I'll ask you to stand up
6 and tell me. Deputy R. B. Ballenger; Investigator Mike
7 Fortner; Detective James Peppers with the Clemson Police
8 Department; Detective Robert Crooks with the Clemson
9 Police Department; Sergeant Darwin Shaw, Greenville
10 County Department of Public Safety; Sergeant Rene
11 Sherbert, Greenville County Department of Public Safety;
12 Ivan Brackan, Greenville County Department of Public
13 Safety, Kara Bennick, B-e-n-n-i-c-k, with the Greenville
14 County Department of Public Safety. Then lay witnesses,
15 Megan George, Joy George, Denise Henderson, Gina Turcotte
16 or Turcotte.

17 MR. NEWKIRK: Turcotte, Your Honor.

18 THE COURT: Turcotte, T-u-r-c-o-t-t-e; Mark
19 Turcotte, Roland Deshaeis?

20 MR. NEWKIRK: Yes, Your Honor.

21 THE COURT: Investigator Ty Bracken with the
22 Greenville County Sheriff's Office; Charles Walker; Joe
23 McMahan. Okay. Those are 17 names. Do any of you know
24 any of those potential witnesses? Yes, sir. Would you
25 stand up, please? Your name, please, sir?

1 MR. MAITLAND: Norman Maitland.

2 THE COURT: Yes, sir, Mr. Maitland.

3 MR. MAITLAND: I might know them by face but I
4 wouldn't know them by name. It's been a few years.

5 THE COURT: Okay.

6 MR. MAITLAND: I was a probation agent.

7 THE COURT: You were a probation agent?

8 MR. MAITLAND: Yes, sir.

9 THE COURT: If any of these people, if you recognize
10 them, would that affect your ability to be a fair and
11 impartial juror in a criminal case?

12 MR. MAITLAND: I have no idea. I'm not sure. This
13 is the first jury I've ever been on. I'm 59 years old.
14 So I don't know.

15 THE COURT: Okay. Well, most of the people probably
16 might be their first one too. But would you follow your
17 oath and decide it only on the evidence and testimony you
18 hear.

19 MR. MAITLAND: Yes, sir.

20 THE COURT: And the law?

21 MR. MAITLAND: Yes, sir.

22 THE COURT: Thank you, sir. Anyone else?

23 (No response from the jury panel.)

24 THE COURT: Okay. Ladies and gentlemen, have any of
25 you had any experiences with the court, this court up

1 here, criminal or civil, if you have had any unpleasant
2 experiences, or if you have any personal feelings about
3 our judicial system and if you couldn't be fair and
4 impartial, if you could not give Mr. Harbin a fair trial,
5 if you could not give the State a fair trial and decide
6 this case on the evidence in this case and the law that
7 applies to this case, if you couldn't follow your oath
8 and do that, would you please stand?

9 (No response from the jury panel.)

10 THE COURT: Okay. Now, your names, I should have
11 told you this downstairs, were pulled out at random. A
12 jury consists of a cross section of the community,
13 citizens from all walks of life, and that's the way
14 juries are always drawn. And in some cases each side
15 gets five challenges without cause. They can just strike
16 five. And after that everybody is seated. And in eight
17 or nine cases, serious cases, the defense gets 10 under
18 the law and the Constitution, and the law mainly, and the
19 State gets five. And in this particular case with these
20 three allegations the defense has 10 preemptory
21 challenges and the State has five.

22 So we will begin with the selection of the jury and
23 I would ask you to stand when your name is called. You
24 will either be seated or excused. If you're seated bring
25 your personal belongings and come, and you will have a

1 seat in the jury box. Madam Clerk, we'll select the
2 jury.

3 THE CLERK: Number 58, Melissa A. Dodson. What says
4 the State?

5 MR. NEWKIRK: Please present Ms. Dodson.

6 THE CLERK: What says the defendant?

7 MS. HORLBECK: Please swear Ms. Dodson.

8 THE CLERK: Come forward, please, ma'am, and take
9 your place in the jury box. Number 93, Sharron S. Hall.
10 What says the State?

11 MR. NEWKIRK: Please present Ms. Hall.

12 THE CLERK: What says the defendant?

13 MS. HORLBECK: Please swear Ms. Hall.

14 THE CLERK: Come forward, please, ma'am. Number 5,
15 Louis Czeizinger, Jr.

16 MR. CZEIZINGER: Czeizinger.

17 THE CLERK: Thank you. What says the State?

18 MR. NEWKIRK: Please present the juror.

19 THE CLERK: What says the defendant?

20 MS. HORLBECK: Please seat the juror.

21 THE CLERK: Come forward, please, sir. Number 39,
22 Glenn M. Cline. What says the State? Up here, please,
23 sir.

24 MR. NEWKIRK: Please present Mr. Cline?

25 THE CLERK: What says the defendant?

1 MS. HORLBECK: Please excuse Mr. Cline.

2 THE CLERK: You may be excused in this case. Number
3 50, Donna M. David.

4 MR. NEWKIRK: Please present Ms. David.

5 THE CLERK: What says the defendant?

6 MS. HORLBECK: Please swear Ms. David.

7 THE CLERK: Come forward, please, ma'am. Number 60,
8 Marie C. Duncan. What says the State?

9 MR. NEWKIRK: Please present Ms. Duncan.

10 THE CLERK: What says the defendant?

11 MS. HORLBECK: Please swear Ms. Duncan.

12 THE CLERK: Come forward, please, ma'am. Number 87,
13 Dexter J. Gourdin. What says the State?

14 MR. NEWKIRK: Please present the juror.

15 THE CLERK: What says the defendant?

16 MS. HORLBECK: Please present Mr. Gourdin.

17 THE CLERK: Come forward, please, sir. Number 10,
18 Walter W. Barton, Jr. What says the State?

19 MR. NEWKIRK: Please excuse Mr. Barton.

20 THE CLERK: You may be excused in this case. Number
21 54, Larry P. Cook. What says the State?

22 MR. NEWKIRK: Please present the Mr. Cook?

23 THE CLERK: What says defendant?

24 MS. HORLBECK: Please excuse Mr. Cook.

25 THE CLERK: You may be excused in this case. Number

1 152, James P. McManus. What says the State?

2 MR. NEWKIRK: Please present the juror.

3 THE CLERK: What says the defendant?

4 MS. HORLBECK: Please swear the juror.

5 THE CLERK: Come forward, please, sir. Number 183,

6 Peggy K. Pruitt. What says the State?

7 MR. NEWKIRK: Please present Ms. Pruitt.

8 THE CLERK: What says the defendant?

9 MS. HORLBECK: Please swear Ms. Pruitt.

10 THE CLERK: Come forward, please, ma'am. Number

11 120, Charles E. Jones.

12 MR. NEWKIRK: Please present Mr. Jones.

13 THE CLERK: What says the defendant?

14 MS. HORLBECK: Please excuse Mr. Jones.

15 THE CLERK: You may be excused in this case. Number

16 124, Harold L. Jordan, Jr.

17 MR. NEWKIRK: Please excuse Mr. Jordan.

18 THE CLERK: Number 26, Elizabeth Styles. What says
19 the State?

20 MR. NEWKIRK: Please present Ms. Style.

21 THE CLERK: What says the defendant?

22 MS. HORLBECK: Please excuse Mr. Styles.

23 THE CLERK: You may be excused in this case. Number

24 99, Rayco D. Henderson.

25 MR. NEWKIRK: Please excuse Mr. Henderson.

1 THE CLERK: Number 34, Patricia Cheek.

2 MR. NEWKIRK: Please present Ms. Cheek.

3 THE CLERK: What says the defendant?

4 MS. HORLBECK: Please excuse Ms. Cheek.

5 THE CLERK: You may be excused in this case. Number
6 243, Stephen B. Turner. What says the state?

7 MR. NEWKIRK: Please present the juror.

8 THE CLERK: What says the defendant?

9 MS. HORLBECK: Please swear Mr. Turner.

10 THE CLERK: Come forward, please, sir. Number 219,
11 Audrea M. Stafford.

12 MR. NEWKIRK: Please present Ms. Stafford.

13 THE CLERK: What says the defendant?

14 MS. HORLBECK: Please excuse Ms. Stafford.

15 THE CLERK: You may be excused from this case.
16 Number 192, William P. Robinson.

17 MR. NEWKIRK: Please present Mr. Robinson.

18 THE CLERK: What says the defendant?

19 MS. HORLBECK: Please excuse Mr. Robinson.

20 THE CLERK: You may excused in this case. Number
21 273, K. Elizabeth Marion. What says the State?

22 MR. NEWKIRK: Please present Ms. Marion.

23 THE CLERK: What says the defendant?

24 MS. HORLBECK: Please present Ms. Manner.

25 THE CLERK: Come forward, please, ma'am. Number 88,

1 Diana M. Granger. What says the State?

2 MR. NEWKIRK: Please present Ms. Granger.

3 THE CLERK: What says the defendant?

4 MS. HORLBECK: Please present Ms. Granger.

5 THE CLERK: Come forward, please, ma'am. Number
6 156, Amanda M. Merchant.

7 MR. NEWKIRK: Please present Ms. Merchant.

8 THE CLERK: What says the defendant?

9 MS. HORLBECK: Please excuse Ms. Merchant.

10 THE CLERK: You may be excused in this case. Number
11 217, Thomas Richard Spearman. What says the State?

12 MR. NEWKIRK: Please present Mr. Spearman.

13 THE CLERK: What says the defendant?

14 MS. HORLBECK: Please present Mr. Spearman.

15 THE CLERK: Come forward, please, sir.

16 THE COURT: One alternate. Two and one.

17 THE CLERK: Number 185, Ginger A. Renner. What says
18 the State?

19 MR. NEWKIRK: Please present Ms. Renner.

20 THE CLERK: What says the defendant?

21 MS. HORLBECK: Please swear Ms. Renner.

22 THE CLERK: Come forward, please, ma'am.

23 THE COURT: Any question about the selection of the
24 jury, Ms. Horlbeck?

25 MS. HORLBECK: None from the defense.

1 THE COURT: Mr. Newkirk?

2 MR. NEWKIRK: None from the State, Your Honor.

3 THE COURT: All right. Ladies and gentlemen, we
4 have the jury for this trial. Judge Miller -- of course
5 criminal -- of course we get the first shot. And he's
6 got a malpractice. We didn't have enough jurors for all
7 three. I'm going to ask y'all to go back downstairs and
8 you will be put in another -- picked out again by the
9 computer. He needs a jury panel for his case. So I'm
10 going to ask you to go back downstairs to be eligible for
11 Judge Miller's case. Okay.

12 (The jury panel exited the courtroom at 11:25 a.m.)

13 THE COURT: All right. Ladies and gentlemen, you
14 are the jurors now in the case of the State of South
15 Carolina and Kevin Lamar Harbin. I would ask you to
16 stand and raise your right hand, please, and be sworn.

17 THE CLERK: Raise your right hands, please. And the
18 appropriate response after the oath is, I will.

19 (The jury was sworn to well and truly try the case
20 at 11:26 a.m.)

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

22 THE COURT: Thank you so much. Okay. Now, before
23 we start the trial we have some legal matters to take up.
24 Let me see lawyers just for a second.

25 (A bench conference was held.)

1 THE COURT: All right. Ladies and gentlemen, we
2 have some legal matters that we are going to go over, and
3 I will have to listen to some testimony before we start.
4 You know as much about this case as I do right now. But
5 criminal cases are serious matters and we have to take up
6 question of law which you would not be concerned about.
7 But I don't want to keep you waiting in the jury room for
8 a long time. So I'm going to ask you -- the bailiff will
9 show you where you will deliberate, across the hall, and
10 where you will be taking your breaks. And then he is
11 going to show you how to get out the back and get back
12 in, come in the back way to get back to the jury room.

13 When you come back I want to be ready to start
14 and -- with opening statements and then go on through the
15 trial without having to -- I don't like to spend a lot of
16 time discussing legal matters with y'all back there in
17 the jury room. So I'm going to ask y'all to be back at
18 1:30. That will give us an hour to get the legal matters
19 straightened out and everybody here can get lunch for an
20 hour and then by 1:30 we should be ready to start
21 without -- that would be the most efficient way to do it.

22 Mr. Gourdin, you're sitting in the foreman's chair.
23 I don't know any of you personally that much. So I'm
24 going to ask you to be the foreperson. That means you
25 preside in the jury room when issues come up. But

1 everybody gets an equal vote and equal voice about the
2 verdict. And whatever verdict you reach in each case
3 will have to be a unanimous verdict. All of you have to
4 agree and everybody gets an equal vote but someone has to
5 preside. And I just picked somebody, picked you at
6 random. Okay.

7 Now, we have an alternate juror. This case will
8 probably go into tomorrow. We want all of you to come
9 back. We don't want anything to happen to you. But in
10 case you got in an accident or something like that, or in
11 case your children got seriously ill, or something
12 happened, the alternate would have to fill in. We have
13 to have 12 jurors in a criminal case. So we have an
14 alternate. And you're one of the jurors just like
15 everybody else until the case is over and we see that
16 everybody makes it through.

17 I'm going to excuse you until 1:30, ask you to be
18 back then and we'll be ready to start the trial. Okay.
19 Do not discuss this case with anyone, not even with each
20 other. Don't let anybody talk to you about this case
21 throughout the trial. Thank you so much.

22 (The jury panel exited the courtroom at 11:40 a.m.)

23 THE COURT: All right. Mr. Newkirk, she's made
24 motions for a Jackson v. Deno hearing. Maybe there was a
25 statement given, maybe there was not. Do you plan to use

1 the statement against the defendant?

2 MR. NEWKIRK: Yes, Your Honor, I do.

3 THE COURT: I mean, if you don't plan to use one I
4 don't need the practice and neither does Mr. Horlbeck.

5 MR. NEWKIRK: No, I do plan on doing that, Your
6 Honor.

7 THE COURT: Okay. Then we'll have a Jackson -- so
8 called Jackson v. Deno. It's a hearing to determine if
9 the statement is admissible under the law.

10 MR. NEWKIRK: All right.

11 THE COURT: Then in addition to that she's made a
12 motion in regard to the identification of the defendant,
13 and we are required to have an out of court hearing on
14 that. If you want to -- if you've got the same witnesses
15 in regard to the Jackson v. Deno and the identification
16 hearing, any objection to us going into both of those at
17 the same time, Ms. Horlbeck?

18 MS. HORLBECK: None, Your Honor.

19 THE COURT: Okay.

20 MR. NEWKIRK: All right. Your Honor, if I may I
21 would like start with the identification.

22 THE COURT: You would like to what?

23 MR. NEWKIRK: Start with the identification
24 witnesses first.

25 THE COURT: Okay. Do you have different witnesses

1 in the Jackson v. Deno?

2 MR. NEWKIRK: Yes, sir, I've got one witness that
3 will testify for both of those hearings. But there are
4 separate witnesses.

5 THE COURT: Okay. Well instead of just keep -- put
6 him back up and sit him back down, maybe we ought to --
7 can we -- I don't think she has any objection to taking
8 his entire testimony.

9 MR. NEWKIRK: Oh, no, that's quite all right.

10 THE COURT: For the record.

11 MR. NEWKIRK: Yes, sir.

12 THE COURT: Okay.

13 MR. NEWKIRK: Your Honor, the State calls Megan
14 George.

15 THE CLERK: Up here, ma'am. Put your left hand on
16 the Bible and raise your right hand.

17 MEGAN GEORGE

18 Having been first duly sworn, testified as follows:

19 THE CLERK: State your full name for the record,
20 please.

21 THE WITNESS: Megan George.

22 THE CLERK: Thank you, ma'am. Have a seat.

23 DIRECT EXAMINATION

24 BY MR. NEWKIRK:

25 Q Ms. George, how old are you?

1 A Nineteen.

2 Q And are you in school?

3 A Yes.

4 Q Where do you go to school?

5 A Clemson University.

6 Q Where did you work on May 12th of 2004?

7 A The Silver Closet.

8 Q And where is the Silver Closet?

9 A On Congaree Road.

10 Q And on May 12th of 2004, did an individual enter the
11 Silver Closet?

12 A Yes.

13 Q And was that -- what was the sex of that individual?

14 A A male.

15 Q Okay. And approximately what time did this male
16 enter the Silver Closet?

17 A 5:10, 5:15.

18 Q And initially when he came in what did he do?

19 A He looked around the store in the jewelry cases and
20 walked around.

21 Q Did this individual approach you?

22 A Yes.

23 Q And why did he approach you?

24 A Well, I asked him if I could help him and he was
25 looking for a crescent moon pieces of jewelry. So he was

1 asking me if I had anything.

2 Q And where was he doing this with you?

3 A In the store. I was behind the counter and he was
4 on the other side.

5 Q And how far from -- how far away were you from this
6 individual?

7 A Probably two to three feet. The distance of the
8 cabinet.

9 Q And while this individual was in the store, was
10 there anybody else in the store?

11 A There was for about 10, 15 minutes.

12 Q And who else was in the store?

13 A Denise.

14 Q What happened as this individual began to speak with
15 you about jewelry?

16 A The man?

17 Q Yes.

18 A I'm sorry. Well, he, like I said, was asking about
19 crescent moon jewelry. So I was looking for charms or
20 rings to see if we had anything, and we didn't. So then
21 I told him I could look in our catalog to see if we could
22 order anything.

23 Q And what happened while you were looking through the
24 catalog?

25 A Well, the catalog was on the other side of the --

1 the other end of where I usually walk around in the back.
2 And so -- which is open to the rest of the store. So
3 when I went to go to the catalog, I turned to put it on
4 the glass case and opened it and that was when I realized
5 that he wasn't on the other side of the counter anymore,
6 he started to walk around to where I was.

7 Q So this individual walked behind ---

8 A Yes.

9 Q --- the counter? What did you do when he got behind
10 the counter?

11 A When I realized where he was, he grabbed the back of
12 my head, my hair, and that's when he said to get all the
13 money out of the cash register.

14 Q And again, how close was he to you when this
15 occurred?

16 A He was right next to me at this time, right behind
17 the counter. He had ---

18 Q And did you give him the money?

19 A Yes.

20 Q And after you gave him the money, what did this
21 individual do?

22 A After we got the money, he still had me by the hair,
23 and we walked out of the -- from behind the cabinet, the
24 glass cases, and walked towards the back of the store
25 where -- he was looking around. We went into the first

1 room on the right, which was a bathroom, and came back
2 out, and we went into the last room on the right, which
3 was more of a closet. So then we went back into the
4 bathroom.

5 Q And what happened when you went to the bathroom?

6 A He closed the door and that's when he asked -- he
7 still had me by the head, but since the door was closed I
8 couldn't really get away anyways, and that's when he
9 asked me to pull my pants down.

10 Q And what did this individual do after he asked you
11 to -- told you to pull your pants down?

12 A He -- I told him no, and he said, do it, again. And
13 so I did. And he put two fingers into my vagina and
14 pulled them out and then he smelled his fingers.

15 Q After the defendant -- or after the individual did
16 that, what did he do?

17 A He told me to pull them back up, so I did. So then
18 he started looking around to see -- well, he was just
19 looking around, and at that point I was just trying to
20 figure out how I could get away. So I just started
21 trying to hit him as hard as I could, and after that he
22 grabbed me and turned me around and threw me against the
23 wall and went to punch me in the face but I blocked it
24 somehow, and then he just stopped.

25 Q And how long -- did this individual then leave?

1 A I'm sorry?

2 Q Did this male individual then leave?

3 A Eventually after -- yes, he did.

4 Q How long were you in the store with this individual?

5 A The whole thing probably lasted 15 to 20 minutes.

6 Q Do you remember speaking with Investigator Mike
7 Fortner?

8 A Yes.

9 Q Do you remember speaking with him on May 28th of
10 2004?

11 A Yes.

12 Q When you spoke with Investigator Fortner, did he
13 show you a lineup?

14 A Yes.

15 Q And where did you meet?

16 A In the -- I don't know what it's called. The --
17 just the officers where all the investigators are, the
18 place in the jail.

19 Q You met him at the law enforcement center?

20 A Yes, sorry.

21 Q Who showed you the lineup?

22 A Mike Fortner.

23 Q And how many people were present when he showed you
24 that lineup?

25 A It was just the two of us in there.

1 Q Did Investigator Fortner -- or what did Investigator
2 Fortner tell you when he showed that lineup to you?

3 A To look at it and make sure -- be sure who I was
4 choosing, that I didn't have to choose anyone if I didn't
5 feel like he was in the lineup, but that if I was going
6 to to make sure that I was positive.

7 Q Did he tell you that one of the people in the lineup
8 was definitely someone that was involved in the incident
9 at the Silver Closet?

10 A No, sir.

11 Q Did -- were you led to believe you should pick
12 someone out of that photo lineup?

13 A No, sir.

14 Q Did you feel any pressure to pick anybody out of
15 that photo lineup?

16 A No, sir.

17 Q Did anyone suggest who you should pick out of the
18 photo lineup?

19 A No.

20 Q And you had a chance to observe this individual in
21 the Silver Closet, correct?

22 A Yes.

23 Q And again how close were you to him?

24 A Two feet, two to three feet.

25 Q Did you have any difficulty in seeing him?

1 A No.

2 Q Was the Silver Closet well lit?

3 A Yes.

4 Q What was the description that you gave the initial
5 officer that arrived at the Silver Closet?

6 A A taller black man, a little over weight, wearing an
7 orange wind suit with a t-shirt underneath. He was bald,
8 didn't have any hair, no facial hair.

9 Q Did you get a good enough look at this individual
10 that you would be able to identify him?

11 A Yes.

12 Q When you were shown the photo lineup, did you
13 observe the person who was at the Silver Closet in the
14 photo lineup?

15 A Yes.

16 Q Did you look at the photo lineup closely?

17 A Yes.

18 Q Did you like at each picture carefully?

19 A Yes, I did.

20 Q Did you tell the investigator which photograph you
21 picked?

22 A Yes.

23 Q What then did you do with the photographic lineup?

24 A I circled it and initialed it -- the picture of the
25 man.

1 Q Was there any doubt as to your selection?

2 A No.

3 (State's Exhibit Number 1 was marked for
4 identification?)

5 BY MR. NEWKIRK:

6 Q Let me show you what's been marked as State's
7 Exhibit Number 1. Do you recognize State's Exhibit
8 Number 1?

9 A Yes.

10 Q Is this the photo lineup you were shown?

11 A Yes.

12 Q And how do you recognize it?

13 A My markings.

14 Q Is this lineup in substantially the same condition
15 as when you first viewed it?

16 A Yes.

17 Q Do you see any changes or additions?

18 A No, sir.

19 Q And point out on the exhibit the picture that you
20 chose? And please point out your markings? Did you
21 select a photograph of any other person as being the
22 person that was in the Silver Closet?

23 A No, sir.

24 Q Were you ever shown another lineup?

25 A No.

1 Q Do you see the person who robbed the Silver Closet
2 and who you picked out of the lineup in the courtroom
3 today?

4 A Yes, sir.

5 Q Where is that person?

6 A Right there.

7 MR. NEWKIRK: Answer any questions Ms. Horlbeck may
8 have of you.

9 THE COURT: Let me see that.

10 CROSS-EXAMINATION

11 BY MS. HORLBECK:

12 Q Hey, Ms. George, I just have a few questions for you
13 right now. You testified that the whole thing took place
14 over the span of about 15 minutes?

15 A Yes.

16 Q Okay. That's a yes?

17 A Yes.

18 Q Okay. All right. And you also testified that the
19 man in the Silver Closet grabbed you by the hair?

20 A Yes.

21 Q Okay. And he grabbed you from behind on your head?

22 A Yes.

23 Q Okay. And the man then steered you around the
24 Silver Closet by your hair?

25 A Yes.

1 Q Okay. Was he behind you, steering you around?

2 A His arm was behind me. He was most of the time
3 beside me.

4 Q Okay. Was he real close to you?

5 A Yes.

6 Q Okay. Did you have a lot of opportunity to turn and
7 move around at all?

8 A I was so tense from the way he was holding me that I
9 just turned where he turned me.

10 Q Okay. And I'm sure by this time you were pretty
11 upset?

12 A Yes.

13 Q Did you begin to cry at any point?

14 A I didn't cry. I think I was in too much shock to do
15 that.

16 Q Scared?

17 A Yes.

18 Q All right. And the man you described was a black
19 male?

20 A Yes.

21 Q Thirties to forties?

22 A Yes.

23 Q Approximately 180 pounds?

24 A Yes.

25 Q Wearing an orange Clemson shirt?

1 A Orange wind suit.

2 Q Okay. And a Clemson shirt underneath?

3 A Yes, yes.

4 Q Okay. And that was your description. Okay. Now,
5 at one point the investigator closed your case because
6 there were no leads, is that true?

7 A I don't know.

8 Q Do you remember that?

9 A I don't remember.

10 Q You don't remember. Okay. Well, there were no
11 leads for a little while, is that correct?

12 A Yes.

13 Q Okay. And did the investigator tell you that he
14 would call you if something changed about the case?

15 A Yes.

16 Q Okay. And you got a phone call from him ---

17 A Yes.

18 Q --- correct? Did you -- did you hope that that
19 meant there was a break in the case?

20 A Yes.

21 Q Okay. And did he ask you that -- to look at a
22 lineup?

23 A Yes.

24 Q Okay. And did you hope that this might be your
25 opportunity to identify the person ---

1 A Yes.

2 Q --- in the Silver Closet?

3 A Yes.

4 Q Okay. And how long do you think -- how long do you
5 think you looked at the six pictures?

6 A It was good a five or 10 minutes.

7 Q Okay.

8 A Just ---

9 Q All right. Now, after you made your selection, what
10 did you do? Did you -- did you tell the officer -- did
11 you tell Officer Fortner which selection you were making?

12 A Yes.

13 Q Okay. And then what did you do with the pictures?
14 Did you continue looking at them or did you hand the
15 pictures back?

16 A No, then I circled the picture and initialed it.

17 Q Okay. Did Officer Fortner have anything to tell you
18 after you made your selection?

19 A He didn't tell me whether or not that was the
20 person.

21 Q Okay.

22 A At that moment.

23 Q When did you find out that that -- that you picked
24 some -- the person that he had in mind?

25 A After we left his desk, we walked back out with my

1 parents, and that's when he told us.

2 Q Okay. All right. And the incident happened on May
3 the 12th?

4 A Um-hm.

5 Q 2004?

6 A Yes.

7 Q And the lineup was shown to you on May the 28th,
8 correct?

9 A Yes.

10 MS. HORLBECK: Okay. All right. I think that's all
11 I've got right now.

12 THE COURT: Thank you, ma'am. You may come down.

13 THE WITNESS: Thank you.

14 MR. NEWKIRK: The State calls Denise Henderson.

15 THE CLERK: Up here, please, ma'am. Put your left
16 hand on the Bible and raise your right hand.

17 DENISE HENDERSON

18 Having been first duly sworn, testified as follows:

19 THE CLERK: State your name, please, ma'am.

20 THE WITNESS: Denise Henderson.

21 THE CLERK: Thank you. Be seated.

22 DIRECT-EXAMINATION

23 BY MR. NEWKIRK:

24 Q Ms. Henderson, where do you work?

25 A Greenville Memorial Hospital.

1 Q And what do you do at Greenville Memorial Hospital?

2 A I'm an Administrative Assistant there.

3 Q Are you familiar with the Silver Closet?

4 A Yes, I am.

5 Q On May the 12th of 2004, were you in the Silver
6 Closet?

7 A I was.

8 Q And approximately what time were you in there?

9 A It was a little bit before 5:00.

10 Q Do you remember who was in the -- was in there with
11 you?

12 A A cashier and a gentleman was in there.

13 Q And how long were you in there total?

14 A Approximately about seven minutes, five to seven
15 minutes.

16 Q Where was this other individual, this male
17 individual in the store?

18 A I went straight to the counter, he was on the
19 right-hand side of me.

20 Q How close were you to him?

21 A About arms -- arms length.

22 Q And did you get a good look at him?

23 A I did.

24 Q Was the business well lit?

25 A It was.

1 Q Did you then leave the store?

2 A After purchasing my merchandise I stayed for a short
3 period.

4 Q Why did you stay for that short period?

5 A Well, when I went in the store I felt a little
6 uneasy because the gentleman that was in there was just
7 kind of looking around and I felt uncomfortable, and I
8 felt uncomfortable for her, so I stayed just a little
9 while longer just to see if he was going to leave.

10 Q And when you say her, you're speaking of Megan
11 George?

12 A Yes.

13 Q Okay. So you were in there five to seven minutes?

14 A Um-hm.

15 Q Did you see this male individual's face?

16 A I did. I saw his face. He did have a cap on, but I
17 did see his face.

18 Q Did you speak with Investigator Fortner?

19 A I did.

20 Q What day was that?

21 A It was a week later when I spoke with him.

22 Q Did you speak with him on May 28th?

23 A Yes.

24 Q And were you shown a photographic lineup?

25 A I did.

1 Q And where did you meet Investigator Fortner?

2 A At my job.

3 Q Who showed you the lineup?

4 A Mr. Fortner.

5 Q And was there anybody else present when he showed
6 you the lineup?

7 A It was just the two of us.

8 Q What did Investigator Fortner tell you when he
9 handed you the lineup?

10 A He wanted me to pick the face. The lineup that I
11 saw, choose who I felt was the person that was in the
12 store.

13 Q Did he tell you that one person in the lineup was
14 definitely the person who was in the Silver Closet with
15 you?

16 A No, he didn't.

17 Q Were you led to believe you should pick someone out
18 of that photo lineup?

19 A No.

20 Q Did you feel any pressure to pick someone out of
21 that photo lineup?

22 A I did not.

23 Q Did anyone -- Investigator Fortner or anyone suggest
24 to you who to pick out of that photo lineup?

25 A No.

1 Q Did Investigator Fortner influence your decision at
2 any time?

3 A He did not.

4 Q And you had a chance to observe the male individual
5 who was in the Silver Closet when you were in there,
6 correct?

7 A Yes.

8 Q When you were shown the photo lineup, did you see
9 the person who was in the Silver Closet?

10 A I did.

11 Q Did you look over the lineup closely?

12 A I did.

13 Q Did you look at each picture closely?

14 A I didn't have to, but I went straight to the face
15 that I saw in the store.

16 Q Was there any doubt in your selection?

17 A None.

18 Q Can you please examine State's Exhibit Number --
19 State's Exhibit Number 1. Do you recognize that lineup?

20 A I do.

21 Q How do you recognize it?

22 A How do I recognize it?

23 Q Yes, ma'am.

24 A I remember the face that I saw in the store that's
25 on this lineup.

1 Q Okay. I'm actually going to show you this one too.
2 (State's Exhibit Number 2 was marked for
3 identification?)

4 BY MR. NEWKIRK:

5 Q Let me show you what's been marked as State's
6 Exhibit Number 2. Do you recognize that lineup?

7 A Yes.

8 Q Is this the actual lineup you were shown, State's
9 Exhibit Number 2?

10 A Um-hm, it is.

11 Q And point out the exhibit -- on this exhibit the
12 photograph you chose?

13 A I chose number three.

14 Q How do you know you chose number three?

15 A That's my signature there.

16 Q Did you ever select a photograph of any other person
17 in the lineup?

18 A No.

19 Q Were you ever shown another lineup?

20 A No.

21 Q And did you see the person -- did you see the
22 person -- do you see the person that you saw in the
23 Silver Closet and that you picked out of that photo
24 lineup in the courtroom today?

25 A Yes.

1 Q Where is that person?

2 A Sitting to the left side of me.

3 Q And do you remember the description you gave of the
4 individual you saw in the Silver Closet?

5 A I do.

6 Q What was that description?

7 A He was a black male. He had a cap. And the outfit
8 that he had on was like jogging type outfit.

9 MR. NEWKIRK: Okay. Please answer any questions Ms.
10 Horlbeck has.

11 CROSS-EXAMINATION

12 BY MS. HORLBECK:

13 Q All right. You were in the Silver Closet for about
14 five to seven minutes?

15 A I was.

16 Q And the -- do you recall giving officer -- or
17 Detective Fortner a description of the man that you saw?

18 A Um-hm.

19 Q Okay. Do you recall telling him that the man was
20 about five seven or five eight.

21 A I don't recall saying that specifically.

22 Q Okay. Do you recall telling him that the man you
23 thought you -- you saw was about 170 pounds?

24 A I did.

25 Q Okay. And do you also recall being unable to

1 remember if the man you saw was bald or not?

2 A No, because I knew he was bald.

3 Q So now today you say you knew he was bald?

4 A With a cap on, he was bald.

5 Q Okay. And you also remember a cap.

6 A Yes, I do.

7 Q Did you tell Officer Fortner about the cap?

8 A I believe I did.

9 Q Okay. And you also could not remember if he was
10 wearing an orange outfit?

11 A Right.

12 Q Okay. You didn't describe a wind suit, did you?

13 A I did not.

14 Q Okay. But today you feel like he was wearing a wind
15 suit?

16 A It was a jogging type outfit.

17 Q Okay. Did you tell that to Officer Fortner?

18 A I believe I told him a wind suit or jogging type
19 outfit.

20 Q Okay. And when you saw the six pictures, you did
21 not look too closely at them?

22 A I looked at them but I knew exactly who was in the
23 store.

24 Q How long would you say you looked at them?

25 A At the pictures?

1 Q Um-hm.

2 A Not even a minute.

3 Q Okay. Did you look at all of them for about -- the
4 whole sheet for about a minute?

5 A Yeah, I looked at the whole picture.

6 Q Okay. All right. And do you recall that when you
7 were in the Silver Closet on May the 12th, do you recall
8 having a discussion with Megan?

9 A I did.

10 Q Okay. And you discussed how you knew the owner of
11 the Silver Closet?

12 A Yes.

13 Q Do you recall that? Okay. And y'all chatted about
14 that for a few minutes?

15 A Um-hm.

16 Q And that was also at the same time as the man being
17 in there?

18 A Um-hm.

19 MS. HORLBECK: Okay. I've got nothing further.

20 MR. NEWKIRK: Nothing on redirect, Your Honor.

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

22 MR. NEWKIRK: The State calls Investigator Mike
23 Fortner.

24 THE CLERK: Put your left hand on the Bible, please,
25 sir, and raise your right hand.

1 MICHAEL FORTNER

2 Having been first duly sworn, testified as follows:

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

5 THE WITNESS: Mike Fortner.

6 THE CLERK: Thank you. Be seated.

7 DIRECT EXAMINATION

8 BY MR. NEWKIRK:

9 Q Investigator Fortner, where do you work?

10 A Greenville County Sheriff's Office.

11 Q Did you investigate a crime that occurred at the
12 Silver Closet?

13 A Yes, sir, I did.

14 Q On May 28th, did you speak with Megan George and
15 Denise Henderson?

16 A Yes, sir, I did.

17 Q And why did you meet these two witnesses?

18 A We had developed a suspect in the robbery of the
19 Silver Closet and I had sent off to SLED for some photos.
20 We did not have any pictures of Mr. Harbin at the
21 sheriff's office, so I had to send off to SLED to get a
22 photo lineup put together. And I spoke with Megan and
23 Ms. Henderson both on that day to show them the lineups.

24 Q How many photographs are displayed in the lineups?

25 A Six.

1 Q Was this defendant included in the lineup?

2 A Yes, sir.

3 Q Were the five other people in the lineup of similar
4 physical characteristics as to this defendant?

5 A Yes, sir.

6 Q In what way?

7 A Shape of the head, eyes. I would say all males, all
8 black males, physical features, as far as the way the
9 face is filled out, that type of thing.

10 Q And where did you show Ms. George this lineup?

11 A I had Ms. George come down to the law enforcement
12 center. She met with me at my desk.

13 Q Where did you show Ms. Henderson this lineup?

14 A I went to her place of employment to show hers.

15 Q Okay. At what time did you show Ms. George this
16 lineup?

*17 A Ms. George, I met with her approximately 8:45 in the
18 morning.

19 Q And when did you meet with Mr. Henderson?

20 A I want to say it was about 10:45 in the morning.

21 Q So you met these witnesses separately?

22 A Separately, yes, sir.

23 Q Did you show the photo lineup to them separately?

24 A Yes, sir.

25 Q How did you present the photo lineup to Ms. George?

1 A The first thing I do is I explain to her that we've
2 got six photos. The person responsible for the robbery
3 may or may not be in one of these photos, but take your
4 time and look at each picture carefully. If you do see
5 the person that you recognize as being in the Silver
6 Closet, responsible for the robbery, point him out to me.
7 If you're not sure do not point anybody out to me and
8 then I just lay it down in front of her and asked her to
9 take her time and look at it. And she looked over the
10 photos and pointed out number three to me.

11 Q And how did you present this photo lineup to Ms.
12 Henderson?

13 A The same way. Just explained to them that the
14 suspect may or may not be in the photos, and for them to
15 carefully take a look at it and point them out if they do
16 see. If they don't don't point anybody out to me.

17 Q Did you tell Ms. George or Ms. Henderson that the
18 person who was involved with the incident at Silver
19 Closet was in the photo lineup?

20 A No, sir.

21 Q Did you lead Ms. George or Ms. Henderson to believe
22 that she had to pick somebody out of the photo lineup?

23 A No, sir.

24 Q Did you exert any pressure on Ms. George or Ms.
25 Henderson to pick somebody out of the photo lineup?

1 A No, sir, I did not.

2 Q And did you in any way influence Ms. George or Ms.
3 Henderson to pick out someone in the photo lineup?

4 A No, sir.

5 Q Did Ms. George select a photograph of the person who
6 committed this crime?

7 A Yes, sir.

8 Q Whose photograph was selected?

9 A She picked out Kevin Harbin.

10 Q How certain or confident was Ms. George in her
11 selection?

12 A She was very confident. She was pretty quick to
13 point out the photo after looking it over.

14 Q Did you ask Ms. George to make any marks on the
15 lineup?

16 A I always have them, once they point out the photo,
17 to circle the photo that they do pick out. And then I
18 had them -- Ms. George put -- place her initials next to
19 it and then I had her sign the back of the lineup as
20 well.

21 Q And can you examine State's Exhibit 1?

22 A Yes, sir.

23 Q Do you recognize that?

24 A Yes, sir.

25 Q Is this the photograph -- the lineup that you showed

1 Ms. George?

2 A Yes, sir.

3 Q And how do you recognize it?

4 A It's got her initials on the front and then her
5 signature across the back, like I asked her to sign.

6 Q And what did you do after -- what did you do with
7 the lineup after you showed it to Ms. George?

8 A I placed it in property and evidence.

9 Q Did you get it out of property and evidence when you
10 came to court today?

11 A For today, yes, sir.

12 Q Is State's Exhibit Number 1 substantially the same
13 condition as when you put it in property and evidence?

14 A Yes, sir.

15 Q Can you point out on this exhibit the photograph
16 that Ms. George picked out.

17 A The one right here with the number three below it.

18 Q Can you point out any marks she made, any indication
19 she made on that?

20 A She did circle around the picture to identify number
21 three, then her initials there next to the photo, and
22 then her signature across the back.

23 Q Okay. Did Ms. George select the photograph of any
24 other person in the photo lineup?

25 A No, sir, that's the only one.

1 Q Did Ms. George ever pick out another individual in a
2 different photo lineup?

3 A No, sir, that's the only lineup I showed her.

4 Q Did Ms. Henderson point out someone in the photo
5 lineup?

6 A Photo number three, yes, sir.

7 Q And did you ask Ms. Henderson to make any marks
8 indicating her choice?

9 A Yes, sir, I also had her circle the photo, place her
10 initials next to the photo she selected, and then also
11 had her sign her name across the back of the lineup.

12 Q And is State's Exhibit Number 2 the lineup that you
13 used with Ms. Henderson?

14 A Yes, sir.

15 Q And what did you do after you showed Mr. Henderson
16 the lineup?

17 A Also placed it in property and evidence.

18 Q Is it substantially in the same condition as when
19 you put it in property and evidence?

20 A Yes, sir, it is.

21 Q And how confident was Ms. Henderson in her choice?

22 A Very confident.

23 Q Did Ms. Henderson select anybody else out of the
24 photo lineup?

25 A No, sir.

1 Q Did Ms. Henderson -- was she shown another photo
2 lineup?

3 A No, sir, that's the only one.

4 Q Investigator Fortner, I want to -- did you speak
5 with the defendant in this case?

6 A Yes, sir, I did.

7 Q And when was this?

8 A It would have been on June 3rd of 2004.

9 Q And where did you speak with the defendant?

10 A At the Pickens County detention center.

11 Q Was this defendant in handcuffs?

12 A Yes, sir, I believe he was, yes.

13 Q Was he in custody?

14 A He was in custody in the Pickens County detention
15 center, yes.

16 Q Okay. Before speaking with the defendant, was the
17 defendant read his Miranda warnings?

18 A Yes, sir, he was.

19 Q Was he done that -- did you do that orally, off the
20 top of your head, or did you read ---

21 A No, sir, we have an actual waiver form here. It's
22 got each individual right listed. And I read each
23 individual right -- or read each one to Mr. Harbin and
24 made sure that he did understand each and every one of
25 them. Then I have him -- to make sure that he can read

1 and write all right, after going through it, I have them
2 read out the fourth line there, you have the right to
3 talk to a lawyer line. After he read that line out loud
4 to me I had him place his initials next to it. Then
5 after that I read the waiver of rights portion there at
6 the bottom. And I circle the word coercion. I explain
7 the word coercion to him, because it's somewhat of an
8 unusual word a lot of people don't know what it is. And
9 just wanted to make sure he did understand what the word
10 coercion was. Had him place his initials to indicate
11 that he did understand it. At which time he voluntarily
12 signed the waiver of rights and I witnessed it. And
13 Investigator Ty Bracken who was with me also witnessed
14 it.

15 Q So the defendant was able to read this form himself?

16 A Yes, sir.

17 (State's Exhibit Number 3 was marked for
18 identification.)

19 BY MR. NEWKIRK:

20 Q Officer Fortner, let me show you what has been
21 marked as State's Exhibit Number 3. Do you recognize
22 that form?

23 A Yes, sir, I do.

24 Q What is that form?

25 A It's the waiver of rights form that I used to read

1 to Mr. Harbin.

2 Q Is your signature on that form?

3 A Yes, sir, it is.

4 Q Is this what you read to the defendant?

5 A Yes, sir.

6 Q Please what you -- read what you read to the
7 defendant?

8 A Before we ask you any questions you must understand
9 your rights. You have the right to remain silent.
10 Anything you say can be used against you in court. You
11 have the right to talk to a lawyer for advice before we
12 ask you any questions and to have him with you during
13 questioning. If you don't have any money to pay a
14 lawyer's fee the Court will appoint one to represent you
15 without cost if you wish. If you decide to answer
16 questions now without a lawyer present, you will still
17 have the right the stop answering at any time. You also
18 have the right to stop answering at any time until you
19 talk to a lawyer. Then I -- go ahead and read the waiver
20 rights part on the bottom.

21 Q Did you -- did the defendant -- did you observe if
22 the defendant understood the Miranda warnings?

23 A Yes, sir, he did.

24 Q Did the defendant indicate to you he wished to waive
25 his Miranda rights?

1 A No, sir. I mean, yes, waive them, yes. He did not
2 request an attorney, no.

3 Q Okay. But he did want to waive his Miranda rights?

4 A Yes.

5 Q Okay. Did he do so in writing?

6 A Yes, sir.

7 Q Does State's Exhibit Number 3 contain a waiver?

8 A Yes, it does.

9 Q Is that the waiver that the defendant was read?

10 A Yes, sir.

11 Q Would you please read that?

12 A All right. The waiver of rights. I have read this
13 statement of my rights and I understand what my rights
14 are. I am willing to make a statement and answer
15 questions. I do not want a lawyer at this time. I
16 understand and know what I am doing. No promises or
17 threats have been made to me, and no pressure or coercion
18 of any kind has been used against me.

19 Q Did the defendant read this waiver?

20 A I read it out loud to him.

21 Q Did the defendant indicate that he understood the
22 waiver?

23 A Yes, sir, he did.

24 Q Did the defendant sign the waiver?

25 A Yes, sir, he did.

1 Q Did you observe him sign the waiver?

2 A Yes, sir.

3 Q And again, did it appear the defendant understood
4 his Miranda warnings?

5 A Yes, sir, he -- I mean, as I'm reading it to him
6 he's looking at it as I'm reading along. So he's
7 following along with me.

8 Q Did it appear that the defendant understood he was
9 waiving his Miranda rights?

10 A Yes, sir.

11 Q Did the defendant give a statement?

12 A Some verbal statements, yes, sir.

13 Q He did not give a written statement?

14 A Not a written one.

15 Q Was -- what was the defendant's physical condition
16 when you spoke to him?

17 A He was in good physical condition, not intoxicated,
18 not any type of injuries, or anything like that, sound
19 mind.

20 Q Was the defendant threatened in any manner?

21 A No, sir.

22 Q Was he coerced in any manner?

23 A No, sir.

24 Q Was he made any promises in exchange for his
25 statement?

1 A No, sir.

2 Q Was he deprived of food or water?

3 A No, sir.

4 Q Was he prevented from using the restroom?

5 A No, sir.

6 Q How long did the total interview last?

7 A I would say approximately an hour.

8 Q Did the defendant understand -- appear to understand
9 what was going on throughout the entire interview
10 process?

11 A Yes, sir, he did.

12 Q Was the defendant's statement freely and voluntarily
13 given?

14 A Yes, sir.

15 Q And what did the defendant say when you spoke to
16 him?

17 A One of the things that he said during the course of
18 the interview, let me get it word for word. He said
19 something to the effect, I know the hammer is going to
20 come down on me since I'm black and the clerk is a white
21 girl. At which time once he said that, he interrupted
22 himself and then asked me, what color was the girl. And
23 I pointed out to him at no point during our conversation
24 did I mention to him that the clerk was a white female.
25 So he knew that on his own. He also made mention that

1 crack was placed in the black communities by white people
2 as a conspiracy to destroy the black communities. And he
3 also made a statement something to the effect of,
4 whatever that date was, June 3, 2004, that it really
5 wasn't June 3, 2004, that it was some other date that he
6 had in mind, apparently based off the Koran, I think it
7 was he was saying.

8 Q Did the defendant say anything else to you?

9 A Nothing other than he couldn't take responsibility
10 for my robbery. I was actually interviewing him on two
11 separate robberies, this being one of them. He said he
12 couldn't take responsibility for my robbery, this one
13 here, the Silver Closet.

14 Q Did you ask him about if he had an orange ---

15 A Yes, sir, I did. I asked if him he had an orange
16 wind breaker type suit. He said, yes, that he had an
17 orange wind breaker, and that he also had orange wind
18 breaker pants that he wore with the orange jacket.

19 Q At any time during your interview with the defendant
20 did he say that he wanted an attorney?

21 A No, sir, he did not.

22 Q Did he -- at any time did he tell you he wanted to
23 stop talking to you?

24 A No, sir.

25 MR. NEWKIRK: Nothing further, Your Honor.

CROSS-EXAMINATION

BY MS. HORLBECK:

Q Okay. It's Detective Fortner or Officer?

A Officer will be fine.

Q Okay. All right. And what -- I'm just going to ask you some questions about the description you were given.

A Okay.

Q What description did Megan George give you of the -- of the culprit she saw in the store?

A The description she gave on the date of the robbery was a black male, approximately 30 to 40 years of age, six foot in height, about 180 pounds. And she said brown hair and brown eyes.

Q Okay. And what was the description that Ms. Henderson gave you?

A I don't know that Ms. Henderson ever actually gave me a description. Let me -- other than a black male I think she might have told me. Do remember her saying that she could not remember for sure what it was that he was wearing.

Q Um-hm. Would it help if I showed you the report I'm talking about, part of the report that I'm talking about?

A Okay.

Q Is that a copy of your report that you wrote in connection with this case?

1 A Yes, it is.

2 Q Okay. And maybe this would refresh your memory. Do
3 you recall speaking with Denise Henderson?

4 A Yes, I do.

5 Q Okay. And have you found that in your report?
6 Okay.

7 A Yes, I have. I got it now.

8 Q Did -- what was the description that she gave you?

9 A She said it was fair skinned black male around five
10 seven, five eight, about 170 pounds.

11 Q Okay. What -- she couldn't remember if he was bald
12 or not, correct?

13 A Right.

14 Q All right. And she didn't mention a cap, did she?

15 A Not to me, no, ma'am.

16 Q Okay. Well, you're the investigator on the case,
17 right?

18 A Right.

19 Q Did anybody else interview her?

20 A Not that I'm aware of, no, ma'am.

21 Q Okay. And she didn't mention -- she didn't mention
22 a cap to you?

23 A No, ma'am.

24 Q And she couldn't remember the -- the color of the
25 outfit, correct?

1 A That's correct.

2 Q Okay. All right. And you said the interview with
3 Mr. Harbin lasted approximately an hour?

4 A That would be about right, yes, ma'am.

5 Q All right. And who else was with you during that
6 interview?

7 A Investigator Ty Bracken.

8 Q Anyone else?

9 A That would be it.

10 Q Okay. And he didn't give a written statement?

11 A No, ma'am.

12 Q Okay. Anything else that y'all talked about for the
13 whole hour? I mean ---

14 A Well, I had another robbery that I was also
15 interviewing him on that occurred down on Augusta Road.

16 Q Okay.

17 A So I -- that was part of it.

18 MS. HORLBECK: Okay. I don't have anything further.

19 MR. NEWKIRK: I have no redirect, Your Honor.

20 THE COURT: Thank you, sir. Anything else, Mr.
21 Newkirk?

22 MR. NEWKIRK: Nothing, Your Honor.

23 THE COURT: All right. Ms. Horlbeck, do you have
24 anything?

25 MS. HORLBECK: No, Your Honor, but just briefly.

1 With respect to the -- some of the statements that
2 Officer Fortner brought up. There was one statement
3 about crack being placed in the black community and
4 there's a conspiracy. And then there's another statement
5 about a different date being followed by the Koran. I
6 would ask that those be -- be inadmissible. I think that
7 they're -- I don't know what the relevance would be to
8 this case. And also I think it brings in Mr. Harbin's
9 character without him taking the stand. And I think that
10 the prejudice of those statements, I think the prejudice
11 of all the statements outweighs the probative value. But
12 I definitely think that the statement regarding the crack
13 and the date, that those would be inadmissible.

14 MR. NEWKIRK: Your Honor, it's my intention to only
15 introduce two statements. One that the defendant says, I
16 know the hammer is going to come back on me since I'm a
17 black -- I am black and the girl is a white girl. And
18 then the defendant interrupts himself and asks what color
19 the girl was. And I'm also going to ask -- or attempt to
20 introduce the statement where the defendant is asked if
21 he owns an orange jumpsuit and he states that did own an
22 orange nylon type jacket that he wore with his break away
23 pants.

24 THE COURT: I would permit those statements to come
25 in. I would exclude the statement that she asked to be

1 excluded and any investigation about another robbery
2 cannot come in, any alleged suspicions of prior bad acts
3 or suspicions of robberies of which he has not been
4 convicted, I'm sure not -- if he's been convicted maybe
5 you can use something for impeachment purposes. But as
6 of right now all of what I know and have heard, cannot
7 talk about investigating him for another robbery.

8 MR. NEWKIRK: Yes, Your Honor.

9 THE COURT: And those statements that she objected
10 to.

11 MR. NEWKIRK: Absolutely.

12 THE COURT: The statements you want to put in do
13 have relevance in this case. And I'm not saying whether
14 they're true or not, or whatever, but it could -- there
15 could be an inference that he had some knowledge about
16 this case that may be known or may not been known by
17 anyone else. So I'll let those two statements come in.

18 MR. NEWKIRK: Thank you, Your Honor.

19 MS. HORLBECK: Your Honor, if ---

20 THE COURT: The one about the victim without him
21 ever being told whether the victim was white or black, he
22 said she -- then he asked the question, I would let that
23 come in. Then the -- about him owning a orange jump suit
24 which she had previously identified before the detective
25 talked to him, I'd let that come in.

1 MR. NEWKIRK: Thank you, Your Honor.

2 THE COURT: All right.

3 MS. HORLBECK: Your Honor ---

4 THE COURT: And the identifications. I assume he
5 used two photographs, one -- he didn't use the same one?

6 MR. NEWKIRK: No, he used separate, yes.

7 THE COURT: Then I'll let the identification come
8 in. It's not being unduly suggestive. I've looked at
9 the six pictures, and there is a great deal of similarity
10 among all six. Okay. Anything else, Ms. Horlbeck?

11 MS. HORLBECK: Just briefly. There is the
12 circumstances of the interview. I believe he was in the
13 Pickens County detention center on another matter. The
14 officer phrased it perfectly. He said that they
15 developed a suspect. I don't have any objection to that
16 kind of language. I just ---

17 THE COURT: Okay.

18 MS. HORLBECK: --- don't want it being -- don't want
19 the jury to know that he's in Pickens County for another
20 matter.

21 THE COURT: Should not come out that he's in Pickens
22 County for another matter, the fact that he interviewed
23 him in Pickens County detention center or whatever.

24 MS. HORLBECK: Thank you, Your Honor.

25 THE COURT: That would be satisfactory. You got to

1 be careful about the testimony, not to put any character
2 evidence, or to shift the burden of proof, or anything
3 like that.

4 MR. NEWKIRK: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. NEWKIRK: I will not do that.

7 THE COURT: All right. We'll be in recess until
8 1:30.

9 MR. NEWKIRK: Thank you, Your Honor.

10 THE COURT: We'll start -- y'all ready for opening
11 statements?

12 MR. NEWKIRK: Yes, Your Honor.

13 MS. HORLBECK: Yes, sir.

14 THE COURT: Okay. Thank you.

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

17 THE COURT: Do you know who's the foreperson?

18 THE BAILIFF: Mr. Gourdin, he's the foreman.

19 THE COURT: Yeah. We got the witnesses sequestered,
20 Mr. Newkirk?

21 MR. NEWKIRK: Yes, Your Honor. I've got my victim
22 in here. She's going to be the next witness, first
23 witness. And my investigating officer.

24 THE COURT: I'm sorry?

25 MR. NEWKIRK: And my investigating officer.

1 (The jury entered the courtroom at 1:45 p.m.)

2 THE COURT: All right. Ladies and gentlemen of the
3 jury, this is a criminal case commenced by the State of
4 South Carolina, represented by the circuit solicitor's
5 office, and Kevin Lamar Harbin.

6 The allegations in these indictments are criminal
7 sexual conduct in the first degree, kidnapping and strong
8 armed robbery. To these charges Mr. Harbin has plead not
9 guilty to all three.

10 Now, his plea of not guilty places the burden of
11 proof upon the State of South Carolina to prove him
12 guilty beyond a reasonable doubt. No person charged with
13 a crime is ever required to prove themselves innocent.
14 The burden of proof is always on the State to prove a
15 defendant guilty of each crime charged beyond a
16 reasonable doubt. A defendant is presumed innocent until
17 you the jury hears evidence from the State satisfying you
18 of his guilt beyond a reasonable doubt.

19 Now, your duty as jurors is to find and determine
20 the facts of the case. You pass upon the credibility and
21 the believability of the testimony of each witness,
22 regardless of who that witness is. And you determine the
23 facts of this case and pass upon the credibility and the
24 believability of the witnesses. You apply the facts that
25 you can find from the evidence, apply those to the law

1 that I will give you at the conclusion of the case, and
2 that's my responsibility, just to give you the law that
3 applies to the case or cases that we hear. And then
4 you'll go back and deliberate until you reach a unanimous
5 verdict.

6 Now, you cannot discuss this case with anyone. We
7 do not keep jurors in motel rooms except in death penalty
8 cases most of time. We trust you now in criminal
9 matters, all of them are important, we trust you to go
10 home and come back and not discuss this case with anyone
11 until the case is over and you start deliberating in the
12 jury room. You have to evaluate the case as we go along,
13 I know that, but don't make up your mind conclusively as
14 to what that verdict should be until you have heard the
15 entire case, the lawyers have had a chance to make their
16 closing statements and then I go over the law with you.
17 But remember that. Don't discuss it with anyone. Keep
18 an open mind throughout the entire trial before you begin
19 your deliberations.

20 Now, we'll begin the trial with opening statements
21 if the attorneys care to make an opening statement.
22 After that you will hear the evidence and testimony from
23 which you will determine the facts. After all the
24 evidence and testimony is in the lawyers can stand up and
25 make their closing statements to you, or summations,

1 after that I will go over the law, then you will go back
2 and deliberate until you reach a verdict.

3 If there are no exceptions to anything I said we'll
4 being this trial with opening statements. The State
5 having the burden of proof goes first.

6 MR. NEWKIRK: May it please the Court, Your Honor?

7 THE COURT: Yes.

8 MR. NEWKIRK: Ladies and gentlemen of the jury, my
9 name is John Newkirk. I'm a prosecutor in this case.
10 After I get a chance to talk to you you're going to hear
11 from Ms. Caroline Horlbeck. And it is her duty to
12 zealously represent the interest of her client. As a
13 prosecutor what I do is I work with law enforcement, with
14 the witnesses and with the victims in order to prosecute
15 individuals who have been charged with violating the
16 criminal laws of South Carolina.

17 And there are two things I want to ask all of you
18 before we start today. First, I ask that everybody
19 listen attentively throughout the entire trial. And
20 second, I ask every single one of you to treat this case
21 with the same level of importance that both the defendant
22 treats this case and that the State treats this case.

23 The first thing I want to talk to you about is the
24 law. And as Judge Patterson told you it -- when this
25 trial is concluded he's going to instruct you on the law

1 that you are to use in determining this defendant's
2 guilt. So if anything I say about the law, or Ms.
3 Horlbeck says about the law is different than what Judge
4 Patterson says, you must go with what Judge Patterson
5 says.

6 This defendant has been charged with three separate
7 crimes. He's been charged with strong armed robbery.
8 He's been charged with kidnapping. And he's been charged
9 with criminal sexual conduct. And I just want to give
10 you kind of a foundation to work off and briefly talk
11 about these things.

12 Strong armed robbery is when you take something from
13 somebody else using force, intimidation or threat.
14 Kidnapping is when you unlawfully confine somebody, seize
15 them, take them away. Criminal sexual conduct occurs
16 when a person commits a sexual battery on another person,
17 and either there is some kind of aggravated force used,
18 or the sexual battery occurs at the same time the victim
19 is also being a victim of a robbery, of confinement, or
20 kidnapping.

21 Ladies and gentlemen, today you're going to hear
22 from Ms. Megan George. Ms. George is going to tell how
23 you she is a 19 year old student at Clemson University.
24 She is going to tell you how on May 12th of 2004, she was
25 a senior in high school at Mauldin High School here in

1 Greenville County. She is going to tell you that on May
2 12th she worked at a store called the Silver Closet. She
3 was a clerk at the Silver Closet. She's going to tell
4 you that on May 12th she was in the store when this
5 defendant entered the store. She's going to tell you
6 that there was another individual in that store as well.
7 There was a customer. It was her and the defendant. She
8 is going to tell you how this defendant kind of walked
9 around the store and that the other customer in the store
10 left, leaving her alone with the defendant.

11 She is then going to tell you how the defendant
12 approached her at the counter and began discussing
13 different types of jewelry with her. And in response to
14 his questions she's going to tell you how she took out a
15 catalog and started looking through it. She's going to
16 tell you that as she was going through that catalog she
17 looked up and the defendant had came around the counter
18 and was standing behind the counter. She is going to
19 tell you that the defendant grabbed her by the hair and
20 told her to give me the money. She is going to tell you
21 how she started fumbling. She was fumbling around trying
22 to get the cash register open. She was able to get the
23 cash register open. She gave the defendant the money.

24 Ms. George is going to tell you how the defendant
25 was not finished yet. Ms. George is going to tell you

1 how the defendant took -- still holding her by the hair,
2 took her through the store. Megan is then going to tell
3 you how the defendant led her into the bathroom. Megan
4 is going to tell you after the defendant forced her into
5 the bathroom the defendant told her to take off her
6 pants. Megan is then going to tell you that she complied
7 with this. And then she's going to tell you that the
8 defendant took his fingers and inserted them in her
9 vagina.

10 Megan is going to tell you, ladies and gentlemen,
11 that the defendant was not done yet. She is going to
12 tell you that after that occurred that the defendant
13 found a vacuum cleaner, the defendant unwound the cord on
14 the vacuum cleaner and the defendant then tied her up in
15 the bathroom, bound her wrists. Megan is then going to
16 tell you the defendant left the bathroom and he pushed
17 furniture up against the door, trying to prevent her from
18 getting out.

19 Ladies and gentlemen, you're going to also hear from
20 the other witness that was in that store. She is going
21 to tell you the defendant was the person who was in the
22 store with her and with the victim, and that she left
23 leaving the victim and the defendant alone in the store.

24 Ladies and gentlemen, today you're also going to
25 hear from other witnesses. You're going to hear from a

1 witness who works in the general location of the Silver
2 Closet. He's going to tell you what he saw on the day of
3 the incident.

4 And ladies and gentlemen, you're also going to hear
5 from police officers. You're going to hear from the
6 responding deputy who was the first person to come on the
7 scene. You're also going to hear from Investigator Mike
8 Fortner who was the lead investigator. He's with the
9 Greenville County Sheriff's Office. He's going to tell
10 you a little bit about his investigation. And ladies
11 and gentlemen, Investigator Fortner is going to tell you
12 about speaking with this defendant. You're going to hear
13 what this defendant told him.

14 After you have heard all of the testimony, and you
15 have seen all the evidence, you will be convinced beyond
16 a reasonable doubt that this defendant is guilty, guilty
17 of strong armed robbery, guilty of kidnapping, and guilty
18 of criminal sexual conduct. Thank you.

19 THE COURT: Ms. Horlbeck.

20 MS. HORLBECK: Good afternoon. This is Kevin
21 Harbin. And my name is Caroline Horlbeck. And I
22 represent him on these charges today. He's plead not
23 guilty to all these charges because he didn't do them,
24 and I'm going to tell you why in a little bit.

25 First, I'd like to start off with just telling you,

1 this case is about the reliability. It's about
2 precision. And it's about accuracy.

3 It reminds me of a car I had when I was in college
4 and part of the time during law school. I had my parents
5 old grey Honda and I loved it. It was a great car. But
6 with the care I took of it it got to the point where the
7 fuel gauge was a little bit off. My dad took the car
8 around to different mechanics and one of mechanics said
9 it was kind of off. One mechanic said, well, maybe it's
10 a little off, but you can still drive it. And another
11 mechanic said, well, it might be a timing belt off, it's
12 just going to be up to y'all what you want to do with it.
13 But at the end of the day it didn't matter whether it was
14 kind of off, or maybe it was off, or it was a tiny bit
15 off, or sort of off. At the end of the day it was the
16 difference between me being able to drive it safely and
17 me being stuck on the road. So we had to remove the fuel
18 gauge because it wasn't accurate. It was no longer
19 precise. And it was no longer reliable.

20 And this case is a lot like that. This case
21 requires accuracy and precision, and reliability. It's
22 so important that the testimony, the evidence in this
23 case be accurate, reliable, precise, that there is even a
24 rule about it. And the judge told you a little bit about
25 it. It's called the burden of proof.

1 The State has the burden of proof in this case. And
2 that means they've got a tough job. Not only do they
3 have to bring you evidence and testimony in the case, but
4 the evidence has to be so precise, and so reliable, and
5 so accurate that it amounts to proof beyond a reasonable
6 doubt. We submit to you that that's not going to happen
7 today. They won't be able to meet that burden.

8 You're undoubtedly going to hear some things that
9 may upset you, but don't let that deter you from your
10 search for accuracy, and precision, and reliability.
11 You're not going to hear any evidence about DNA. There
12 is no scientific evidence. There is no fingerprint
13 evidence. And when all this is said and done and you go
14 back to your jury room and you begin your deliberations,
15 we believe that the proper verdict for you to bring will
16 be not guilty.

17 It's going to be just like that fuel gauge has to be
18 put aside and thrown out. This case is going to be just
19 the same, because it's not precise. The evidence and
20 testimony is not accurate and it's not reliable. And we
21 ask you to return a verdict of not guilty. Thank you.

22 THE COURT: All right. Mr. Newkirk, call your first
23 witness.

24 MR. NEWKIRK: The State calls Megan George.

25 THE CLERK: Put your left hand on the Bible, please,

1 ma'am, and raise your right hand.

2 MEGAN GEORGE

3 Having been first duly sworn, testified as follows:

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

5 THE WITNESS: Megan George.

6 THE CLERK: Thank you. Be seated.

7 DIRECT EXAMINATION

8 BY MR. NEWKIRK:

9 Q Megan, where do you live?

10 A Greenville, South Carolina.

11 Q And what do you do for a living?

12 A I'm a student,

13 Q And where are you a student at?

14 A Clemson University.

15 Q What year are you at Clemson?

16 A A sophomore.

17 Q Where did you go to high school?

18 A Mauldin High School.

19 Q And in May of 2004, where did you go to school?

20 A Mauldin High School.

21 Q And in May of 2004, where did you work?

22 A At the Silver Closet.

23 Q What is the Silver Closet?

24 A It's a jewelry store. They sell necklaces, rings,
25 charms.

1 Q And where is the Silver Closet located?

2 A On Congaree Road.

3 Q And what county is that in?

4 A Greenville.

5 Q Were you working at the Silver Closet on May 12,
6 2004?

7 A Yes, sir.

8 Q How long had you worked at the Silver Closet?

9 A I had just finished my training. It had been two or
10 three weeks. That was my first day by myself.

11 Q And what day did you go into work that day -- or
12 what time, excuse me?

13 A What time? It was the afternoon shift, so about
14 1:00.

15 Q And when was your shift supposed to be over?

16 A Six.

17 Q Okay. On May 12th of 2004, did a male customer
18 enter the store?

19 A Yes.

20 Q Approximately what time did he enter the store?

21 A Five ten, five fifteen.

22 Q Okay. Is that person in the courtroom today?

23 A Yes.

24 Q Can you point him out?

25 A Yes.

1 Q Please point him out?

2 A (Indicating).

3 Q When the defendant entered the store, was there
4 anybody else in the store?

5 A Yes.

6 Q Who else was in the store.

7 A Denise.

8 Q And what did the defendant do when he entered the
9 store?

10 A He began looking around in the jewelry cases. I was
11 helping someone so I couldn't help him at that time.

12 Q And what was -- what was Denise doing?

13 A She was purchasing some things at the counter where
14 the cash register was.

15 Q Did Denise leave?

16 A Yes.

17 Q And when Denise left, who else was left in the
18 Silver Closet?

19 A Just me and him.

20 Q Okay. After Denise left, what did the defendant do?

21 A I asked him if I could help him with anything, help
22 him find anything, and he said he was looking for
23 crescent moon, anything with a crescent moon on the
24 jewelry. So I looked in the different cabinets and I
25 didn't see anything.

1 Q And when you were talking to the defendant, where
2 were you standing?

3 A I was behind the counter. He was in the -- on the
4 other side in the middle of the store.

5 Q Were you able to find the jewelry that the defendant
6 was looking for?

7 A No.

8 Q And what did the defendant do next?

9 A I told him I would look in our catalog. So I went
10 to the other side of the cash register where it was
11 opened to the rest of the store to get the catalog. And
12 I turned around and put it back on the glass case where
13 he was, and that's when I noticed he wasn't there
14 anymore, he had started walking around the counter.

15 Q So the defendant walked around the counter?

16 A Yes.

17 Q What did the defendant do when he got behind the
18 counter?

19 A When I realized he was right next to me, he grabbed
20 the back of my head with his hand, it actually broke the
21 clasp in my hair. And he then told me to give him the
22 money from the cash register.

23 Q When you say the defendant grabbed your head, how
24 did he grab your head?

25 A He was next to me so it would have been his left

1 hand that grabbed right below my neck, and just grabbed
2 onto my hair.

3 Q Okay. And what did the defendant say when he did
4 this?

5 A He told me to give him the money.

6 Q After the defendant told you to give him the money,
7 what did you do?

8 A We walked toward the cash register which would be on
9 my left. I had just started working there like I said,
10 and so I was still unsure of how just to open the cash
11 register without actually making a transaction. So I was
12 fumbling, trying to find the button. And he was telling
13 me that if I was trying to find the call button -- or he
14 told me that I shouldn't be trying to find the call
15 button, that he would hurt me. And I tried to explain
16 that I just didn't know. I finally got it opened and he
17 took the money out.

18 Q Okay. So the defendant took the money. Where was
19 this money located?

20 A In the cash register.

21 Q Okay. Was there any other money in the store?

22 A Yes. He asked me if there was anymore. I didn't
23 want to risk anything, so I knew that in the drawer
24 underneath there was a cash box. So I got that out and
25 he took the money from that as well.

1 Q After the defendant took the money, what did he do?

2 A After he took it, he looked around the store, still
3 had me by the hair, and we walked out from behind the
4 counter and walked towards the back of the store. There
5 was a little bar kind of a counter but -- on our right,
6 but behind it was the bathroom, the first room on the
7 right. So we walked into there. For some reason we left
8 that and went to the next room. It was more of a closet,
9 so we went back into the bathroom.

10 Q And while the defendant was walking you around, how
11 did -- how was he doing this?

12 A He still had me by the head, and was just very
13 forceful. I was really tense, so I just moved wherever
14 he moved so I wouldn't get hurt any more, but ---

15 Q What was defendant's demeanor?

16 A Very stern. Just -- I can't really describe it.
17 Just very, very forceful in the way he was speaking and
18 not caring whether or not I was being hurt the way he was
19 pulling me back and forth. Just very stern.

20 Q Okay. And where did the defendant end up taking
21 you?

22 A We went back into the bathroom.

23 Q Did you go inside the bathroom?

24 A Yes.

25 Q Did the defendant go in the bathroom with you?

1 A Yes.

2 Q Did he still have you by the hair at this point?

3 A Yes.

4 Q What did the defendant do when you got into the
5 bathroom?

6 A He closed the door, and by this point he had
7 loosened a little bit on my head because I was in that
8 room, I couldn't really go anywhere with the door closed.
9 And that's when he asked me to pull my pants down.

10 Q And -- that's all right. You're doing good. After
11 he told you to pull your pants down, what did he do?

12 A Thank you. I said no, and he kept saying -- he said
13 it again for me to do it, and so I did it. And I was so
14 scared. I didn't know what he was going to do. At that
15 point he took two fingers and stuck -- put them into my
16 vagina and then pulled them out. And then he just
17 smelled his fingers and he said to pull them back up.

18 Q What did the defendant do after he did that?

19 A After that he started looking around the room. I
20 didn't know what he was thinking, didn't know what he was
21 going to do. So I started to think about how I could get
22 away. And so my first instinct was just to hit him as
23 hard as I could. And then he grabbed me by the shoulders
24 and turned me around and put -- threw me against the
25 wall, the opposite wall, and tried to punch me, but

1 somehow I blocked it, and he just stopped. He didn't do
2 that again. But then after that is when he went for
3 the -- the vacuum cleaner and got the cord.

4 Q And what did the defendant do with the vacuum
5 cleaner?

6 A When I was up against the wall to the right of me
7 was the toilet. It was in the corner and there are the
8 two bars that are caddy-corner for elderly people, on the
9 wall. He put me over the toilet so I was basically
10 straddling it, with my hands behind my back and then tied
11 up my wrists first with the cord, and then tied that
12 around the bars. And he still had the end of the vacuum
13 cleaner which he put through my belt loop.

14 Q After the defendant tied you up, what did he do?

15 A He told me that if I got out of that and came out
16 into the store before he had gotten a chance to get out,
17 he would come back and hurt me even more. So -- I'm
18 sorry.

19 Q Go ahead.

20 A So I -- you know, I told him that I understood, not
21 that calmly, but I -- you know, he kept saying it and
22 that's when he left.

23 Q So the defendant left the bathroom?

24 A Yes.

25 Q And did you hear anything after he left the

1 bathroom?

2 A I heard things moving outside of the door. I wasn't
3 sure what it was, but I did hear things sliding across
4 the floor. And then I -- there's a door chime in the
5 store to let you know when people are coming or leaving.
6 So when I heard that I knew he had probably left the
7 store.

8 Q After hearing the door chime, what did you do?

9 A I started to just wiggle my fists -- or my wrists
10 out of the cord. I got one out, then got the other. And
11 then I had trouble getting the plug out of the belt
12 buckle, so I just had to kind of put body weight into it
13 and it just ended up ripping the belt buckle. But then I
14 got out.

15 Q And how did you get out of the bathroom?

16 A I tried to open the door and realized there was
17 something against it, that I couldn't just easily open
18 the door. I knew I couldn't just use my upper arm
19 strength because I'm not that strong. But so I leaned
20 into it and used my legs, and opened it just enough where
21 I could squeeze out.

22 Q And what was on the other side of the door?

23 A It was the top -- there was a candle -- a cabinet
24 that had two separate pieces. And he had taken the top
25 piece and pushed it in front of the door.

1 Q So you crawled over that?

2 A Yes.

3 Q Okay.

4 (State's Exhibit Number 4 was marked for
5 identification.)

6 BY MR. NEWKIRK:

7 Q Megan, let me show you what has been marked as
8 State's Exhibit Number 4. Can you look inside that
9 envelope, State's Exhibit Number 4, without taking what's
10 inside of there out, can you look at that?

11 A Yes.

12 Q Do you recognize State's Exhibit Number 4?

13 A Yes.

14 Q And what is State's Exhibit Number 4?

15 A My hair clip.

16 Q Was that the hair clip that you were wearing on May
17 12th of 2004?

18 A Yes, sir.

19 MR. NEWKIRK: Your Honor, at this time the State
20 would move State's Exhibit Number 4 into evidence.

21 MS. HORLBECK: Without objection.

22 THE COURT: Without objection the hair clip is in
23 evidence.

24 (State's Exhibit Number 4 was filed.)

25 THE COURT: Are you going to leave it in that bag or

1 take it out?

2 BY MR. NEWKIRK:

3 Q Yeah. Can you remove it? Again, what is State's
4 Exhibit Number 4?

5 A My hair clip.

6 (State's Exhibit Numbers 5 through 8 were marked for
7 identification.

8 BY MR. NEWKIRK:

9 Q Megan, let me show you State's Exhibit Number 5. Do
10 you recognize what is depicted in State's Exhibit Number
11 5?

12 A Yes.

13 Q What is it?

14 A That's behind the counter, the cash register at the
15 Silver Closet.

16 Q Does that picture accurately reflect the cash
17 register inside the Silver Closet as it looked on May
18 12th, 2004?

19 A Yes.

20 MR. NEWKIRK: Your Honor, at this time the State
21 would offer State's Exhibit Number 5 into evidence.

22 MS. HORLBECK: Without objection.

23 THE COURT: Okay. It's in evidence.

24 (State's Exhibit Number 5 was filed.)

25 BY MR. NEWKIRK:

1 Q Megan, do you recognize what is depicted in State's
2 Exhibit Number 6?

3 A Yes.

4 Q And what is it?

5 A That's the outside of the bathroom.

6 Q And is that a picture of the outside of the bathroom
7 of what?

8 A Of the Silver Closet.

9 Q Does that picture accurately reflect the bathroom in
10 that part of the Silver Closet as it looked on May 12,
11 2004?

12 A Yes.

13 MR. NEWKIRK: Your Honor, the State would move
14 State's Exhibit Number 6 into evidence.

15 THE COURT: Without objection?

16 MS. HORLBECK: Without objection.

17 THE COURT: It's in evidence.

18 (State's Exhibit Number 6 was filed.)

19 BY MR. NEWKIRK:

20 Q Megan, on State's Exhibit Number 6, can you point
21 out to the jury what's depicted in this picture?

22 A This is the upper part of the cabinet that was put
23 in front of that door that I couldn't -- had to put force
24 in to get out.

25 Q And what is that door?

1 A This?

2 Q Yes.

3 A That's the door to the bathroom.

4 Q So you climbed over -- you came through that door
5 and you climbed over that ---

6 A Yes.

7 Q --- piece of furniture right there?

8 A Yes.

9 Q Show you what has been marked as State's Exhibit
10 Number 7. Do you recognize what is depicted in that
11 picture?

12 A Yes.

13 Q What is that?

14 A This is the same thing. This is the bottom of the
15 cabinet with still the top of it against the door.

16 Q Does that picture accurately reflect the inside of
17 the Silver Closet as it was on May 12th of 2004?

18 A Yes, sir.

19 MR. NEWKIRK: Your Honor, I would move State's
20 Exhibit Number 7 into evidence.

21 THE COURT: Okay. Without objection?

22 MS. HORLBECK: Without objection.

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

24 BY MR. NEWKIRK:

25 Q And Megan, what is that that's depicted in the

1 picture?

2 A This is the lower half of the cabinet. This is the
3 upper half.

4 Q Okay. Let me show you what's been marked as State's
5 Exhibit Number 8. Do you recognize that?

6 A Yes.

7 Q What is that?

8 A That's my hand with some of the bruises from the
9 cord of the vacuum cleaner.

10 Q When was that picture taken?

11 A The same day I did the lineup, which was May 28th, I
12 believe.

13 Q Okay. Does that picture accurately reflect your
14 hand as it was on May 28, 2004?

15 A Yes.

16 MR. NEWKIRK: The State would offer State's Exhibit
17 Number 8 into evidence.

18 MS. HORLBECK: Without objection.

19 THE COURT: Okay. Without objection.

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

21 BY MR. NEWKIRK:

22 Q Megan, after you got out of the bathroom, what did
23 you do?

24 A Like I said, I heard the chime. I had to push the
25 door open. I climbed over. I went straight for the

1 front door and locked it. I didn't think to turn off the
2 open light or anything, but I locked the door. I went
3 back behind the counter, tried to call 911, and for some
4 reason I used -- for some reason it didn't go through. I
5 was so nervous I didn't -- maybe I pressed the wrong
6 button. So the next thing I thought to do was call my
7 mom.

8 Q What did you tell your mom when you called?

9 A I told her the store had been robbed. I'm sure I
10 was frantic and she probably couldn't understand what I
11 was saying, but I told her over and over the store had
12 been robbed. She made sure I was okay. But then she
13 said you need to call 911.

14 Q And after talking with your mom, who did you call?

15 A I called 911 and it went through. And they told me
16 they would send the police.

17 Q Did you call -- did you call anybody else?

18 A I did. I called Gina, the owner of the store.

19 Q Is that Gina Turcotte?

20 A Yes.

21 Q What did you tell Gina?

22 A I told her the same thing, that the store had been
23 robbed. Again, she made -- wanted to know if I was okay.

24 Q Did the police arrive?

25 A Yes.

1 Q And after the police arrived, what happened?

2 A They started asking, you know, basic questions of a
3 description of what he looked like, basically just what
4 had happened, wanted to know if I was by myself, that
5 kind of stuff.

6 Q Did you go to the hospital?

7 A Yes.

8 Q And when did you go to the hospital?

9 A When?

10 Q Yes.

11 A My parent arrived soon after the policeman. The
12 ambulance came right after them. And so we left soon
13 after, and I left in an ambulance.

14 Q And what hospital did you go to?

15 A Piedmont Womens.

16 Q And were you physically hurt after this?

17 A The only things was the bruises, my hands.

18 Q Do you remember speaking with Investigator Mike
19 Fortner?

20 A Yes.

21 Q Do you remember speaking with him along with a SLED
22 agent?

23 A I don't remember.

24 Q Do you remember speaking -- did you speak with a --
25 someone who makes drawings?

1 A Yes, yes.

2 Q Okay. When was this?

3 A I believe this was later on that week. That was
4 Wednesday, so I think it was Friday.

5 Q Okay. And you spoke with this artist?

6 A Yes.

7 Q And what did you tell that artist?

8 A I gave her a description of his face.

9 Q And in response to that did she create a drawing, a
10 composite sketch?

11 A Yes.

12 (State's Exhibit Number 9 was marked for
13 identification.)

14 BY MR. NEWKIRK:

15 Q Megan, let me show you what's been marked as State's
16 Exhibit Number 9. Do you recognize that?

17 A Yes.

18 Q What is that?

19 A That's the drawing she came up with after I gave her
20 a description.

21 Q And that accurately depicts the drawing?

22 A Yes.

23 MR. NEWKIRK: Okay. Your Honor, at this time I
24 would offer State's Exhibit Number 9 into evidence.

25 MS. HORLBECK: I object to that. I don't think he's

1 laid enough proper foundation.

2 THE COURT: When did she do the drawing?

3 BY MR. NEWKIRK:

4 Q Megan, do you remember speaking with the composite
5 sketch artist on the date of May 14, 2004?

6 A Yes.

7 Q Okay. And again, what did you tell her?

8 A I gave her a description of what I remembered from
9 Wednesday, when he was there.

10 Q And what did she do with that description?

11 A She listened to what I said, looked through the book
12 they have, and she drew from what I was saying.

13 Q And do you remember the description that you gave
14 her?

15 A Yes.

16 Q What was the description?

17 A The basic description was he was a male, a black
18 male, between 30s and 40s, a little bit -- he had a
19 rounder face. I remember his eyes. I told her what he
20 was wearing, that he was bald.

21 Q Does this copy -- is that the drawing that the
22 sketch artist created on May 14, 2004?

23 A Yes.

24 MR. NEWKIRK: Your Honor, at this time the State
25 would ---

1 MS. HORLBECK: Your Honor, I would -- I still
2 object. I don't think he's laid a foundation as to the
3 technique, and we haven't heard from the person who
4 actually drew the photograph.

5 THE COURT: I would sustain the objection ---

6 MR. NEWKIRK: Okay.

7 THE COURT: --- at this time.

8 BY MR. NEWKIRK:

9 Q Megan, do you remember speaking with Mike -- with
10 Investigator Fortner a second time?

11 A Yes.

12 Q And when was this?

13 A May 28th.

14 Q And where did you speak with him?

15 A At the law enforcement, I believe.

16 Q When you spoke with Investigator Fortner, did he
17 show you a lineup?

18 A Yes.

19 Q And do you remember what time it was when you met
20 him?

21 A It was in the morning. I'm not sure what time. It
22 was in the morning.

23 Q And who showed you this lineup?

24 A Mike Fortner.

25 Q How many people were present?

1 A It was just the two of us.

2 Q And what did Investigator Fortner tell you when he
3 handed you this lineup?

4 A He told me that -- to look at the pictures to see if
5 I saw him in there. If I didn't don't point anyone out.
6 And if I did to make sure that I was sure.

7 Q Did the investigator tell you that the person who
8 was in the lineup was definitely the person that was in
9 the Silver Closet?

10 A No.

11 Q Were you led to believe you should pick somebody
12 out?

13 A No.

14 Q Did you feel some pressure to pick somebody out?

15 A No, sir.

16 Q Did anyone suggest to you who to pick out?

17 A No.

18 Q Did Investigator Fortner influence your decision at
19 all as to who to pick out?

20 A No.

21 Q Again, how long a time period were you able to
22 observe the defendant at the Silver Closet?

23 A Fifteen, twenty minutes.

24 Q And how close were you to him?

25 A Before the incident he was right in front of me

1 about two foot. But then throughout the whole incident
2 he was right there next to me.

3 Q Did you get a clear view of him?

4 A Yes.

5 Q Is the -- was the Silver Closet well lit?

6 A Yes.

7 Q And did you get a good enough look at him that you
8 would be able to identify him?

9 A Yes.

10 Q And when you were shown the photographic lineup, did
11 you see the person who robbed the Silver Closet?

12 A Yes.

13 Q Did you look at the lineup closely?

14 A I did.

15 Q Did you look at each picture carefully?

16 A Yes, sir.

17 Q Did you tell Investigator which photograph you had
18 picked?

19 A Yes.

20 Q And what did you do then do with the photographic
21 lineup?

22 A I circled the picture and initialed it.

23 Q Were -- did you have any doubts about your
24 selection?

25 A No.

1 Q Show you what has been marked as State's Exhibit
2 Number 1. Megan, do you recognize State's Exhibit Number
3 1?

4 A Yes.

5 Q What is it?

6 A The lineup I was given.

7 Q And how do you recognize it?

8 A My signature, initials.

9 Q And is that lineup in substantially the same
10 condition as when you looked at it on May 28, 2004?

11 A Yes.

12 MR. NEWKIRK: Your Honor, at this time the State
13 would offer State's Exhibit Number 1 into evidence.

14 MS. HORLBECK: Without objection.

15 THE COURT: It's in evidence.

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

17 BY MR. NEWKIRK:

18 Q Point out, Megan, on this lineup which selection you
19 made?

20 A Number three.

21 Q Did you make any notations?

22 A I circled it and initialed it.

23 Q Were you shown any other photo lineups?

24 A No.

25 Q Did you pick anybody else out of the photo lineup?

1 A No, sir.

2 Q This was the only person you picked out of the photo
3 lineup?

4 A Yes.

5 Q And the person that you saw rob -- that robbed the
6 Silver Closet and that you picked out of the photo
7 lineup, is that person in the courtroom today?

8 A Yes.

9 Q Where is that person?

10 A Right there.

11 MR. NEWKIRK: Please answer any questions Ms.
12 Horlbeck has for you.

13 CROSS-EXAMINATION

14 BY MS. HORLBECK:

15 Q All right. Ms. George, I just have a few questions
16 for you. You recall that after you dialed 911 the
17 officers arrived?

18 A Yes.

19 Q All right. And the first officer you spoke to, do
20 you recall that his name was Officer Ballenger?

21 A Yes.

22 Q And he asked you some questions and you did your
23 best to answer them, didn't you?

24 A Yes.

25 Q And part what he asked was he asked for a

1 description of the culprit?

2 A Yes.

3 Q And you gave him a description?

4 A Yes, ma'am.

5 Q While the incident was fresh on your mind?

6 A Yes.

7 Q Pretty much right after it happened, correct?

8 A Yes.

9 Q Okay. And the description you gave was a black
10 male, correct?

11 A Yes.

12 Q All right. Thirty to forty years old, wearing -- is
13 that correct?

14 A Yes.

15 Q All right. Wearing an orange jacket and orange
16 pants?

17 A Yes.

18 Q All right. And a Clemson shirt?

19 A Yes, ma'am.

20 Q All right. And you described the person as having a
21 shaved -- a shaved head?

22 A Yes.

23 Q Or bald head?

24 A Yes.

25 Q All right. You didn't recall any scars, tattoos?

1 A No, ma'am.

2 Q Okay. You didn't recall shoe size or anything like
3 that?

4 A No, ma'am.

5 Q And you also described some of the other people who
6 were in the Silver Closet with you, maybe to Officer
7 Fortner, did you give ---

8 A Um-hm, yes.

9 Q Is that correct?

10 A Yes.

11 Q Okay. Let me skip -- let me move you a little bit
12 then to that interview with the Officer Fortner.

13 A Okay.

14 Q All right. You described at the time that a couple
15 of customers, two or so may have been in the Silver
16 Closet?

17 A Earlier that day or ---

18 Q Yeah, at the same time as the culprit?

19 A Okay. Yes, I guess.

20 Q You tell me, I don't want --

21 A It was -- I'm pretty sure I just said one.

22 Q Okay. All right. Let me -- you gave a statement in
23 this case too, a signed statement?

24 A Yes.

25 Q Okay. All right. Let me hand you this and ask if

1 you recognize this? Take as much time as you need.

2 A Yes, I do.

3 Q And what is that?

4 A This is the statement I gave Detective Fortner.

5 Q Okay. And is that your signature?

6 A Yes, it is.

7 Q All right. Let me direct your attention to this
8 line right here.

9 A This right here?

10 Q Right.

11 A Okay.

12 Q The part starting with ---

13 A Yes.

14 Q All right. Do you recall telling Officer Fortner
15 that maybe two or so customers were in the Silver Closet
16 with you?

17 A Yes, ma'am.

18 Q You do?

19 A Yes.

20 Q Okay. And that's in your statement, correct?

21 A Yes, ma'am, it is.

22 Q Okay. Do you recall having a conversation with one
23 of the customers?

24 A I do.

25 Q All right. And y'all chatted about your boss, Gina?

1 A Yes.

2 Q And how the customer knew her?

3 A Yes.

4 Q Okay. And the customer left her name and number?

5 A Yes.

6 Q She had a bracelet to be fixed?

7 A Yes.

8 Q Okay. There was another customer that you thought
9 was in there?

10 A I vaguely remember it.

11 Q Okay. All right. Somebody who dropped off an
12 engraving item?

13 A Um-hm.

14 Q Okay. And when the culprit walked in, he was just
15 looking around, wasn't he?

16 A Yes.

17 Q Okay. And you didn't feel the need to press an
18 alarm or call the police at that point?

19 A No.

20 Q Okay. Now, you described that when you were in the
21 bathroom your first instinct was to try to hit the
22 culprit?

23 A When I realized he was looking around trying to
24 see -- yes.

25 Q Right. And you were trying to think of a way to get

1 away?

2 A Yes.

3 Q Okay. Were you crying at that point?

4 A I was just distressed.

5 Q Tense?

6 A Yes, very tense.

7 Q Upset and afraid?

8 A Yes, ma'am.

9 Q Okay. Did you scream or do anything like that?

10 A I never screamed.

11 Q Okay. You don't recall screaming?

12 A No.

13 Q And you don't recall crying the whole time?

14 A I wasn't -- I don't know how to describe it. It
15 wasn't crying like tears, but I was definitely distressed
16 and when I was talking to him and ---

17 Q Okay. Things were kind of jumbled that night?

18 A Yes.

19 Q All right. And were you having a hard time
20 explaining what happened to everybody? Were you that
21 scared still?

22 A Afterwards?

23 Q Um-hm.

24 A It was definitely hard for me to express it.

25 Q Okay. All right. And when you gave your

1 description, did you describe the culprit's nose? You
2 didn't describe that kind of thing, did you?

3 A To the police officers?

4 Q Um-hm.

5 A I didn't -- they didn't ask for that kind of detail
6 really. I didn't get into that.

7 Q And you didn't get into the shape of the head?

8 A I'm not sure at that point. I know I did with the
9 sketch artist.

10 Q Okay. But you recall your first description didn't
11 include any that?

12 A Okay, yeah.

13 Q I mean you tell me.

14 A Yes.

15 Q Because your first description ---

16 A Was more basic.

17 Q --- was that he was a black male?

18 A Yes.

19 Q Thirty to forty years old, correct?

20 A Yes, ma'am.

21 Q Wearing an orange wind suit outfit?

22 A Yes.

23 Q And the Clemson shirt?

24 A Yes, ma'am.

25 Q Correct. And had a shaved or bald head?

1 A Yes.

2 Q Okay. Now, when you described the customers that
3 came into the Silver Closet, did you know their names?

4 A No, ma'am.

5 Q Okay. But you mentioned the name Denise today?

6 A Yes.

7 Q And you know today that that was one of the
8 customers?

9 A Yes.

10 Q Okay. All right. Now, when you talked to the
11 police officers and you talked to them about the case,
12 did they say that they were going to keep you informed
13 about leads and where the case was going?

14 A Yes.

15 Q Okay. And your boss Gina was there as well? Was
16 she there when the police came?

17 A She was not in the store at the time.

18 Q Okay.

19 A When we -- when we gave -- when we were getting
20 ready to leave in the ambulance that's when I talked to
21 her for a few minutes.

22 Q All right. And when you looked at the lineup, you
23 said that Detective Fortner was there with you, correct?

24 A Yes.

25 Q Okay. And he actually called you to set up the

1 lineup, is that correct?

2 A Yes.

3 Q All right. When he called were you glad to hear
4 from him?

5 A I was glad to hear there was a lead.

6 Q All right. So you were hopeful that this might be a
7 break in the case?

8 A Yes.

9 Q Okay. You hoped you might be able to pick out the
10 person in the lineup?

11 A Yes.

12 Q Okay. And the pictures he showed you, there were
13 just six pictures?

14 A Yes.

15 Q Okay. And they were all -- they were all bald or
16 shaved men?

17 A Yes.

18 Q Okay. And when you picked out the third picture,
19 the -- Officer Fortner didn't say anything to you then,
20 did he?

21 A No, ma'am.

22 Q But later on he told you that that was who he
23 thought was the suspect?

24 A He said that that was the suspect.

25 Q Okay. And then he wrote out an affidavit?

1 A Yes.

2 Q And you signed it?

3 A Yes.

4 Q And he signed it?

5 A Yes, ma'am.

6 Q Okay. How long would you say you looked at the
7 lineup?

8 A Five to 10 minutes.

9 Q Okay.

10 A So I could spend some time on each picture.

11 Q All right. And after you looked at the lineup, did
12 you -- after you made your selection, did you keep
13 looking for a minute?

14 A I kept going back to that picture.

15 Q Okay. All right. And when you went to the
16 emergency room, you said the only injury to you was done
17 to your wrist?

18 A Yes.

19 Q Okay. And there were other pictures done of your
20 wrist, is that right? Do you recall?

21 A I think they might have taken a few, but I don't
22 remember.

23 MS. HORLBECK: Okay. All right. And just out of
24 the rule of completeness I'd request to have those
25 pictures and ask her about them.

1 MR. NEWKIRK: Your Honor, I think the rule of
2 completeness goes with a statement.

3 MS. HORLBECK: Well, I think it would go ---

4 MR. NEWKIRK: If she -- if I introduce a segment of
5 a statement, only a section of the statement, then
6 defense counsel wants the entire statement. I don't
7 think that applies to physical evidence.

8 MS. HORLBECK: Well, if she's testified that there
9 were other pictures taken then I'd just request to have
10 the pictures of her hand so that I could ask her about
11 those as well.

12 THE COURT: If he's got -- do you have them with
13 you?

14 MR. NEWKIRK: Yes.

15 THE COURT: Okay.

16 MS. HORLBECK: Just have these marked for
17 identification purposes only.

18 (Defendant's Exhibit Numbers 1 through 3 were marked
19 for identification.)

20 BY MS. HORLBECK:

21 Q All right. Megan, I'm handing you Defense Exhibits
22 1, 2 and 3 just for identification purposes only.

23 A Um-hm.

24 Q All right. And what's that a picture of?

25 A Me.

1 Q All right. And where -- is that the hand that you
2 were -- that you said there were bruises on?

3 A Yes.

4 Q Where is the bruise?

5 A Right there?

6 Q Okay. So it's more on your hand part?

7 A Yes.

8 Q Okay. Could you maybe stand up and show that to the
9 jury?

10 A This is the wrist right here. The bruises were
11 right in the nerve part of my wrist.

12 Q Okay. And this another picture, State's -- I mean,
13 Defense Exhibit 3 for identification purposes only?

14 A Yes, ma'am. It's right there.

15 Q All right. Okay. And Defense Exhibit 2 for
16 identification purposes only.

17 A It's this brown part right here.

18 Q All right. Now, you'd never seen this culprit
19 before?

20 A No.

21 Q He was not a friend of a friend?

22 A No.

23 Q Okay. And you were not able to provide any address
24 or any name?

25 A No.

1 Q Okay. And there were no leads in the case?

2 A No.

3 Q For a while, I mean?

4 A Right.

5 Q Okay. All right. And there were no leads until you
6 picked out the picture in the lineup?

7 A Right.

8 Q Okay. And that picture, you picked that out solely
9 on your memory, correct?

10 A Yes.

11 Q Okay. Now, do you remember what you wore that day?

12 A The ---

13 Q The day it happened?

14 A I don't remember.

15 Q Okay. I know that was a long time ago. And you
16 don't -- do you recall -- you don't recall which one of
17 the customers was actually ---

18 A I'm sorry, did you say -- you meant wore the day of
19 the incident?

20 Q Right.

21 A I'm sorry. I thought you meant the lineup. Yes, I
22 do remember what I was wearing.

23 Q Okay. What was that?

24 A I was wearing brown corduroy pants with a maroon
25 t-shirt.

1 Q Okay. Now, you don't recall which one of the --
2 which one of the customers was there first, do you?

3 A The engraving, yes. Because Denise actually saw
4 him.

5 Q Okay. All right. And for a while you didn't recall
6 that your barrette had broken, did you?

7 A I knew that it had ---

8 Q But you didn't ---

9 A I didn't worry about it. I knew my hair was up and
10 then it was down, but I didn't think about it too long.

11 Q Okay. You didn't tell the police about it?

12 A I did. I told them that I had my hair back, and
13 they never said anything about finding it.

14 Q Okay. On the night that you gave your statement,
15 did you mention it in your statement?

16 A I don't remember.

17 Q Okay. But you didn't mention it at first, did you?

18 A No, it was not something that was pressing on my
19 mind.

20 Q Okay. And you didn't mention it because you didn't
21 realize it for a little while?

22 A Right.

23 Q And when you did realize it, it was already in the
24 trash?

25 A Actually I think Gina's husband found it.

1 Q Right. So ---

2 A So I don't know if it was in the trash.

3 Q But it was in the store?

4 A Yes.

5 Q Okay. And the police officers retrieved it?

6 A Yes.

7 Q Okay. Was it sent off for analysis, if you know?

8 A I don't know.

9 MR. NEWKIRK: Objection, Your Honor.

10 MS. HORLBECK: I asked if her she knew. If she
11 doesn't know then I'm not going to go any further.

12 BY MS. HORLBECK:

13 Q All right. Once the barrette was found, were you --
14 was it explained to you that they would again call if
15 there were any leads?

16 A Yes.

17 Q The police? All right. Now, your wrists were tied
18 behind your back?

19 A Yes.

20 Q Okay. You mentioned that -- how long were your
21 wrists tied up?

22 A Well, he had to do that first obviously before he
23 could put me against the corner of the wall.

24 Q Right. But you don't know how long?

25 A I don't know how long exactly.

1 Q All right. Okay. Now, the night you gave your
2 statement, you didn't mention that the buckle had ripped,
3 did you, that your loop in your pants had ripped?

4 A I don't remember. I'm pretty sure I did, but ---

5 Q All right.

6 A I was obviously still wearing those.

7 Q Okay. Let me direction you once again to your
8 statement.

9 A Okay.

10 Q Okay. Tell me what this is again?

11 A That's my statement.

12 Q Okay. And this is your -- this is the portion of
13 the statement that you signed, correct?

14 A Yes.

15 Q Okay. All right. And at the bottom could you just
16 read that silently to yourself?

17 A Okay.

18 Q Okay. There is nothing in the statement about the
19 loop ripping?

20 A No, there wasn't.

21 Q Okay. You forget that -- do you think you forget
22 that because you were upset, scared?

23 A Yes.

24 Q Okay. And you were nervous enough that you
25 dialed -- you think you may have dialed the wrong

1 number ---

2 A Yes.

3 Q --- when you called 911?

4 A Yes, I did.

5 Q Okay. All right. Now, you didn't see a gun in this
6 case, did you?

7 A No.

8 Q Okay. And when the officer came, do you recall if
9 the Silver Closet was dusted down for prints?

10 A I don't -- I don't remember. My parents handled a
11 lot of that.

12 Q All right.

13 A The details.

14 Q They handled details like the dusting down for the
15 prints?

16 A Yes.

17 Q Okay. Did you point out to the officers the areas
18 you thought the culprit may have touched?

19 A Yes.

20 Q Okay. What areas were those.

21 A The cabinet where I had put the book down for him to
22 look through. I couldn't remember but I assume that
23 would be the -- one of the places he would have touched.

24 Q Okay. That was what you pointed out?

25 A Yes.

1 Q Okay. Now, you said on direct that you didn't
2 recall turning off the lights?

3 A In the -- what you -- in the main store?

4 Q Um-hm. Yes.

5 A Yes.

6 Q Okay.

7 A I don't remember doing that.

8 Q Okay. Let me just direct you again to your
9 statement. And again this is -- is this your
10 statement?

11 A Yes.

12 Q Okay. I'm just going to direct your attention to
13 right -- starting right there, just read it to
14 yourself.

15 A Yeah, that was in the bathroom.

16 Q Okay.

17 A I thought you were talking about the main store.

18 Q Okay.

19 A Outside.

20 Q But on direct didn't you testify that you don't
21 recall whether or not you turned off the open light?

22 A Right.

23 Q Okay. Then in your statement it says that you did
24 turn the off -- the open light off, correct? Go ahead
25 and look at it. It's -- that's what I'm talking about.

- 1 A Yes, I see that.
- 2 Q Is that what it says?
- 3 A Yes, ma'am.
- 4 Q And your statement does reflect that you did turn
5 off the open light?
- 6 A Yes, ma'am.
- 7 Q Okay. And do you recall turning off the -- the
8 interior lights as well in the store?
- 9 A I really don't remember. That's not what I was
10 thinking of at that time.
- 11 Q I understand. But your statement reflects that you
12 did turn off all the interior lights?
- 13 A Okay, yes.
- 14 Q I mean ---
- 15 A Yes, I mean from what I've read, yes, ma'am.
- 16 Q Okay. Do you want to -- do you want to look at it
17 again?
- 18 A I mean I -- I understand that. I'm sorry, I'm
19 just ---
- 20 Q That's all right. There was just a lot going on
21 that night?
- 22 A Yes.
- 23 Q And things were kind of jumbled as well, right?
- 24 A Yes, ma'am.
- 25 Q And you were scared and you were upset? Now, you

1 also mentioned that the culprit grabbed you -- grabbed
2 your hair from behind?

3 A Yes.

4 Q All right. And when he grabbed your hair from
5 behind, was he behind you?

6 A His arm was behind me. When we would turn to go
7 somewhere he would be behind me, but for most of the part
8 he was right -- right here next to me.

9 Q Okay. So on your right hand side then?

10 A Yes.

11 Q Okay. And does that mean that the left hand side
12 of -- then the left hand side of the head would be next
13 to you, correct?

14 A Yes.

15 Q Okay. Do you recall a scar or anything like -- of
16 that nature on the culprit?

17 A No.

18 Q Okay. All right. If you could turn your head. Do
19 you -- I'm talking about -- pointing to my client. Do
20 you see this scar here?

21 A Yes.

22 Q Do you recall seeing that that day?

23 A No, ma'am, I wasn't looking for that.

24 Q All right.

25 MS. HORLBECK: Thank you. I've got nothing

1 further.

2 REDIRECT-EXAMINATION

3 BY MR. NEWKIRK:

4 Q Megan, what was the defendant wearing when he
5 entered the Silver Closet?

6 A An orange wind suit.

7 Q Okay. And who else was in the Silver Closet when
8 the defendant came in?

9 A Denise.

10 Q Okay. So Denise Henderson was there?

11 A Yes.

12 Q And then was there another customer there?

13 A To be honest, I don't -- she came in before Denise,
14 but I don't remember if she was there overlapping the
15 times that they were there, but I'm pretty sure it was
16 just Denise and him.

17 Q Okay. So Denise was in the Silver Closet with you
18 and the defendant?

19 A Yes, yes.

20 Q Okay. And after this occurred, were you upset?

21 A Yes.

22 Q Were you worrying about your hair clip?

23 A No, not at all.

24 Q Were you concerned about whether or not the lights
25 were on or off?

1 A No.

2 Q But the person that you picked out of the photo
3 lineup is the person in the courtroom today, correct?

4 A Yes, sir.

5 Q And that is -- and this defendant is who entered the
6 Silver Closet, correct?

7 A Yes, sir.

8 Q Okay. And did you hesitate when you were looking at
9 the photo lineup and made your selection?

10 A No.

11 Q So you were sure ---

12 A I was sure.

13 Q --- it was this defendant?

14 A It was.

15 MR. NEWKIRK: Nothing further, Your Honor.

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

17 MS. HORLBECK: Your Honor, may I just do brief
18 redirect (sic)?

19 THE COURT: Wait, hold on.

20 RECROSS-EXAMINATION

21 BY MS. HORLBECK:

22 Q Megan, just one more thing. You were not able to
23 describe exactly how you got out of bathroom, is that
24 correct.

25 A I ---

1 Q To the officer, let me clarify that?

2 A Yes, yes.

3 Q Okay. And again you were scared that night,
4 upset?

5 A Yes, ma'am.

6 Q Crying some. And you were having trouble dialing
7 the number to the 911?

8 A Yes.

9 Q Okay. You did -- you were able to get your mother
10 and your boss on the phone, is that correct?

11 A Yes.

12 Q Okay. You didn't recall your hair clip that night,
13 but you recalled it a little bit later?

14 A Yes.

15 MS. HORLBECK: And -- that's it. That's all I've
16 got.

17 THE COURT: Okay.

18 MR. NEWKIRK: The State calls Denise Henderson.

19 THE CLERK: Up here, please, ma'am. Place your left
20 hand on the Bible and raise your right hand.

21 DENISE HENDERSON

22 Having been first duly sworn, testified as follows:

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

24 THE WITNESS: Denise Henderson.

25 THE CLERK: Thank you. Be seated.

DIRECT EXAMINATION

BY MR. NEWKIRK:

Q Ms. Henderson, where do you live?

A Greenville.

Q And what do you do for a living?

A I'm an administrative assistant.

Q And are you familiar with the Silver Closet?

A I am.

Q Have you ever been to the Silver Closet?

A I have.

Q Did you go to the Silver Closet on May 12th of 2004?

A I did.

Q And why did you go there?

A To purchase a pendant for my mother for Mother's Day.

Q And what time of day was this?

A It was a little bit before 5:00.

Q And when you arrived, how many people were inside the store?

A There were three.

Q And who were those people?

A The cashier, myself and a gentleman.

Q Do you see that gentleman in the courtroom today?

A I do.

1 Q Where is he?

2 A On the left side of me.

3 Q What did you do when you were inside the Silver
4 Closet?

5 A When I went in there was a pendant that I was
6 suppose to purchase that was behind the desk, and I
7 talked to her for a little while. After purchasing it I
8 kind of stayed in there for a little while because I
9 honestly did feel unease being there.

10 Q Why did you feel unease?

11 A Well, when I got to the store, when I went in the
12 store, honestly out of curiosity I was wondering why
13 there were no vehicles there because there was a
14 gentleman in the store. And so while I was in there
15 looking around, it just seemed weird that he was in the
16 store looking and not purchasing anything. So I did stay
17 in there for a while, hoping that he would leave.

18 Q And while you were there, what was the defendant
19 doing?

20 A Just looking at the jewelry in the cases.

21 Q Did you leave the Silver Closet?

22 A I did leave.

23 Q How long were you in there?

24 A About seven minutes.

25 Q When you left the Silver Closet, who was inside?

1 A The gentleman and the cashier.

2 Q So Megan was inside?

3 A Megan was there.

4 Q And was the defendant inside?

5 A He was.

6 Q Did you get a good look at this individual?

7 A I did.

8 Q At the defendant?

9 A I did.

10 Q Have you talked to Investigator Fortner?

11 A I did.

12 Q And when did you talk to Investigator Fortner?

13 A It was about a week, a little over a week later.

14 Q And where you did you talk with Investigator
15 Fortner?

16 A At my job.

17 Q Did Investigator Fortner show you a photo lineup?

18 A He did.

19 Q Were you alone when he showed it to you?

20 A I was.

21 Q No other law enforcement there?

22 A No.

23 Q No other witnesses there?

24 A No.

25 Q What did Investigator Fortner say to you when he

1 gave you the lineup?

2 A He wanted me to take a look at the lineup and see if
3 I could identify the person that was in the store on the
4 lineup.

5 Q Did he -- did Investigator Fortner tell you that
6 person was definitely in the lineup?

7 A No, he didn't.

8 Q Did he lead you in any way as to who to pick out?

9 A He did not.

10 Q Did he put pressure on you to pick out a certain
11 person?

12 A No.

13 Q Did he suggest to you in any way who to pick out?

14 A No.

15 Q When you were shown the photo lineup, did you see
16 the person who was in the Silver Closet in that photo
17 lineup?

18 A I did.

19 Q Did you look at the lineup closely?

20 A I did.

21 Q Did you look at each picture closely?

22 A I looked through it; but I did see the individual
23 directly, I did.

24 Q Did you tell the detective that you picked the
25 photograph?

1 A Um-hm, I did.

2 Q And what did you do to the photo lineup?

3 A I circled the person that I saw at the Silver
4 Closet.

5 Q Did you hesitate in who you picked out at all?

6 A No.

7 Q Okay. Let me show you what's been marked as State's
8 Exhibit Number 2. Do you recognize that?

9 A I do.

10 Q What is that?

11 A That's the lineup that Mr. Fortner showed me.

12 Q And is that in substantially the same condition when
13 he showed it to you on May the 28th?

14 A Yes.

15 MR. NEWKIRK: Your Honor, at this time I would offer
16 State's Exhibit Number 2 into evidence.

17 THE COURT: All right. Without objection.

18 (State's Exhibit Number 2 was filed.)

19 BY MR. NEWKIRK:

20 Q Ms. Henderson, can you point out which picture you
21 picked out?

22 A This one.

23 Q Did you -- can you point out any marks you may have
24 made on the lineup?

25 A I put my initials beside it.

1 Q What about the circle?

2 A I circled it as well.

3 Q Did you ever pick anybody else out of the photo
4 lineup?

5 A No.

6 Q Were you ever shown another photo lineup?

7 A No.

8 Q Is the person that you saw in the Silver Closet the
9 person who you picked out of the photo lineup?

10 A Yes.

11 Q Is that person in the courtroom today?

12 A Yes.

13 Q Can you point him out?

14 A He's right there.

15 MR. NEWKIRK: Please answer any questions Ms.

16 Horlbeck has for you.

17 CROSS-EXAMINATION

18 BY MS. HORLBECK:

19 Q Ms. Henderson, you were at the Silver Closet
20 approximately five to seven minutes?

21 A Yes.

22 Q All right. And you recall chatting with the clerk?

23 A Yes.

24 Q All right. Y'all chatted about you knew the -- the
25 owner of the Silver Closet?

1 A Right.

2 Q You had worked with her in the past?

3 A Right.

4 Q You left your name and number for the owner to
5 contact you?

6 A Right.

7 Q Okay. You don't recall any other customers being in
8 the Silver Closet with you that day?

9 A There weren't any others.

10 Q Except for the culprit or who you say is the
11 culprit?

12 A Right.

13 Q Okay. But no other female customers that you recall
14 of?

15 A No.

16 Q Okay. And when the officer contacted you about the
17 case, it was about a week later?

18 A Um-hm.

19 Q All right. You described what you saw the best you
20 could, to the best of your ability?

21 A Yes, ma'am.

22 Q And it was fresh in your mind when you did that
23 description?

24 A Yes.

25 Q And you described a black male, correct?

1 A Correct.

2 Q Fair skinned?

3 A Correct.

4 Q Five seven, or five eight?

5 A Correct.

6 Q You could not remember what he wore?

7 A I know he had on a jump suit.

8 Q Okay. You didn't tell the officer that, though, did
9 you?

10 A No.

11 Q Okay. And that would not be in his report? I
12 mean -- well, you don't know that. All right. You also
13 couldn't remember if the man that you saw was bald or
14 not?

15 A I knew he was bald.

16 Q How did you -- how did you know he was bald?

17 A Because of the way his cap was on in the back.

18 Q You also recalled a cap?

19 A Um-hm.

20 Q And you did not describe the cap to the officer when
21 he asked you about the man you saw?

22 A I did.

23 Q You say you did?

24 A Um-hm.

25 Q All right. And did you -- he took notes of what you

1 said you saw?

2 A I'm certain he did.

3 Q All right. And that would be in his report, do you
4 suspect?

5 A If he took notes it should be in there.

6 Q All right. And you said the man had a cap on, but
7 you knew he was bald?

8 A Yes.

9 Q Is that correct?

10 A Um-hm.

11 Q Okay. Now, you don't recall a tattoo or a scar or
12 anything like that on the man?

13 A No, huh-uh.

14 Q Okay. And you say you got a good look at him?

15 A I did.

16 Q All right. This man was a stranger to you?

17 A Yes.

18 Q You had never seen him before?

19 A No.

20 Q Wasn't a friend of a friend?

21 A No.

22 Q Okay. And you described a certain amount of
23 unease. When you left the store did you -- or before
24 you left the store, did you insist that the clerk leave
25 with you?

1 A No.

2 Q Did you pull her aside and say, look, I don't like
3 the looks of this guy?

4 A No.

5 Q Did you consider calling the police after you left?

6 A I did not.

7 Q Okay. You also didn't describe your unease to the
8 officer when the officer called you?

9 A When he called me?

10 Q When he called you to get a description of what you
11 saw?

12 A I did tell him the experience that I had, the unease
13 feeling that I had.

14 Q Then you would -- did he take notes about that?

15 A If he called me, I don't know.

16 Q Okay. Would you expect that that would be in his
17 report?

18 A I would hope so.

19 Q And again, you said you got a good look at the
20 culprit?

21 A Yes.

22 Q Okay. And on your lineup, there are no people in
23 this lineup that have caps on, is that correct?

24 A That's correct.

25 Q Okay. And you said he had a cap on but you knew he

1 was bald?

2 A Um-hm.

3 Q Okay. And obviously everybody in this lineup has a
4 bald or a shaved head, nobody with hair, correct?

5 A Correct.

6 Q All right. All right. Do you recall -- you said
7 you didn't recall any scars. Could you -- do you see
8 this, that this is a scar on the side of his head?

9 A I don't see it from here.

10 Q You come down here and look if you'd like.

11 A That's all right.

12 MS. HORLBECK: Why don't you come here. Request to
13 approach, Your Honor? Turn your head.

14 BY MS. HORLBECK:

15 Q Do you see this scar now?

16 A Yes.

17 Q Okay. You didn't describe that when the officer
18 asked you for a description?

19 A No, no.

20 MS. HORLBECK: All right. Nothing further.

21 REDIRECT-EXAMINATION

22 BY MR. NEWKIRK:

23 Q Ms. Henderson, on May 12 of 2004, did this
24 defendant -- was this defendant inside the Silver
25 Closet?

1 A He was.

2 Q And did you pick this individual out of a photo
3 lineup?

4 A I did.

5 MR. NEWKIRK: Nothing further.

6 MS. HORLBECK: One more question.

7 RECROSS-EXAMINATION

8 BY MS. HORLBECK:

9 Q In your photo lineup, do you see anybody with scars
10 in that lineup?

11 A He doesn't have a scar in this lineup either.

12 Q No one in that lineup has a scar, do they?

13 A No.

14 MS. HORLBECK: Thank you.

15 THE COURT: Thank you, ma'am. You can come down,
16 Ms. Henderson. Thank you.

17 MR. NEWKIRK: The State calls Gina Turcotte.

18 THE CLERK: Up here, please, ma'am. Put your left
19 hand on the Bible and raise your right hand.

20 GINA TURCOTTE

21 Having been first duly sworn, testified as follows:

22 THE CLERK: State your full name for the record,
23 please.

24 THE WITNESS: I'm Gina Turcotte.

25 THE CLERK: Thank you. Be seated.

DIRECT EXAMINATION

BY MR. NEWKIRK:

Q Ms. Turcotte, where do you live?

A Here in Greenville County.

Q And where do you work?

A I work at Greenville Hospital System and we also own our business.

Q And when you say we?

A My husband Mark and I.

Q What business do you own?

A The Silver Closet.

Q And do you know Megan George?

A I do.

Q And how do you know her?

A Megan came to interview for a position at our store.

Q And did Megan work at the Silver Closet?

A She did. She trained several times and then began to work at our store.

Q Was she working on May 12th of 2004?

A Yes.

Q Is the Silver Closet equipped with any kind of video surveillance camera.

A It is not. We do have a security system and panic buttons and a mobile panic button, but not video.

Q Did you get a call from Megan on May 12th of 2004?

1 A Yes.

2 Q Do you remember approximately what time that was?

3 A It was about 5:20, because I had picked up my
4 children and we were on our way home, which was the usual
5 routine.

6 Q And what did she tell you when she called her (sic)?

7 MS. HORLBECK: Your Honor, I just say that -- I
8 don't know what she's going to say but I just ask that
9 anything she say be limited to time and place.

10 MR. NEWKIRK: I think the victim has already
11 testified as to who she called.

12 MS. HORLBECK: But I don't know that lay witnesses
13 are allowed to bolster a description in certain types of
14 cases. There -- testimony from other witnesses is
15 limited as to time and place.

16 THE COURT: I would sustain the objection.

17 BY MR. NEWKIRK:

18 Q When you spoke with Megan, what was her demeanor on
19 the phone?

20 A She was very -- I mean, she was shaken up.

21 MS. HORLBECK: Your Honor, again, I renew my
22 objection. I think any description is just limited to
23 time and place.

24 THE COURT: I'll let her say she was upset.

25 MS. HORLBECK: Thank you, Your Honor.

1 BY MR. NEWKIRK:

2 Q Again?

3 A She was upset. She called and she said that we had
4 been ---

5 Q Okay. Are you familiar with the finances of the
6 Silver Closet?

7 A Yes.

8 Q How much money was stolen on May 12th?

9 A Less than \$100. We have mostly a credit card
10 business. People often used credit not cash.

11 Q Let me show you, Ms. Turcotte, State's Exhibit
12 Number 4. Do you recognize that?

13 A Yes.

14 Q What is that?

15 A This is a hair barrette that I found.

16 Q And where did you get that?

17 A The next day when I came back to clean everything
18 up, I found this on the floor. Well, actually I found
19 this and it was -- I'm sorry. I had found this -- a
20 piece, and it was -- one piece was in the garbage.

21 Q And how did you find out about this?

22 A The -- well, when I was trying to prepare myself to
23 go back into the store Megan's mom had called me to
24 say ---

25 MS. HORLBECK: I object to any hearsay.

1 THE COURT: All right.

2 BY MR. NEWKIRK:

3 Q What did you do after you found the barrette?

4 A I called Mr. Fortner to let him know that I had
5 found it.

6 Q Did you give it to Mr. Fortner?

7 A Yes.

8 Q How often was the store cleaned?

9 A It's part of their daily responsibility at the very
10 end of the day to wipe all of the cases down.

11 Q Okay. And if you -- how many people come into the
12 Silver Closet on a given day, approximately?

13 A At least 35, 40 people. It gets busy especially
14 during lunch.

15 Q How often is the store dusted?

16 A The store -- in our show room area it's all glass
17 cases, so they're always wiped down every day. Shelving
18 and things can be wiped down maybe once a month, once
19 every couple weeks.

20 MR. NEWKIRK: All right. Nothing further.

21 CROSS-EXAMINATION

22 BY MS. HORLBECK:

23 Q All right. Ms. Turcotte, that's how I pronounce
24 your name?

25 A Turcotte.

1 Q Turcotte, I apologize. You didn't get a -- you
2 responded -- or I guess you arrived at your store that
3 evening not because of the panic button, is that correct?

4 A Yes, ma'am.

5 Q The panic button was not hit in this case?

6 A Yes, ma'am.

7 Q Okay. And you had a chance to talk to the police
8 officers?

9 A Basically when we arrived I was with my children,
10 and they basically said that we just had to stay outside.

11 Q Okay. All right. You had Officer Fortner's number
12 at some point, though?

13 A Yes.

14 Q Okay. And you were able to talk to the officers at
15 some point, correct?

16 A Yes.

17 Q Okay. And did they tell you they would keep you
18 informed of the case and what happened?

19 A Yes.

20 Q Okay. And when you spoke to Officer Fortner, you
21 had called him because you had found a barrette?

22 A Yes.

23 Q Okay. Or your husband had found it?

24 A He -- he saw it the night before. I -- my husband
25 had the children at the store because I went to the

1 hospital, and he was afraid I would be upset by some of
2 the things that I would see, so he tried to clean some
3 things up knowing that I was going to be there the next
4 day.

5 Q Okay. And the barrette -- I don't mean to interrupt
6 you, but the barrette was one of the things he cleaned
7 up?

8 A Yes, ma'am.

9 Q Okay. All right. Now, that was retrieved for the
10 officer?

11 A Um-hm.

12 Q Okay.

13 A We have a lot of jewelry bags and I put it in a
14 pack.

15 Q Okay. All right. And you said the counters were
16 wiped down approximately once a month?

17 A No, the glass cases, it's part of the daily task of
18 the store ---

19 Q Okay.

20 A --- every day because it's how we present our
21 jewelry. So we want to keep it clean. So every day
22 that's a major task to do.

23 Q Did you wipe down the glass cases?

24 A That ---

25 Q Personally that day?

1 A Oh, no.

2 Q All right. Then you don't have personal knowledge
3 that that was actually done before this incident?

4 A I mean it's usually not done until we close, which
5 is later.

6 Q Okay. And y'all hadn't closed yet, right?

7 A No, ma'am.

8 Q Your closing time is at 6:00?

9 A Six o'clock.

10 MS. HORLBECK: Okay. All right. Just one moment.
11 Beg the Court's indulgence.

12 BY MS. HORLBECK:

13 Q Where is the panic button?

14 A There are two. There is one at the back door and
15 then there is one that is a mobile. It's like a hand --
16 you can hold it in your hand if you want, or have it, you
17 know, around your neck or on your wrist or something.

18 MS. HORLBECK: Okay. All right. Thank you.

19 MR. NEWKIRK: Nothing further, Your Honor.

20 THE COURT: Thank you. All right. We'll take about
21 a 10 minute recess or so at this time. Do not discuss
22 the case. And I'll bring you back in and we'll continue
23 with the testimony. Okay.

24 (The jury exited the courtroom at 3:20 p.m.)

25 THE COURT: All right. We'll start back in about 10

1 or 15 minutes.

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

4 (The jury entered the courtroom at 3:48 p.m.)

5 THE COURT: All right.

6 MR. NEWKIRK: The State calls Mark Turcotte.

7 THE CLERK: Put your left hand on the Bible and
8 raise your right hand.

9 MARK TURCOTTE

10 Having been first duly sworn, testified as follows:

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

12 THE WITNESS: Mark Richard Turcotte.

13 THE CLERK: Thank you. Be seated.

14 DIRECT EXAMINATION

15 BY MR. NEWKIRK:

16 Q Mr. Turcotte, where do you live?

17 A In Taylors.

18 Q And where do you work?

19 A I work for Milliken and Company.

20 Q Are you familiar with the Silver Closet?

21 A I am.

22 Q And how so?

23 A I'm part owner.

24 Q Okay. And so Gina is your wife?

25 A She is my wife, yes.

1 Q Are you familiar with the incident that occurred on
2 May 12, 2004?

3 A I am.

4 Q On May 12th, did you go to the Silver Closet?

5 A I did.

6 Q And when did you go there?

7 A It was after work. I had gotten home and my wife
8 had informed me that there was a robbery at the store.

9 Q And what time was it that you went there?

10 A It was between 5:00 and 6:00. I don't remember the
11 exact time, but I had come home from work, and I get off
12 at 5:00. So it must have been around 5:30 sometime.

13 Q And what did you do when you got there?

14 A Well, we had our kids with us because we drove
15 together. So when we got there the police were still
16 inside the store with Megan and her family, and so we
17 waited out in the parking lot with the kids.

18 Q Did you go inside the store that night?

19 A I did.

20 Q And what time did you go inside the store?

21 A Once the police had finished -- the forensic people
22 had finished inside the store, my wife had left with the
23 Georges to go to the hospital, and they needed somebody
24 to -- we needed to lock the store up after they had
25 finished inside. So that's when I went in, after they

1 were finished.

2 Q And what did you do when you went in?

3 A My intent was to go in and just turn off the lights,
4 lock up the store. But I did walk around and look around
5 a little bit while I was in there.

6 Q Did you find anything as you were walking around?

7 A Yes. I went behind the counter where the cash
8 register is, and I wanted to, you know, just make sure
9 everything was okay behind there, and I found a piece of
10 a barrette on the floor behind the counter. And then I
11 proceeded around the rest of store, turned off -- went
12 into the bathroom next and there was a vacuum cleaner
13 cord still tied up between the railings behind the
14 toilet, and so I untied that, and once I did that I went
15 ahead and turned the lights off and locked the store.

16 Q And why did you untie the vacuum cord?

17 A Basically my wife was going to be coming there the
18 next day ---

19 MS. HORLBECK: Your Honor, I object to this as
20 relevance.

21 THE COURT: I would sustain the objection. What was
22 going to happen the next day doesn't have anything to do
23 with the case.

24 BY MR. NEWKIRK:

25 Q Okay. Let me show you what has been marked as

1 State's Exhibit Number 4. Do you recognize that?

2 A I do. That's the piece of the barrette that I found
3 behind the counter.

4 Q And after you found that, what did you do with it?

5 A I picked it up and put it in the trash underneath
6 the counter.

7 Q Why did you put it in the trash can?

8 A Because I did not want anyone else to find it and be
9 upset by it.

10 Q Okay. And did you tell anybody about it?

11 A I did. That night I told my wife about it and the
12 vacuum cleaner cord in the bathroom.

13 Q Okay. And again, can you describe how -- what the
14 vacuum cleaner cord looked like in the bathroom?

15 A Well, the ---

16 MS. HORLBECK: Asked and answered.

17 THE COURT: All right. I would overrule go -- I'll
18 let him go ahead and answer.

19 MS. HORLBECK: Thank you, Your Honor.

20 THE WITNESS: The cord is attached to the vacuum and
21 the vacuum was on the side of the -- beside the toilet,
22 and I don't remember exactly how it was tied, but it was
23 still wrapped between the railings. There's a railing on
24 one side of the toilet and one behind it. And the cord
25 was wrapped between the two.

1 MR. NEWKIRK: Nothing further.

2 MS. HORLBECK: Just briefly.

3 CROSS-EXAMINATION

4 BY MS. HORLBECK:

5 Q Is there a panic button in the store?

6 A There is.

7 Q Okay. And one of them is a mobile panic button that
8 can be worn?

9 A There -- yes.

10 Q All right. And y'all responded not because of the
11 panic button, correct?

12 A Correct. I responded because of my wife.

13 Q Okay. I mean, y'all didn't go to the store because
14 the panic button was hit, is that correct?

15 A That's correct.

16 MS. HORLBECK: Okay. I don't have anything further.

17 THE COURT: Thank you, sir. You may come down.

18 MR. NEWKIRK: The State calls Deputy Ballenger.

19 THE CLERK: Put your left hand on the Bible, please,
20 and raise your right hand.

21 ROBERT BALLENGER

22 Having been first duly sworn, testified as follows:.

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

24 THE COURT: Robert Ballenger.

25 THE CLERK: Thank you. Be seated.

DIRECT EXAMINATION

BY MR. NEWKIRK:

Q Deputy Ballenger, where do you work?

A I work for the Greenville County Sheriff's Office.

Q And what are your duties at the sheriff's office?

A I'm a uniform patrol officer. I answered calls for service, 911, burglaries, robberies, things of that nature.

Q Were you on duty on May 12th of 2004?

A Yes, I was.

Q On May 12th of 2004, did you respond to the Silver Closet?

A Yes, I did.

Q Why did you respond there?

A There was -- a call that came out from that location of a robbery and I responded.

Q Do you remember what time it was approximately when you got there?

A It was shortly after 5:30. I was on my way to work and I was on Haywood Road going towards the law enforcement center.

Q And what did you observe when you first arrived?

A When I first arrived there, I approached the front of the business and came in contact with Megan George, who was working in the store. She was upset and crying.

1 Q And what was her -- what was her demeanor like?

2 A She was upset.

3 Q Did you make any physical observations about her?

4 A Well, she seemed very upset. I asked her what had
5 happened. And I asked her if -- I told her that we had
6 help coming on the way and asked if she was injured. She
7 had some marks on her wrists.

8 Q So you -- did you observe marks on her wrists?

9 A Yes, I did.

10 Q Did any other officers respond to the scene?

11 A Yes, they did.

12 Q Did forensics officers respond to the scene?

13 A Yes, they did.

14 MR. NEWKIRK: Nothing further, Your Honor.

15 CROSS-EXAMINATION

16 BY MS. HORLBECK:

17 Q Officer Ballenger, am I correct in calling you
18 officer, or are you a deputy?

19 A Deputy or officer, either one is proper.

20 Q All right. When you got to the Silver Closet, Megan
21 was upset and crying?

22 A Yes.

23 Q Visibly shaken, would you say?

24 A Yes.

25 Q All right. And you arrived at the Silver Closet as

1 quickly as you could, is that correct?

2 A That's correct.

3 Q Okay. Did -- excuse me. And you arrived in
4 response to a phone call?

5 A It was -- dispatch had put out a call that a robbery
6 had occurred at that location.

7 Q Okay. And you asked Ms. George for a description of
8 the culprit?

9 A I did. That's normal procedure.

10 Q All right. And she described a black male?

11 A She described a black male, 30 to 40 years old,
12 wearing a faded orange shirt covered by a wind breaker
13 with orange wind breaker pants to match the top.

14 Q Okay. All right. She didn't give you a detailed
15 description of the culprit's mouth, did she?

16 A No, she did not.

17 Q All right. And there was no detailed description of
18 the culprit's head, like the shape of the head?

19 A Other than a close -- or the hair was close, nothing
20 more than that.

21 Q All right. You said the hair -- she described that
22 the hair was close shaved?

23 A She said the hair was close to the head.

24 Q Okay. All right. Now, did -- she didn't provide
25 any detailed description of the nose on the culprit, did

1 she?

2 A No, ma'am.

3 Q Okay. And didn't describe a scar or a tattoo?

4 A No, ma'am.

5 Q All right. And you confirmed that Megan and the
6 culprit, they were strangers? She didn't know him then,
7 did she?

8 A She said she did not know him. She was monitoring
9 the store. He had come in as a customer.

10 Q All right. And she was unable to provide you with a
11 name or an address of the culprit?

12 A No, she didn't know him.

13 Q I know, I'm just covering my bases.

14 A Okay.

15 Q All right. And officers scoured the area looking
16 for someone of that description?

17 A Right. Several officers responded to the area.
18 Sergeant Moore was the on duty supervisor that responded.
19 And he coordinated to have the dog team and other units
20 in the area looking for him.

21 Q All right. And as a result of this scouring of that
22 area, no one was arrested, correct?

23 A Not that I'm aware of.

24 Q Okay. And at that point you didn't arrange a photo
25 lineup?

1 A I didn't arrange a photo lineup.

2 Q All right. At that point in the investigation
3 you -- your investigation had not focused on any one
4 person?

5 A That's correct.

6 Q All right. And a lineup at that point would have to
7 include a lot of bald or close shaven black males in
8 Greenville County?

9 A Well, I didn't have enough information to do a
10 lineup. That wouldn't be part of what I do.

11 Q All right. And she pointed out all of the areas
12 that the -- that she believed the culprit touched, is
13 that correct?

14 A She did point out several areas inside the store
15 that she believed the culprit had touched.

16 Q Okay. Do you recall what areas she pointed out?

17 A She showed me around the store to the different
18 glass cases. She said this subject had asked about a
19 special order of jewelry, that he had -- she pulled out
20 the lot -- a book that they look through to order stuff
21 from.

22 Q Right.

23 A She said that he had -- he had her to open the cash
24 register drawer and she reached in it and the same as the
25 cash box, but he didn't touch those things.

1 Q All right.

2 A And then he took her into a rear room where he had
3 been in there with her, so ---

4 Q Okay. And you confirmed also that forensic -- let
5 me rephrase this. Forensics arrived as well?

6 A Yes, I did see the forensics officer arrive on
7 scene.

8 Q And they dusted down the areas that she pointed out?

9 A They processed the scene.

10 Q Okay. I mean, dusted down for fingerprints, is that
11 what you mean by process the scene?

12 A Right.

13 Q Okay. All right. And were photographs taken?

14 A I do not know.

15 Q Okay. You don't know if any photographs were taken?

16 A I do not know.

17 Q All right. All right. No weapon was discovered, no
18 gun, or knife, or anything of that nature?

19 A I was never apprised of a weapon.

20 Q Say that again?

21 A I was never told of a weapon being found.

22 Q Okay. All right. Now, she didn't provide you any
23 details on how her hands were tied, did she?

24 A She said that she was tied with a cord from a vacuum
25 cleaner.

1 Q Right.

2 A And there was a vacuum cleaner there and the cord
3 was laying off of the vacuum cleaner on the floor. And
4 the marks she had -- it appeared there was marks on her
5 wrists that could have been made by a vacuum cleaner
6 cord.

7 Q Okay. Did -- all right. Did she include the fact
8 that the vacuum cord had been tied in her belt loop, and
9 the belt loop had been broken?

10 A I don't remember that.

11 Q All right. And she didn't provide details of how
12 she got out of the bathroom?

13 A I was told that ---

14 Q I mean from her?

15 A From her?

16 Q From her mouth, yeah.

17 A From her, that the lights were off and that the
18 table had been used to barricade the door.

19 Q Okay. Did she provide specific details on how she
20 got out of that room?

21 A No.

22 Q Okay. And you saw her right after all of this had
23 happened?

24 A In the few minutes.

25 Q As soon as you could get there?

1 A Right.

2 Q From -- what would you say, within 10 minutes, five
3 minutes?

4 A Probably within 10 minutes.

5 Q And you confirmed that she was visibly shaken and
6 upset?

7 A Yes, ma'am.

8 MS. HORLBECK: I've got nothing further.

9 MR. NEWKIRK: I've got no redirect, Your Honor.

10 THE COURT: Thank you, sir.

11 MR. NEWKIRK: The State calls Mike Fortner.

12 THE CLERK: Put your left hand on the Bible and
13 raise your right hand, please, sir.

14 MIKE FORTNER

15 Having been first duly sworn, testified as follows:

16 THE CLERK: State your name for the record, please,
17 sir.

18 THE WITNESS: Michael Fortner.

19 THE CLERK: Thank you. Be seated.

20 DIRECT EXAMINATION

21 BY MR. NEWKIRK:

22 Q Investigator Fortner, where do you work?

23 A I work for the Greenville County Sheriff's Office.

24 Q And what are your duties at the sheriff's office?

25 A I'm assigned to the robbery unit, investigate

1 robberies.

2 Q Were you involved in the investigation of the
3 robbery at the Silver Closet?

4 A Yes, sir, I was.

5 Q And what was your role in that investigation?

6 A As the primary investigator, initially start off
7 with an interview with Megan George.

8 Q And when was the first time you spoke to Ms. George?

9 A It would have been when I had her come down, which
10 was about two days later, I believe it was on the 14th of
11 May.

12 Q And what did you talk with her about on the 14th of
13 May?

14 A I took some photographs of her wrists. She had some
15 minor bruising on her wrists from where she said the
16 vacuum cleaner was wrapped around her arm. And I believe
17 that's pretty much it.

18 Q Did you meet with Ms. George on a second time?

19 A Yes, sir, I did.

20 Q And ---

21 A I met with her again on the 20th of May.

22 Q Where did you meet her?

23 A At the law enforcement center.

24 Q Okay. On -- and what did you do when you met her
25 this second time?

1 A I took a detailed statement from her about
2 everything that had taken place during the incident time,
3 and got her to sign it and everything.

4 Q Did you show her a photographic lineup?

5 A Not on the 20th of May, no.

6 Q Okay. What date did you show her a photographic
7 lineup?

8 A All right. I got up again with her, would have been
9 on May 28th.

10 Q Okay. And where did you meet her this time?

11 A I met her again at the law enforcement center.

12 Q And what time of day was it?

13 A This was at 8:45 in the morning.

14 Q Okay. And where did you show Ms. George this
15 lineup?

16 A At my desk in the office.

17 Q Did you put this lineup together?

18 A No, we did not have a photo of the defendant at the
19 sheriff's office here. So I had to send it off to SLED
20 to get driver's license photos, and SLED actually put a
21 lineup together for me and e-mailed it to me.

22 Q And how many photographs were displayed in the
23 lineup?

24 A Six.

25 Q Was this defendant included in the lineup?

1 A Yes, sir, he was.

2 Q And were the other five people in the lineup of
3 similar physical characteristics of this defendant?

4 A Yes, sir. Yes, sir.

5 Q In what way?

6 A Well, they're all black males. They're all bald or
7 shaved head. They all have predominately round type
8 faces, and kind of full in this face.

9 Q And where did you show Ms. George this lineup?

10 A At my desk at the law enforcement center.

11 Q Was there anybody else around when you did this?

12 A No, sir, just her and me.

13 Q How did you present the photo lineup to Ms. George?

14 A The way I do it is I take -- in this case it's on a
15 sheet of paper. It's got six photos on it. I explain to
16 the person I'm going to show the lineup to that we have
17 six photos on a piece of paper. I want you to take your
18 time, take a look at all the pictures. The person
19 responsible for this incident may or may not be in here.
20 So take your time and look at them. If you don't see the
21 person responsible, don't pull -- or point anybody out to
22 me. I laid it down in front of Ms. George. And she
23 identified photo number three as being the person who was
24 responsible.

25 Q All right. And what are you looking at right there?

1 Q Did the defendant sign the waiver?

2 A Yes, sir.

3 Q Did you observe the defendant sign the waiver?

4 A Yes, sir, I did.

5 Q Can you please read what that waiver says?

6 A Sure. It says, I have read this statement of my
7 rights, and I understand what my rights are. I am
8 willing to make a statement and answer questions. I do
9 not want a lawyer at this time. I understand and know
10 what I am doing. No promises or threats have been made
11 to me. No pressure or coercion of any kind has been used
12 against me. And what I do, since the word coercion is
13 such an unusual word, a lot of people aren't real
14 familiar with it, I go back and circle that word and I
15 make sure that the person I'm talking to understands what
16 the word coercion means. And then I have them place
17 their initials next to it to indicate that.

18 Q And did this defendant appear that he wanted to
19 waive his Miranda rights?

20 A Yes, sir.

21 Q Did this defendant give you a statement?

22 A A verbal statement, yes, sir.

23 Q He did not give a written statement?

24 A Not a written statement?

25 Q And what did the -- did the defendant say?

1 A Basically he said during the course of our
2 conversation that, I know the hammer is going to come
3 down on me since I am black and the clerk is a white
4 girl. And at that time, after he made that statement, he
5 quickly stopped himself and then asked me, what color was
6 the girl. And I explained to him that at no point in
7 time during our conversation did I ever indicate to him
8 that the clerk who was robbed was a white female.

9 Q So you never told the defendant that -- that the
10 clerk was a white female?

11 A That's correct. I never told him.

12 Q Did you ask the defendant anything else?

13 A I asked him if he owned an orange jogging type
14 jacket and pants, and he said that he did own an orange
15 jacket and orange pants that he wears together as a set.

16 MR. NEWKIRK: Nothing further.

17 CROSS-EXAMINATION

18 BY MS. HORLBECK:

19 Q Okay. Officer Fortner, you testified that the
20 photographs of -- of Ms. George's wrists were taken on
21 the 14th of May?

22 A Yes, ma'am.

23 Q And that would have been just a couple days after
24 the incident?

25 A Right, I believe the incident actually happened on

1 Wednesday. And I think it was Friday when we took the
2 pictures.

3 Q All right. And let's talk a little bit about the
4 furniture. You mentioned that the -- that the furniture
5 was used to block the bathroom door?

6 A That's correct.

7 Q All right. How -- how was the furniture arranged,
8 do you recall?

9 A Basically, there's a -- I guess you call it a hutch.
10 It's got two parts to it. It's got a bottom part to it
11 and then it's got a top part. The top part is not
12 attached to the bottom. It just sits up on top of it.
13 And this was picked up off the top of that, moved over in
14 front of the bathroom door. And if I remember correctly,
15 the bottom part as well was moved over to help block the
16 door, to keep the door from coming open.

17 Q So there was a bottom part in front of the door and
18 then a top part in front of the bottom door, kind of to
19 wedge everything shut?

20 A Something -- something to that effect, yes, ma'am.
21 I don't remember exactly how it was arranged. But ---

22 Q I know. Okay. Was the space kind of small in that
23 area?

24 A Between from where the door came open or -- back
25 where this stuff was, yes.

1 Q Right. Okay. All right. And you mentioned you
2 interviewed Megan I think the first time on the 20th of
3 May, is that right?

4 A I believe that's -- well, the first time I talked to
5 her was on the 14th when she came down and took pictures
6 of her wrists.

7 Q Okay. Is that when you interviewed her then?

8 A I spoke briefly with her, yes.

9 Q Okay.

10 A But I brought her back later for the more detailed
11 statement.

12 Q Okay. And you confirmed that the culprit in the
13 Silver Closet was a stranger to her?

14 A Correct.

15 Q Okay. And she could provide no name, or address as
16 to where this person lived or who he was?

17 A That's correct.

18 Q Okay. And she indicated that she believed there
19 were two customers in the store, two or so customers in
20 the store?

21 A That's right.

22 Q Okay. And later investigation -- your investigation
23 later showed that there was only one customer in the
24 store?

25 A Right. One had left just shortly before everything

1 got started.

2 Q Only one customer in the store when the culprit was
3 in there?

4 A That's correct.

5 Q Okay. And Ms. George had described that two were
6 actually in the store at the same time as the culprit?

7 A I think she was thinking that the first one that
8 left just shortly before the second one got there. I'm
9 thinking she might have been thinking they were both
10 there together.

11 Q Okay. And you recall taking a statement from her?

12 A Yes.

13 Q Okay. Let me show this to you. What is that that
14 I'm showing to you?

15 A It's a copy of the statement I took.

16 Q Okay. And that statement was signed by her?

17 A Yes.

18 Q Okay. Let me direct your attention to this part of
19 statement. All right. Right there that starts -- just
20 read it silently to yourself. The part that starts, he,
21 maybe just a couple sentences.

22 A Okay.

23 Q Okay. In the victim's own statement, if I could
24 find it, it says he was in there for about 10 minutes or
25 so, maybe two or more customers came in while he was

1 there?

2 A That's what she says, yes, ma'am.

3 Q Okay. All right. She didn't say anything further
4 about what she was thinking when she said that two or so
5 customers came in, correct? I'll hand this back to you
6 if you would like to look at it.

7 A I didn't understand the question. What was it?

8 Q Well, you offered an interpretation of what you
9 thought she was thinking. She didn't say that to you,
10 did she?

11 A No, that's not what she said.

12 Q Okay. All right.

13 A No. And at that time I didn't know anything
14 different from what she was telling me.

15 Q Okay. And you confirmed that -- that the customer
16 in the store that was with her and the culprit was Denise
17 Henderson?

18 A That's correct.

19 Q And there was a conversation between Ms. Henderson
20 and Ms. George?

21 A She says they spoke, yes. I mean, she was in there
22 to make a purchase, yes.

23 Q Okay. They were chatting about the boss, Gina?

24 A That could be, yes.

25 Q Do you want a copy of her statement that you took

1 from her? Actually we can look in your report too. I
2 think you put it in your report.

3 MS. HORLBECK: Can I have just a minute, Your Honor?

4 BY MS. HORLBECK:

5 Q Okay. Let me hand this part of the statement to
6 you. And again this is the -- Megan George's statement
7 and it -- start with that part that says, I think, and
8 read for a few sentences, silently.

9 A Okay.

10 Q Okay. Do you recall that there was a conversation
11 between Ms. George and Ms. Henderson?

12 A Right.

13 Q Okay. And they were discussing how Ms. Henderson
14 knew Gina?

15 A Right.

16 Q The boss?

17 A Correct.

18 Q And Ms. Henderson actually left her name and number
19 for Gina to call?

20 A Right.

21 Q They worked together at the hospital?

22 A Right.

23 Q Okay. Okay. And you also got from Ms. George a
24 description of the culprit?

25 A Well, the actual description was -- I obtained from

1 the responding deputies when they responded.

2 Q But you confirmed that description with her?

3 A That's correct, yes.

4 Q Okay. It was a black male, 30 to 40 ---

5 A Thirty to forty years old, six foot, 180 pounds, and
6 described in report as having brown hair and brown eyes.

7 Q Okay. Now, she didn't describe anything about a
8 scar, or a tattoo on the culprit?

9 A No, ma'am, she did not.

10 Q Okay. And she didn't give you a detailed
11 description about the eyes the person had, or the mouth,
12 or ---

13 A No.

14 Q Okay.

15 A We were just looking for basic information to get
16 out so we know what we're looking for.

17 Q Right. But there was no detailed description about
18 the shape of the head and the eyes and the nose, correct?

19 A Not with me, no, ma'am.

20 Q Okay. Not with -- you're the investigator in the
21 case, right?

22 A Correct.

23 Q And there wasn't any detailed description with
24 anybody, is that correct?

25 A No, that would be incorrect.

1 Q Okay. Well, with you she gave you the description
2 of a black male, 30 to 40, shaved head, five ten, 180
3 pounds?

4 A That's right.

5 Q And she gave approximately the same description to
6 Officer Ballenger?

7 A Yes.

8 Q Okay. Did any other officer write a report in this
9 case?

10 A No.

11 Q Okay. And those are the two descriptions that we
12 have, from the two officers that wrote the reports?

13 A Right.

14 Q Okay. All right. And at that point with that
15 description, you didn't have any leads on who to arrest?

16 A At that point, yes, ma'am, that's correct.

17 Q All right. And you had officers scour -- or
18 officers scoured the area, is that correct?

19 A That's correct. They called the tracking team, the
20 dog team, and we had several officers in the area.

21 Q Okay. What were some of the officers that were in
22 the area, do you recall any of their names?

23 A Not ---

24 Q Just a couple.

25 A I don't know. Ballenger was the primary responding

1 deputy, the only one I'm familiar with.

2 Q Okay. And again, you had no leads from officers
3 scouring the area?

4 A That's correct.

5 Q Okay. And do you recall whether or not an article
6 was placed in the newspaper regarding the incident?

7 A It seems to me like there was an article in the
8 paper, yes, ma'am.

9 Q Okay. All right. And at that point you didn't
10 offer a photo lineup?

11 A No. Didn't have anybody to put in one.

12 Q Okay. And again, you hadn't focused on anybody at
13 that point?

14 A That's correct.

15 Q Okay. And a lineup at that point would have
16 included a lot of black males with shaved and ---

17 A Right, it would have been impractical to do.

18 Q Okay.

19 A Randomly picked photos.

20 Q Okay. And when you did show the photo lineup to
21 her, her choice was based solely on her memory, correct?

22 A That's correct.

23 Q Okay. And she -- with regard to the barrette, you
24 didn't know about that at first, did you?

25 A Not at first, no.

1 Q Okay. And you didn't know about it until it was
2 found?

3 A Until I was called about it.

4 Q Okay. And Megan evidently forgot to tell you about
5 it?

6 A I don't remember if she mentioned anything about the
7 barrette getting broken in hair or not to me, no.

8 Q Okay. So it wasn't mentioned to you?

9 A Not that I recall anyways.

10 Q Okay. Do you recall if it was mentioned to any of
11 the other officers whose reports you've read?

12 A I don't remember any of them saying anything about
13 it, no, ma'am.

14 Q Okay. All right. And she could provide no details
15 on how she got unbound, she just said that she had small
16 wrists?

17 A She managed to wiggle free.

18 Q Okay. All right. And there was nothing in her
19 statement about the loop on the belt being broken?

20 A No, ma'am.

21 Q All right. And she was -- her statement didn't have
22 a description of how she got out of the bathroom, did it?

23 A I remember she said that she forced open the door.

24 Q Right. But after she got out, how she got out from
25 behind the counter area?

1 A She just climbed over the -- the one shelf that was
2 laying there.

3 Q Okay. And you wrote a report in this matter, didn't
4 you?

5 A Yes, ma'am.

6 Q Okay. Okay. I'm going to hand you this and ask you
7 if you can identify what it is?

8 A It's one of my -- part of my supplemental report
9 that I wrote.

10 Q Okay. And you signed -- or your name is down at the
11 bottom?

12 A That's correct.

13 Q Okay. I'm going to direct your attention to this
14 sentence right here. Just read it to yourself.

15 A Okay.

16 Q Now, she indicates she wasn't sure how she got out
17 but thinks she climbed over?

18 A That's correct.

19 Q And you had some concerns about how she got out from
20 behind the counter?

21 A Just simply because of how tight it was. But she is
22 obviously much smaller than I am.

23 Q How tight of a squeeze it was?

24 A Right.

25 Q Okay. But you wanted to give her a lie detector

1 test?

2 MR. NEWKIRK: Objection, Your Honor.

3 THE COURT: Sustain the objection.

4 MS. HORLBECK: Well, Your Honor, if I could be heard
5 on that?

6 THE COURT: Okay. If y'all would step out just
7 briefly.

8 (The jury exited the courtroom at 4:30 p.m.)

9 MS. HORLBECK: Your Honor, I believe that the
10 results of a polygraph are inadmissible. She was never
11 polygraphed in this case, and I think it's important for
12 the police to -- I mean for the jury to understand that a
13 polygraph was contemplated because it goes to her bias
14 and her credibility as a witness.

15 THE COURT: Well, then it would come in whether your
16 man had been polygraphed or not. Polygraphs are just not
17 admissible, and you shouldn't have brought it up,
18 shouldn't ask the question in front of the jury.

19 MS. HORLBECK: Well, I apologize.

20 THE COURT: She didn't -- they did not polygraph
21 her?

22 MS. HORLBECK: No, they didn't, but ---

23 THE COURT: Maybe she would have taken one. I don't
24 know. Did they offer her one?

25 MS. HORLBECK: They did, and she refused.

1 THE COURT: Okay. Well ---

2 MS. HORLBECK: I won't mention it any further.

3 THE COURT: Did they offer your client one and
4 refused?

5 MS. HORLBECK: No, sir, they -- they didn't offer
6 him one.

7 THE COURT: They didn't?

8 MS. HORLBECK: They did not offer him one.

9 THE COURT: Well, why would you offer the victim one
10 and not offer the defendant one?

11 THE WITNESS: We had some concerns about some of the
12 circumstances at the time.

13 THE COURT: Well, anyway, polygraphs are not
14 admissible. I don't know of any case law that would
15 permit offering a polygraph to the victim coming in.
16 What do you know about it, Solicitor?

17 MR. NEWKIRK: Your Honor, I take the same stance you
18 do. I do not think that polygraphs are admissible.

19 THE COURT: The Supreme Court has just said they're
20 not reliable.

21 MR. NEWKIRK: Exactly, not reliable. And I think
22 that goes as to anybody who may have taken it or may have
23 been asked about it, whether or not it's the defendant or
24 a witness.

25 THE COURT: All right. I don't think -- the only

1 thing you can do is just skip over that unless you can
2 give me a case on point.

3 MS. HORLBECK: I don't have a case on point. I
4 honestly thought it was the results of a polygraph that
5 were inadmissible. Otherwise I -- you know, I wasn't
6 trying to do anything incorrect. I thought it was just
7 the results. We don't have the results so I didn't think
8 it was objectionable, but I respect your ruling. I just
9 want my argument noted for the record, as it is.

10 THE COURT: I don't know of any cases where it's
11 admissible. And the fact that someone had refused it
12 would be almost the same thing as -- it's just not
13 admissible.

14 MS. HORLBECK: All right.

15 THE COURT: Okay. All right. Bring the jury back
16 in.

17 (The jury entered the courtroom at 4:35 p.m.)

18 THE COURT: Okay.

19 BY MS. HORLBECK:

20 Q All right. Officer, you had some concerns with the
21 case, correct?

22 A That's correct.

23 Q All right. And based on the lack of leads in the
24 case, it was administratively closed?

25 A Yes, ma'am.

1 Q All right. And the victim's were -- it was
2 explained to them that you would call them if that status
3 changed?

4 A That's correct.

5 Q All right. And when you interviewed Mr. Harbin, you
6 also had another officer with you?

7 A Yes, ma'am.

8 Q Ty Bracken?

9 A Yes, ma'am.

10 Q Okay. And at that point Mr. Harbin denied
11 involvement with the charges, as well as what you said he
12 said?

13 A He said he could not take responsibility for them,
14 that's correct.

15 Q All right. Okay. And then he was served warrants
16 by Wes Smith?

17 A That's right.

18 Q All right. Okay. The contents of the lineup, these
19 were provided to you -- the pictures in the lineup were
20 provided to you by SLED?

21 A SLED actually arranges the lineups completely, then
22 they e-mail them to me.

23 Q Okay. And the lineup consists of driver's license
24 photos?

25 A That's correct.

1 Q And they have access to -- well, you tell me, they
2 have access to all the photos?

3 A They have access to the photos, and we're able to
4 arrange a lineup with them and then e-mail.

5 Q All right. Based on just whatever -- just whatever
6 description is needed for whatever case?

7 A What you do, is you send them the name and the
8 driver's license number of the individual that you want
9 to a -- or a lineup put together of. They pull up that
10 individual's picture and they just work it off that
11 picture there, and they find other pictures that are
12 close -- closely resemble the person in question.

13 Q Okay. And so then -- what I'm trying to get at,
14 they have access to pictures of everybody?

15 A Yes.

16 Q People with hair, people of all different
17 nationalities?

18 A That's correct.

19 Q Okay. All right. And when you showed the photo
20 lineups to Ms. George and to Ms. Henderson, you knew the
21 picture of Kevin was in there?

22 A Yes, ma'am, I did.

23 Q Okay. And you knew that that was the person that
24 the investigation focused on?

25 A Yes, ma'am.

1 Q Okay. Now, there were no fingerprints, correct?

2 A That's correct.

3 Q All right. They were -- obviously the Silver Closet
4 was processed for fingerprints?

5 A That's correct.

6 Q And fingerprints were lifted?

7 A I believe they did pull up some fingerprints, but
8 nothing that was of a match to Mr. Harbin.

9 Q All right. And there was a palm print lifted too?

10 A That's correct.

11 Q And the palm print didn't match Mr. Harbin either?

12 A That's right.

13 Q Okay. All right. And you also spoke to Denise
14 Henderson, yourself, correct?

15 A Yes.

16 Q All right. And she gave you a description of the
17 person that she thought she saw in the Silver Closet?

18 A Yes, she did.

19 Q All right. She recalled a black male, fair skinned,
20 about five seven to five eight?

21 A That's right.

22 Q All right. She didn't recall the color of the
23 clothing that he wore?

24 A No, she did not.

25 Q All right. And she didn't recall whether the person

1 she saw was bald or not?

2 A She told me that he was bald.

3 Q Okay.

4 A I'm sorry. I'm incorrect on that. She said she
5 couldn't remember if he was bald or not.

6 Q Okay. And she didn't mention a hat either?

7 A No, she did not mention a hat to me.

8 Q Okay. And you showed the photo lineup to Ms.
9 Henderson a couple hours after Ms. George saw her lineup?

10 A That's right.

11 Q Okay. And she -- Ms. Henderson was shown the same
12 six pictures as Ms. George saw?

13 A That's correct.

14 Q Okay. And the photos -- the photos that Ms.
15 Henderson got to look at were all of bald men, or of
16 closely shaved men?

17 A That's correct.

18 MS. HORLBECK: Okay. All right. I don't have
19 anything further.

20 REDIRECT-EXAMINATION

21 BY MR. NEWKIRK:

22 Q Investigator Fortner, as part of your investigation,
23 did you speak with someone at the Congaree Self-Storage?

24 A Yes, sir, I did.

25 Q And where is that located?

1 A It is just down the road from where the Silver
2 Closet is located at. I don't have the exact address in
3 my report here. It's just down the street from where the
4 Silver Closet is located at.

5 Q Did you speak with someone from Congaree
6 Self-Storage.

7 A Yes, sir. I spoke with manager of the place named
8 Roland, I guess it's Deshaeis.

9 Q And on what date did you speak with him?

10 A Let's see. It looks like it's probably on May 13th.

11 Q And this incident occurred on May 12th?

12 A That's correct, yes, sir.

13 Q Earlier defense counsel asked you if this case had
14 been administratively closed?

15 A That's right.

16 Q And why had it been administratively closed?

17 A We administratively close a case where you come to a
18 point where you've got no more leads, you've got no
19 suspects in mind, there's no leads, nothing to work with.
20 So we would do what is called an administratively closed
21 case. Nothing that says you can't go back and reopen the
22 case. It's just not actively working on it at the time.

23 Q Did you reopen this case?

24 A Yes, 'sir, I did.

25 Q And after you reopened this case, is that when you

1 showed Ms. George the lineup?

2 A That's right.

3 Q Is that when you showed Ms. Thom- -- Ms. Henderson
4 the lineup?

5 A Yes, sir.

6 MR. NEWKIRK: All right. Nothing further, Your
7 Honor.

8 MS. HORLBECK: Nothing further.

9 THE COURT: Thank you, sir.

10 MR. NEWKIRK: The State calls Roland Deshaeis.

11 THE CLERK: Up here, please, sir. Put your left
12 hand on the Bible, please, sir, and raise your right
13 hand.

14 ROLAND DESHAEIS

15 Having been first duly sworn, testified as follows:

16 THE CLERK: And what is your name, please, sir?

17 THE WITNESS: Roland Deshaeis.

18 THE CLERK: Thank you. Be seated.

19 DIRECT EXAMINATION

20 BY MR. NEWKIRK:

21 Q Mr. Deshaeis, where do you live?

22 A At 68 Congaree Road.

23 Q And is that in Greenville County?

24 A Yes, sir.

25 Q And is that close to the Silver Closet?

1 A Indeed it is, yes, sir.

2 Q And is that a business?

3 A It's a self-storage company.

4 Q Do you live there as well?

5 A I am the resident manager. I live there, yes,
6 sir.

7 Q Do you remember speaking with Investigator Fortner
8 of the sheriff's office?

9 A Yes, sir, I do.

10 Q And do you remember what day that was?

11 A Well, there was an officer on the evening I believe,
12 or immediately the following day, but I think it was in
13 the evening.

14 Q And were you aware that the Silver Closet had been
15 broken into?

16 A No, sir.

17 Q Okay. Were you aware when the officers came and
18 told you?

19 A No, sir.

20 Q Did the officers ask you what you saw on May 12,
21 2004?

22 A They asked me if I saw anything unusual, or did I
23 see anything.

24 Q And did you -- what did you see?

25 A Well, that evening -- I know it was that evening

1 because he called me up at my residence, and I came down
2 to speak to him. So I do recall it was that evening.
3 And I told him I was -- it was after five o'clock,
4 because we close at 5:00, and I was standing at my
5 kitchen sink looking out the window.

6 Q And what did you observe?

7 A I observed -- it was directly in front of me and I
8 observed a black man coming from right at the corner of
9 Quizno's, and coming -- there's a slight incline, coming
10 down the -- sort of an embankment, walking down. And I
11 remember distinctly the color orange that the black man
12 was wearing. And then I must have looked down at the
13 sink and I looked back up and then I gathered that the
14 individual walked -- there's a side -- sort of a like a
15 side road, so I just gathered that he walked down that
16 side road as opposed to continuing to proceed directly
17 toward the storage company.

18 Q And how far were you from the defendant?

19 A In a matter of yards, I would say like 2 to 300
20 yards.

21 Q So you could -- you weren't able to see his face?

22 A No, sir.

23 Q And where were you looking from, where were you from
24 when you saw this (sic)?

25 A I was at my kitchen window, which is directly

1 towards Quizno's.

2 Q And what store is Quizno's next to?

3 A There is a little shopping center. There is Duke's
4 Sandwich Shop which is at the end of the shopping center,
5 and then Quizno's is in the next shopping center.

6 Q Is Quizno's next to the Silver Closet?

7 A It's at the end of the Silver Closet. The Silver
8 Closet is around the corner.

9 Q All right.

10 (State's Exhibit Number 10 was marked for
11 identification?)

12 BY MR. NEWKIRK:

13 Q Mr. Deshaeis, are you familiar with the Congaree
14 Road area?

15 A Yes, sir, I've been managing that facility for five
16 years.

17 Q And as managing that facility, have you also lived
18 at that facility?

19 A Yes, sir.

20 Q Let me show what has been marked at State's Exhibit
21 Number 10. Do you recognize what is depicted in State's
22 Exhibit Number 10?

23 A I certainly do, sir.

24 Q Is this a fair and accurate representation of the
25 Congaree Road area?

1 A It is indeed, because we do have a sort of an aerial
2 view of our storage facility, and I can clearly see
3 that -- where the storage facility is, relative to
4 Congaree Road and ---

5 MR. NEWKIRK: Your Honor, at this time the State
6 would offer Exhibit Number 10 into evidence.

7 MS. HORLBECK: Without objection.

8 THE COURT: Okay.

9 (State's Exhibit Number 10 was filed.)

10 BY MR. NEWKIRK:

11 Q Mr. Deshaeis, can you step down off the stand? Is
12 your storage facility depicted on this photograph?

13 A Yes, sir.

14 Q Where is that?

15 A Right here, that's the office, and upstairs is the
16 residence.

17 Q So do you live in the upstairs?

18 A Yes, sir.

19 Q And where was the window that you were looking out
20 of?

21 A The window is right up -- right here.

22 Q And where did you see this individual -- this
23 individual who had orange clothes on?

24 A Here's the one little shopping plaza I mentioned,
25 and the direct sight to me, that's Quizno's over there,

1 right at the end. It appeared -- I didn't see him come
2 from the side, but it appeared to me that he came from
3 the little side entrance. And there's a little
4 embankment where -- stepping right down, and I have a
5 straight shot.

6 Q Okay. About what time of the evening was it when
7 you saw this?

8 A To me, it was about 5:30 because we close at five
9 o'clock.

10 Q And do you know ---

11 A Between 5:00 and 6:00.

12 Q And do you know where the Silver Closet is located?

13 A It's -- well, I've been there and it's sort of right
14 in here. You know, like I mentioned, right around the
15 corner. I mean I've stopped in there maybe once or twice
16 to look at some jewelry and ---

17 Q Was it dark outside?

18 A No, sir.

19 MR. NEWKIRK: Nothing further, Your Honor.

20 MS. HORLBECK: All right. Ms. Horlbeck.

21 MS. HORLBECK: Just quickly.

22 CROSS-EXAMINATION

23 BY MS. HORLBECK:

24 Q Okay. You said that you saw a man dressed in orange
25 clothing?

1 A Yes, ma'am.

2 Q Okay. And you did not see the face?

3 A No, ma'am.

4 MS. HORLBECK: Okay. I don't have anything
5 further.

6 THE COURT: Okay.

7 MR. NEWKIRK: Okay. I've got nothing further. Can
8 this witness be excused, Your Honor?

9 MS. HORLBECK: No objection.

10 THE COURT: All right. You may be excused, sir.
11 That is you can go home, you don't have to stay. All
12 right.

13 MR. NEWKIRK: Your Honor, the State calls Dar Shaw.

14 THE CLERK: Put your left hand on the Bible, please,
15 and raise your right hand.

16 DARWIN SHAW

17 Having been first duly sworn, testified as follows:

18 THE CLERK: State your name for the record, please
19 sir?

20 THE WITNESS: Darwin Shaw, S-h-a-w.

21 THE CLERK: Thank you. Be seated.

22 DIRECT EXAMINATION

23 BY MR. NEWKIRK:

24 Q Officer Shaw, where do you work?

25 A I'm a sergeant with the Greenville County Forensics

1 in Greenville County.

2 Q And what are your duties with the forensics?

3 A We responds to scenes with all agencies within
4 the -- within Greenville County. We process scenes for
5 latent fingerprints, photographic documentation of
6 scenes, the collection of evidence and preparing reports
7 for court purposes.

8 Q Were you on duty on May 12th of 2004?

9 A Yes, I was.

10 Q On that date did you respond to the Silver Closet?

11 A Yes, I did.

12 Q And why did you respond to the Silver Closet?

13 A Dispatch gave me a call of a -- of an armed robbery
14 that had occurred at that location.

15 Q Did any other forensic officers arrive -- respond
16 with you?

17 A Technician Hornsby had shown up after I did. I was
18 the first technician on scene.

19 Q And is Technician Hornsby here today?

20 A No, sir, he passed away in February.

21 Q And when you arrived at the Silver Closet, what did
22 you do?

23 A When I got to the scene I went -- I tried to find
24 out who the officer was actually taking the report. Got
25 information from that deputy as to what the situation

1 was, how many people were involved, what the business --
2 where the business was. And then I went in, kind of
3 walked around the interior, just to see what the inside
4 looked like.

5 Q Did you dust for fingerprints?

6 A I did. Originally the victim was there at the
7 scene. I requested she escort me inside to show me areas
8 which may have been touched by the suspect.

9 Q And which areas did you dust?

10 A Did the interior and the exterior of the front door,
11 the counter tops, the cash register drawer. There were
12 two tables that had been pushed -- reportedly pushed in
13 front of the bathroom door. I processed those two
14 tables. I noticed there was no air-conditioning on and
15 no lights on in the business. I went back to the breaker
16 box, which was on the very back wall, and saw that the
17 breakers had been switched off and processed the breaker
18 box as well.

19 Q And were you able to lift fingerprints?

20 A I did lift fingerprints and sent fingerprints to our
21 latent examiner.

22 Q Did you do anything else at the Silver Closet?

23 A Took photographs. Took photographs of the scene and
24 primarily then processed for latent prints.

25 MR. NEWKIRK: Okay. No further questions.

CROSS-EXAMINATION

1
2 BY MS. HORLBECK:

3 Q Okay. You mentioned that you noticed the
4 air-conditioning and the lights were off?

5 A That's correct.

6 Q Okay. And you said as a result of that you dusted
7 down the breaker box for prints?

8 A Yes, I did.

9 Q Okay. Did you go to the breaker box because of your
10 own observation of the electricity and the fact that it
11 was off?

12 A Yes, I did. I noticed that there were no lights.

13 Q Okay.

14 A I was going to process any items in the bathroom and
15 when I went to flip the switch on there was no power, so
16 I checked.

17 Q Okay. All right. Was anything said to you about
18 the lights being altered, or the electricity being turned
19 off, or that's just something you assumed went off?

20 A I don't recall. I just knew that that was the
21 situation that occurred.

22 Q All right. You said that you dusted down the
23 interior of the entrance?

24 A The interior and exterior doors, the doors, the
25 frame, the glass.

1 Q Okay. All right. The counter tops?

2 A Yes.

3 Q All right. And how about the doorknob to the
4 bathroom?

5 A The doorknob to the bathroom.

6 Q Okay. The sink?

7 A The sink, the toilet.

8 Q All right. And also two tables and the cash
9 register?

10 A That's correct.

11 Q All right. And you recall that you were able to
12 lift prints.

13 A I did send prints to our latent examiners for
14 examination.

15 Q Okay. Do you recall how many prints you lifted?

16 A Not offhand, no.

17 MS. HORLBECK: Okay. All right. Nothing further.

18 MR. NEWKIRK: No redirect, Your Honor.

19 THE COURT: All right. Thank you, sir. Okay.

20 Ladies and gentlemen, we're going to have to finish it
21 tomorrow morning. Tonight when you go home do not
22 discuss the case with whoever you see, because you might
23 get some input from someone who has not seen the
24 witnesses or heard the testimony in the whole case. We
25 trust you not to do that. Tomorrow night when you go

1 home, after it's over you can talk to anybody you want to
2 about it, or you don't have to talk to anybody, if the
3 lawyers call you up. So it's up to you. But tonight we
4 trust you not to discuss it with anybody. You cannot
5 talk to anybody about it until you begin discussing and
6 having your deliberations in the jury room. Okay.

7 I'm going to excuse you for the evening. And ask
8 you to be back at nine in the morning, back here in the
9 jury room, and we'll start. Thank you so much.

10 (The jury exited the courtroom at 4:57 p.m.)

11 THE COURT: All right. We'll be in recess until
12 nine o'clock in the morning. Let me see the lawyers just
13 for a minute.

14 (A bench conference was held.)

15 (Court adjourned for the evening. The following
16 proceedings were held on September 7, 2005, as
17 follows:)

18 THE COURT: Let's take up everything we need to
19 outside the presence of the jury since they're not here.
20 Okay.

21 MR. NEWKIRK: Your Honor, I intend to call my latent
22 print examiner and qualify her as an expert. And I want
23 to ask the question, after -- if I have laid the proper
24 foundation, if there are instances where an individual
25 will touch a surface and he will not leave a latent

1 fingerprint. And I didn't know if you wanted to proffer
2 that testimony before the jury is in here..

3 THE COURT: Well, is it going to be like touching a
4 brick building on the outside, or is it going to be
5 touching something that was in this Silver Casket -- or
6 Closet?

7 MR. NEWKIRK: I think she can -- she can testify in
8 general some reasons why we won't -- why an individual
9 will not leave latent fingerprints, such as ---

10 THE COURT: Where?

11 MR. NEWKIRK: --- like if you're sweaty, if the
12 person's hands are sweaty or oily, or maybe if the
13 surface is dirty.

14 THE COURT: Well, you got to tie it into some
15 surface here that he may have touched. If you can do
16 that -- I mean, I don't know what he touched or what
17 she -- you know, the victim would say he touched. But I
18 know he was looking at -- I don't know if he looked or
19 leafed through that catalog, or put his hands on the
20 counter, or -- you know, maybe he touched things in the
21 closet or in the bathroom. I don't know. It depends on
22 where they tried to lift the prints. You got to tie it
23 into where they lifted the prints.

24 MR. NEWKIRK: Okay.

25 THE COURT: And then in her expert opinion, if it's

1 a female.

2 MR. NEWKIRK: Um-hm.

3 THE COURT: Is there -- is -- you know, whether or
4 not he could have put his hands down there and maybe not
5 left a print.

6 MR. NEWKIRK: And I believe the -- what is in the
7 record is that they dusted for fingerprints on the
8 counter where he was standing, the front door, and the
9 glass on the back door.

10 THE COURT: She can only testify as to where they
11 dusted for the prints and whether or not he may have left
12 them or there might be a good reason why he didn't ---

13 MR. NEWKIRK: Okay.

14 THE COURT: But you can't just ask her ---

15 MR. NEWKIRK: Just out right.

16 THE COURT: --- out of the whole thing. You got to
17 tie it in to what -- where they dusted for prints.

18 MR. NEWKIRK: Okay.

19 THE COURT: Got any comments on that, Ms. Horlbeck?

20 MS. HORLBECK: If he lays the proper foundation ---

21 THE COURT: Yeah, she's an expert too.

22 MS. HORLBECK: --- to tie it in.

23 THE COURT: If she can testify to that, I don't
24 know.

25 MS. HORLBECK: Right. If her qualifications are

1 such that she's able to testify to that. I don't know
2 anything about her qualifications. I guess ---

3 THE COURT: If she's an expert in fingerprints, or
4 you can ask her all kinds of questions on
5 cross-examination.

6 MS. HORLBECK: Right. Right.

7 THE COURT: Okay. All right. We'll just kind of be
8 at ease until he gets here. All right. I'll tell the
9 jury the judge hasn't got here yet.

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

12 THE COURT: We're ready. Y'all ready?

13 MR. NEWKIRK: Yes, sir.

14 MS. HORLBECK: Yes, sir.

15 MR. NEWKIRK: Your Honor, last night I told you I
16 had one additional witness. This morning I may call a
17 second witness. It will be very, very short.

18 THE COURT: Okay.

19 (The jury entered the courtroom at 9:55 a.m.)

20 THE COURT: Okay. All right. Solicitor, we're
21 ready now.

22 MR. NEWKIRK: The State calls Sergeant Rene
23 Sherbert.

24 THE CLERK: Put your left hand on the Bible and
25 raise your right hand, please, ma'am.

RENE SHERBERT

Having been first duly sworn, testified as follows:

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

THE WITNESS: Rene Foster Sherbert.

THE CLERK: Thank you. Be seated.

DIRECT EXAMINATION

BY MR. NEWKIRK:

Q Sergeant Sherbert, where do you work?

A I work for the Greenville Department of Public Safety, forensic division.

Q And how long have you worked for the Greenville Department of Public Safety?

A I have been with the Department of Public Safety for approximately nine years.

Q And again, what's your current position?

A I'm a sergeant and latent print examiner.

Q And how long have you held this position?

A For four years.

Q And prior to being a latent print examiner, what did you do?

A Prior to being a latent print examiner, I was a sergeant in the crime scene section of the forensic division, answering crime scene calls.

Q And what training and education did you receive on your way to becoming a latent print examiner?

1 A I'm a certified police officer and have been since
2 1986. I have received in excess of 600 hours of advance
3 level training in the forensic field. Initially I
4 received in excess of 160 hours of introduction to crime
5 scene investigations. I have received the introduction
6 to fingerprint classification and comparison training
7 courses at the South Carolina Criminal Justice Academy,
8 as well as the ID technician school, which is processing
9 and developing for latents print with various types of
10 chemicals. I have attended the advanced administrative
11 latent fingerprint school at the FBI academy in Quantico,
12 Virginia. I have also attended and successfully
13 completed the combined advanced ridgology demystifying
14 palm prints classification course. I have also most
15 recently successfully completed the advanced palm print
16 training course in April of this year. I also have an
17 Associate's Degree in criminal justice from Greenville
18 Technical College. And I have received hours towards my
19 Bachelor's Degree from the University of Virginia. I
20 also train our department, in the Department of Public
21 Safety, the forensic officers that work crime scenes, and
22 investigations, crime scene investigations and processing
23 technique as well as latent print comparison and
24 processing.

25 Q And do you still receive training on occasion?

1 A Yes, sir, I do. The South Carolina Division of the
2 International Association for Identification provides
3 quarterly training commencing with an annual conference
4 each year. I attend all those trainings. I'm also a
5 board member of the South Carolina Division of the
6 International Association for Identification. And I also
7 attend periodic training to maintain my law enforcement
8 certification with the South Carolina Criminal Justice
9 Academy.

10 Q And what tasks do you perform as a latent print
11 examiner?

12 A Currently as a latent print examiner, what I do is I
13 receive the prints, latent prints, fingerprints that are
14 lifted from crime scenes. Not just latent prints, it's
15 fingerprints, sometimes we receive footwear. We also get
16 tire tracks and foot print evidence, shoe wear. What we
17 have to do once we receive those is look at them and then
18 determine the comparability of these types of prints that
19 we have and they're logged in and this type of thing.
20 Documentation is made and then if we have someone to
21 compare them to, a possible suspect, or a victim's print,
22 or someone, you know, say that was riding in the car with
23 the owner of the car, other elimination prints that we
24 have, then we perform a comparison to determine if the
25 prints are the same. And if we have, you know, no prints

1 then sometimes we can't do anything until we develop a
2 suspect.

3 Q And prior to becoming a print examiner, what was
4 your title?

5 A Prior to being a latent print examiner, I was a
6 sergeant in the crime scene investigation, answering
7 crime scene calls for various agencies around Greenville
8 County.

9 Q And what tasks did you perform as a crime scene ---

10 A As a crime scene officer, I would go to a crime
11 scenes and my job would be to get on a scene and obtain
12 all the information involving the crime, and then process
13 the scene accordingly, depending on what type of incident
14 it would be, and most of the time that would involve
15 preservation of the evidence as far as photographic
16 documentation. Often times videography to be able to
17 capture the crime scene in the way we find it. Then also
18 to collect and preserve any evidence, and process
19 evidence. A lot times on scene and often times we have
20 to collect evidence and take it back to the lab for
21 processing.

22 Q When you were a crime scene officer, was one of your
23 duties to collect any fingerprints at the scene?

24 A Right. On many scenes that we go on, from auto
25 break-ins to homicides, we have to process a scene,

1 depending on what type of scene it is, and determine
2 based on eye witness accounts or victim's accounts as
3 to what has happened and items that have been touched,
4 and then process accordingly items that have been
5 handled or appeared to have been handled by a suspect or
6 anything like that, and try to obtain prints from the
7 scene.

8 Q And can you explain to the jury what a latent print
9 is?

10 A Yes, sir. The latent print and the fingerprint
11 community is defined as a print as unknown. It's an
12 unknown print. And latent basically refers to a print
13 that you cannot see with the naked eye. It has to be
14 processed with a type of, you know, fingerprint powder or
15 type of chemical in order to be able to be seen.

16 Q How do you -- how do you lift a latent fingerprint
17 from a crime scene?

18 A You process an area that you -- that either appears
19 to have be handled by a suspect or by the information
20 that someone has given you that they touched here or
21 there, and you process it. Depending on the type of
22 surface would -- dictates what type of chemical that you
23 might use, say black powder or something like that. And
24 you process the area using a fingerprint brush and the
25 black powder, or whatever type of chemical that you're

1 using, and you apply it to the areas that you think may
2 have been contacted by a person or persons at the scene.
3 And then these prints become visible. If they're there,
4 or if you're using the right chemical they become visible
5 to where you can actually see them with the naked eye.
6 And you can tell that there is something there and you
7 may see some rigid detail from the fingerprints. And
8 once you have that often times you can photographically
9 capture it by taking photographs. And then what we use
10 is called latent lift tape. It's similar to Scotch
11 tape but not quite. What we use is longer and thicker.
12 And -- but it is somewhat like the consistency of Scotch
13 tape. And you apply this tape to the prints that you see
14 and rub over it so that the tape picks up all the powder,
15 which is attaching to the fingerprint ridges. And then
16 you lift this tape and apply it to a fingerprint lift
17 card.

18 Q In your experience as a crime scene officer, did you
19 ever process glass counter tops.

20 A Oh, absolutely, many times.

21 Q Did you every process toilets?

22 A Yes, sir, I have.

23 Q Did you ever process sinks?

24 A Yes, sir.

25 Q Wooden tables?

1 A Oh, all different kinds of wooden surfaces.

2 Q Did you ever process a cash register?

3 A I have processed a cash register.

4 Q How about a breaker box?

5 A Yes, I have.

6 Q Processed a breaker box?

7 A Yes, I have, inside and outside breaker boxes.

8 Q And how do you compare latent fingerprints?

9 A You compare latents prints by taking the unknown
10 print, the latent that you have and then, like I said, if
11 you have someone to look, be it a victim or some
12 elimination prints, or a possible suspect, we use
13 magnifying glasses instead of microscopes, we just use
14 magnifiers, and look at the unknown print with one
15 magnifier, and then I have another magnifier where I'm
16 looking at the known print, and then I go back and forth.
17 And I'm looking for size and shape and pattern to be, you
18 know, the same in each one. And that's how you do a
19 comparison. And sometimes we do use the computers. In
20 this age we're able to scan prints and then put them up
21 on the screen and put them side by side, the latent
22 prints and the known print and do it that way.

23 Q And why are latent prints a positive form of
24 identification?

25 A Fingerprints are a positive means of identification

1 because they begin to form prior to birth when we're
2 still in the mother's womb, and they form at random. And
3 then once you're born you have those prints. And you
4 know as you grow the prints grow, but the features of
5 them do not change. And these prints remain unchanged
6 until after death and decomposition of the body occurs,
7 unless there is some type of incident that happens prior
8 to that that might cause a permanent scar, or burning, or
9 an amputation, or something of that nature.

10 Q In the seven years that you have been a latent print
11 examiner, how many latent prints have you examined?

12 A I have literally examined hundreds of thousands of
13 fingerprints, and I did comparison prior to being a
14 latent print examiner because that was part of our duties
15 in the crime scene section also.

16 Q When you were a crime scene officer, how many crime
17 scenes did you -- did you analyze for latent
18 fingerprints?

19 A As far as -- do you mean as far as processing?

20 Q Processing, yes.

21 A Okay. On crime scenes the majority of the crime
22 scenes that we answer in the crime scene section involve
23 fingerprint processing of some type, either there on the
24 scene or something you have to collect and bring back to
25 the lab to process. And it's probably in the high

1 hundreds to close to a thousand that I have processed, if
2 not more.

3 Q Have you ever been qualified as an expert before?

4 A I have been qualified as an expert witness in the
5 field of fingerprint science, in both general sessions
6 court and federal court.

7 Q And approximately how many times have you been
8 qualified?

9 A I have been qualified three times.

10 Q Have you ever not been qualified?

11 A No, sir, I have never not been qualified.

12 MR. NEWKIRK: Your Honor, at this time the State
13 would move the Court to qualify Sergeant Sherbert as an
14 expert in fingerprint science.

15 THE COURT: I will.

16 MS. HORLBECK: Without objection.

17 THE COURT: I would permit her to express her
18 opinion in regard to fingerprints. Okay.

19 BY MR. NEWKIRK:

20 Q Did you -- Sergeant Sherbert, did you compare the
21 prints in this case?

22 A Yes, sir, I did.

23 Q And where did you get those prints from?

24 A The latent prints were submitted to our office by
25 Sergeant Dar Shaw and Forensic Technician Joey Hornsby.

1 Q And did you compare those prints that you received
2 from Sergeant Shaw with the defendant's prints?

3 A Yes, I did.

4 Q And did any of those prints match the defendant's
5 prints.

6 A They did not match.

7 Q Sergeant Sherbert, let me show you what has been
8 marked as State's Exhibit Number 5. Have you ever
9 processed a cash register similar to that, what is
10 depicted in State's Number 5?

11 A Yes, sir. The cash register that's depicted in this
12 photograph marked State's Exhibit 5 appears to be of a
13 plastic form with beige and grey keys that also appear to
14 be plastic.

15 Q Is there any instance where someone would touch a
16 cash register such as that and not leave a latent print?

17 A It is possible. Cash registers are something that
18 are handled quite frequently. And often times on the
19 keys they're dipped in in the center and we don't lay our
20 fingers completely flat on them. So often times all you
21 get is a tip, and then you use this same key over and
22 over again, and the type of pressure that you use when
23 touching objects a lot of times dictates whether or not
24 a -- you know, a comparable print may be left on that
25 type of surface. If there's -- if they've pushed or slid

1 their fingers across it, or anything like, then that
2 would obliterate, you know, the print of being able to
3 see it. Often times on cash registers, the keys are what
4 is used and then a key usually opens the drawer and they
5 get the money in and out -- out of the cash registers
6 that way, and so a lot of times the surfaces that they're
7 touching are not like flat, smoother surfaces which will
8 make it easier to get a print off of.

9 Q Let me show what has been marked as State's Exhibit
10 Number 7. Have you ever processed a table such as
11 depicted in State's Exhibit Number 7? . . .

12 A Are you speaking about the white one here?

13 Q Yes, both those -- yeah, these two white ones. This
14 one here and this one there.

15 A Are these made of wood, is what that is, painted
16 wood?

17 MS. HORLBECK: Objection.

18 THE COURT: She can't ask questions. All right.

19 THE WITNESS: I'm not exactly sure by looking at the
20 picture what the surface is made of. I've processed many
21 types of counter tops, and wood furniture, and different
22 things like that, things that are painted and unpainted,
23 or have polyurethane coating, and don't have polyurethane
24 coating, and all of those would have a factor as to
25 whether or not the surface would be more conducive for

1 holding a print or not. Also the texture of the surface,
2 whether or not it's a smooth, flat surface versus a
3 grainy surface. And a lot of times surfaces such as
4 counter tops, the laminate type counter tops, even wood
5 surfaces like this that appear smooth, once you put black
6 fingerprint powder on them, or magnetic type powder then
7 you see, oh, there's a lot of grain there, or there's
8 ridges in the wood that stand up, things like that. And
9 especially on like laminate counter tops that you find at
10 banks, a lot of times they're very grainy, not
11 striations, but very grainy, like in having dimples that
12 stick up, and it makes -- sometimes it can make it
13 difficult in being able to develop a print on that type
14 of surface.

15 BY MR. NEWKIRK:

16 Q Sergeant Sherbert, let me show you State's Exhibit
17 Number 5 again. And do you see a glass counter top
18 depicted in that area?

19 A Yes, I do. I see a glass counter top on both sides
20 of where the register is located.

21 Q In your experience as a crime officer, have you ever
22 processed glass counter tops similar to that one depicted
23 in State's Exhibit 5?

24 A Yes, I have processed glass counter tops in various
25 types of businesses.

1 Q And is there any instances where an individual could
2 touch a glass counter top such as that and not leave a
3 latent print?

4 A It is possible that any one of us can come in
5 contact with various types of surfaces, even glass, and
6 not leave any prints that are comparable.

7 Q And why is that?

8 A There is several reasons. If the glass counter
9 top has been cleaned with a cleaner, and the residue
10 wasn't -- it wasn't cleaned completely and taken off,
11 then that residue can form a barrier to keep the prints
12 from actually adhering to the surface. If there -- if
13 the surface is wet then that water would provide a
14 barrier and keep the prints from actually coming in
15 contact with the surface, so that you wouldn't be able to
16 lift the print off the surface. If a person has
17 excessive oily hands, like maybe they've had their hands
18 in grease or something like that, or they're sweating
19 profusely, and they go to come in contact with a surface,
20 then instead of leaving the individual ridges that are
21 there in the fingers, and being separated by those
22 valleys that are there, then what you get is like a blob.
23 You may see the outline of what appears to be a finger,
24 but the ridges just basically all run together when you
25 have excessive oils, excessive water, food, and you know,

1 a lot if they've had an excessive amount of blood, then
2 all you get is the outline of the finger itself as
3 opposed to those individual ridges. And in order to make
4 a comparison you have to have definition between where
5 those ridges are. That's the fingerprint ridges. If you
6 look at your fingerprints, those lines that you see,
7 those are the friction -- that's friction ridge skin.
8 And the raised portions are the lines that we look at
9 when we do comparisons. And the valleys are called the
10 furrows and those are what you don't see when someone
11 comes in contact with a surface. So when we process
12 something and then we lift it then what we're seeing are
13 the lines. And those are the fingerprint ridges. If
14 there is a contaminate on the hands that, you know,
15 make it -- obscure that and make it so thick that all
16 you see -- the ridges just run together and all you see
17 is like an outline of the finger. Also, if you have
18 excessively dry skin then a lot of times when you come in
19 contact with a surface you're not going to transfer any
20 of the sweat, or oils, or other contaminants onto a
21 surface, so that you're not leaving a print, or you're
22 not leaving enough that's comparable.

23 Q As -- when you were a crime scene officer, did you
24 ever process a toilet or a sink?

25 A A toilet or a sink?

1 Q Yes.

2 A Yes, sir, I have.

3 Q And is there an instance where a toilet -- an
4 individual can touch a toilet or a sink and not leave a
5 latent fingerprint?

6 A Yes, sir. If the surface is dusty or dirty then
7 that could be a barrier that blocks. A lot of times
8 people think in dust, oh, there's fingerprints there in
9 the dust, but all you see is the outline of the fingers.
10 What happens when you come in contact with something like
11 dust is -- and then you see oh, there was fingers there,
12 well, what they did is they touched the dust and carried
13 the dust away. Their hands didn't -- or their skin
14 didn't actually come in contact with the surface itself,
15 it picked up the dust and carried it off. And a lot of
16 times you have dust, or dirty surfaces, or excessively
17 dry skin.

18 Q In your experience as a crime scene officer, did you
19 process an indoor breaker box for fingerprints?

20 A Yes, I have processed indoor breaker boxes.

21 Q And is there an instance where a person can touch an
22 indoor breaker and not leave a fingerprint?

23 A It's possible, depending on -- you know, how they
24 touch the breaker box, or how they touch the door to it.
25 Often times they have those like a little D ring and you

1 just lift that up and pull the door open, and that small
2 rounded D ring is too small of a surface to get any print
3 that would be comparable.

4 MR. NEWKIRK: Nothing further.

5 CROSS-EXAMINATION

6 BY MS. HORLBECK:

7 Q All right. Officer, in this case you reviewed
8 the -- you reviewed prints that were pulled from the
9 interior entrance and the exterior of the entrance,
10 correct?

11 A Yes, ma'am.

12 Q All right. And prints that were pulled from the
13 counter tops?

14 A Glass counter tops inside the business, yes, ma'am.

15 Q And prints that were pulled from the doorknob to the
16 bathroom?

17 A I do not have any prints that were submitted to me
18 from a doorknob.

19 Q Prints from the sink and the toilet?

20 A No prints were submitted to me from the sink or the
21 toilet.

22 Q Prints from the breaker panel?

23 A I have no prints from a breaker panel.

24 Q How about fingerprints from the cash register?

25 A I have no prints that were submitted from a cash

1 register.

2 Q So all that testimony regarding the possibility of
3 leaving a print on a sink, or a toilet, or breaker panel,
4 or the cash register has nothing to do with this case,
5 because you didn't even analyze any prints from those
6 areas?

7 A I did not analyze any prints from those areas you
8 just mentioned.

9 Q All right. So the plastic -- the possibility of
10 leaving a print on a plastic register has nothing to do
11 with this case?

12 A I didn't examine any print submitted from a cash
13 register.

14 Q You didn't even analyze anything off of a register
15 at all?

16 A There were no prints submitted off of a register.

17 Q So the possibility -- or the ability of a person to
18 leave a print on a plastic register has nothing to do
19 with this case?

20 A I didn't have any submitted to me, no, ma'am.

21 Q The possibility of a whether or not somebody can
22 leave a print on a toilet, or a sink has nothing to do
23 with this case because you didn't analyze prints from a
24 sink or a toilet?

25 A I did not analyze any prints from a sink or a

1 toilet.

2 Q And whether or not dust is a barrier between a
3 finger and leaving a print on a dusty area has nothing to
4 do with this case?

5 A I don't know if there was any dust on any of the
6 surfaces at the crime scene because I did not respond
7 directly to the crime scene.

8 Q But you did testify that a toilet area could be
9 dusty?

10 A Yes, ma'am, I did.

11 Q And you didn't even analyze a print from that area?

12 A That's correct.

13 Q It has nothing to do with this case, correct?

14 A I didn't analyze any prints from a toilet.

15 Q And the prints you did analyze, you used a magnifier
16 to look at those prints?

17 A That's correct.

18 Q They're magnified to a higher degree so that you
19 could see what you had in front of you and make a match
20 if possible?

21 A Right. The magnifiers allow you to see the
22 intricate detail of the print.

23 Q You had over 600 hours of training?

24 A In excess of 600 hours of advanced forensic
25 training, yes, ma'am.

1 Q Every type of fingerprint training there could be,
2 ridgology, advanced palmology, I'm know I'm not using the
3 correct terms, but all of that, all the advanced,
4 looking at hand and fingerprints and seeing if there is
5 a match?

6 A Yes, ma'am, I've had advanced ridgology, and
7 ridgology and palm printing and all those ---

8 Q Okay.

9 A --- latent print schools.

10 Q Okay. And when you analyze fingerprints all you
11 need is one, all you're looking for is one match,
12 correct?

13 A We don't stop at one.

14 Q You don't stop at one, but in this case you didn't
15 even find one that matched Kevin Harbin?

16 A That's correct.

17 Q All right. And at some point recently you even
18 analyzed Kevin Harbin's palm print, didn't you?

19 A Yes, ma'am, that's correct.

20 Q And there was no match?

21 A That's correct.

22 Q Okay. Now, when you analyzed his fingerprints, did
23 you analyze them for the presence of oil?

24 A I don't have any way to determine whether oil is
25 there, because I have the lift tape and then the black

1 powder and then the fingerprint card. I have no way to
2 determine whether there was oil there. A lot of times in
3 looking at the prints, and in this case there are some
4 areas in the tape where you have those blobbing
5 formations, so I don't know if that's the presence of oil
6 or other contaminants. I have no way of telling that.

7 Q And you're not -- so you're not able to test for the
8 presence of oil on a fingerprint lifted?

9 A That's correct.

10 Q You're not able -- you're not able to test for the
11 presence of water on a fingerprint that was lifted?

12 A That's correct.

13 Q You're not able to test for the presence of sweat on
14 a fingerprint that was lifted?

15 A That's correct. It would have to go to a lab to be
16 able to determine those types of things.

17 Q And that wasn't done in this case?

18 A No, ma'am.

19 Q Okay. You mentioned that you also analyzed
20 footprints. No footprints were submitted to you in this
21 case?

22 A No, ma'am, not in this case.

23 Q And you have analyzed literally hundreds of
24 thousands of fingerprints in your experience, correct?

25 A Yes, ma'am.

1 Q And in this case none of the fingerprints that you
2 analyzed matched Kevin Harbin?

3 A That's correct.

4 Q All right. Did you compare the fingerprints that
5 you lifted to any of the gentlemen pictured in this photo
6 lineup, any of the other gentlemen besides Kevin?

7 A The only person that I compared in this case was
8 Kevin Harbin.

9 MS. HORLBECK: Thank you.

10 MR. NEWKIRK: No redirect, Your Honor.

11 THE COURT: Okay. Thank you. You may come down.

12 THE WITNESS: Thank you.

13 MR. NEWKIRK: Your Honor, can Sergeant Sherbert be
14 excused?

15 MS. HORLBECK: Without objection.

16 THE COURT: Without objection she may be excused.

17 All right, sir.

18 MR. NEWKIRK: The State calls Joy George.

19 THE CLERK: Put your left hand on the Bible, please,
20 ma'am, and raise your right hand.

21 JOY GEORGE

22 Having been first duly sworn, testified as follows:

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

24 THE WITNESS: Joy George.

25 THE CLERK: Thank you. Be seated.

DIRECT EXAMINATION

BY MR. NEWKIRK:

Q Ms. George, where do you live?

A Mauldin, South Carolina.

Q And what do you for a living?

A Administrative assistant.

Q Are you Megan George's mother?

A Yes, I am.

Q Do you remember the events of May the 12th of 2004?

A Yes, I do.

Q On May 12th of 2004, did you get a phone call from Megan?

A Yes, I did.

Q And when did you get that phone call?

A Actually I got two phone calls. The first one was about 4:50, 4:55 in the afternoon.

Q And when was the second phone call?

A The second phone call was about 5:35, 5:30 to 5:35.

Q And after that second phone call, did you speak with Megan?

A Excuse me?

Q Did you speak with Megan that second time she called?

A Yes, I did.

MS. HORLBECK: And Your Honor, I renew my objection

1 that all evidence of this type has to be limited to time
2 and place.

3 MR. NEWKIRK: Your Honor, the only question I would
4 ask is her demeanor when she spoke to her.

5 THE COURT: Okay.

6 BY MR. NEWKIRK:

7 Q Ms. George, what was Megan's demeanor when you spoke
8 with her the second time?

9 A She was very nervous, panicky and crying.

10 Q After speaking with Megan, did you go to the Silver
11 Closet?

12 A Yes, I did.

13 Q Did you see Megan at the Silver Closet?

14 A Yes, I did.

15 Q Were there police around at that time?

16 A Yes, sir.

17 Q What was Megan's physical appearance when you saw
18 her?

19 A She had her arms folded, her head down, very nervous
20 and afraid.

21 Q Did she appear to be afraid?

22 A Yes, she did.

23 Q Was she upset?

24 A Yes, she was.

25 Q Did you go to the hospital with Megan?

1 A I did.

2 MR. NEWKIRK: Nothing further.

3 MS. HORLBECK: No questions.

4 THE COURT: Thank you, ma'am.

5 MR. NEWKIRK: The State rests, Your Honor.

6 MS. HORLBECK: And Your Honor, at the appropriate
7 time I do have a brief motion.

8 THE COURT: Okay. All right. That's the testimony
9 from the State. I need to hear this motion, and then
10 I'll bring y'all back out. If y'all will just step
11 across the hall.

12 (The jury exited the courtroom at 10:25 a.m.)

13 MS. HORLBECK: Your Honor, I just make one motion
14 for a directed verdict at this time.

15 THE COURT: Okay. I think based on the testimony
16 and the victim and the other witness there is direct
17 evidence by their identification which is a question of
18 fact. I'm not saying it's true or not, but considering
19 the evidence in the light most favorable to the State I
20 would deny the motion.

21 MS. HORLBECK: Thank you, Your Honor.

22 THE COURT: Now, are you going to present any
23 evidence and will Mr. Harbin testify?

24 MS. HORLBECK: The answer to both your questions is
25 no. And if you would like to question him he's prepared

1 for that.

2 THE COURT: Okay. Mr. Harbin, it's often said that
3 the most important decision that a defendant must make in
4 a criminal trial is whether or not to take the witness
5 stand and testify in his own behalf, or to exercise his
6 Constitutional right to remain silent.

7 Now, whether or not you testify or not testify is
8 the decision you have to make in consultation with your
9 attorney, Ms. Horlbeck. Ultimately the decision will be
10 yours but you need to talk with her about it. And if the
11 State has any criminal convictions they can ask you about
12 for impeachment purposes I would instruct the jury that
13 they could only consider that as to how it may bear if
14 any on your credibility or believability in this case and
15 not as to whether you're guilty or innocence.

16 Now, I don't know -- I'm sure that whatever your
17 record, if you have a prior record, has been revealed to
18 you by -- to the defense attorney.

19 But now, if you choose not to testify and exercise
20 your Constitutional right, and I'm not indicating what
21 you should do, that does not create any presumption
22 against you. And I will instruct the jury that they
23 cannot permit that fact to weigh in the slightest degree
24 against you in this case, nor can that fact enter into
25 their discussions or deliberations in the jury room. You

1 do not have to prove anything. Under the Constitution of
2 South Carolina, and the United States it's your
3 prerogative to testify or to remain silent. And the
4 burden is always upon the State to prove you guilty
5 beyond a reasonable doubt.

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

8 MR. HARBIN: Yes, sir.

9 THE COURT: And have you made a decision as to what
10 you're going to do in this case?

11 MR. HARBIN: Yes, sir, I choose not to testify.

12 THE COURT: You're not going to testify. And you've
13 discussed it with Ms. Horlbeck?

14 MR. HARBIN: Yes, sir.

15 THE COURT: All right. Thank you. Anything else
16 from the State?

17 MR. NEWKIRK: Nothing from the State, Your Honor.

18 THE COURT: From the defense?

19 MS. HORLBECK: Nothing from the defense.

20 THE COURT: Okay. And if she -- the defense is not
21 going to present any evidence, then you argue first.

22 MR. NEWKIRK: Yes, sir, Your Honor.

23 THE COURT: She argues last. Y'all ready or do you
24 need five minutes or so?

25 MR. NEWKIRK: Your Honor, could I have five minutes?

1 MS. HORLBECK: That's fine.

2 THE COURT: All right. We'll take a short recess
3 and then we'll have closing arguments. Okay.

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

6 THE COURT: All right. Ready, Mr. Newkirk?

7 MR. NEWKIRK: I'm ready.

8 (The jury entered the courtroom at 10:55 a.m.)

9 THE COURT: Ladies and gentlemen, we're ready for
10 the closing arguments. The State will go first. And Ms.
11 Horlbeck will argue last. All right.

12 MR. NEWKIRK: May it please the Court? Ladies and
13 gentlemen, good morning. And one of the most important
14 parts of the trial has been ended. And for that is you
15 the jury hearing all the testimony and seeing all the
16 evidence. And that is so important because it is that
17 and only that that all of you will use in determining
18 this defendant guilty. Not what I say or what Ms.
19 Horlbeck says, but what the evidence tells you. But it's
20 not the most important part of the trial, because the
21 most important part of the trial has not started yet.
22 The most important part of the trial is all of you going
23 back in your jury deliberation room and making a decision
24 on whether or not the defendant is guilty.

25 The first thing I want to talk to you about this

1 morning is the law. Like I told you in my opening
2 statement, when we're done talking this morning, Judge
3 Patterson is going to instruct on what law you are to use
4 to determine this defendant's guilt. So if anything I
5 say or anything Ms. Horlbeck says differs in any way from
6 what Judge Patterson says, you must follow the
7 instructions that Judge Patterson gives you.

8 This defendant has been charged with three crimes.
9 He's been charged with strong armed robbery, kidnapping
10 and criminal sexual conduct.

11 Strong armed robbery is when a person takes from
12 another or within that person's presence, in this case
13 cash, with the intent of permanently depriving that
14 person of that cash. And the person takes in this case
15 the cash by means of force, threats or intimidation.

16 The evidence that we have seen today is that this
17 defendant took from Megan George, or in Megan George's
18 presence money belonging to the Silver Closet. He took
19 that money and took that money to permanently deprive the
20 Silver Closet of that money. He was not taking the money
21 to borrow it and at some other time bring it back.
22 Likewise he used force and intimidation in order to get
23 that money. When he went back there, when he went around
24 the counter, he grabbed Megan by the hair and told her to
25 give me the money. And he again told her not to hit any

1 panic button, just to give him the money.

2 The second crime that this defendant is charged with
3 is kidnapping. And ladies and gentlemen, kidnapping
4 occurs when a person unlawfully seizes, abducts confines
5 or carries away another person. And I just want to
6 stress to you that kidnapping, when you think of
7 kidnapping in common terms, people think of taking
8 somebody away, putting them in the trunk of a car and
9 driving away. Well, that is kidnapping, but there are
10 other things that are kidnapping, including unlawfully
11 seizing a person and unlawfully confining a person.

12 And that is what we have here. When the defendant
13 went around the counter to rob Megan, he took her by the
14 hair, unlawfully seized Megan. He then drug her. He
15 brought her across the store still holding onto her hair.
16 He took her inside the bathroom where he committed a
17 sexual battery on her. Then he bound her hands with a
18 vacuum cleaner cord, tied the vacuum around her hands,
19 around her wrists and through her belt buckle, and then
20 tied that to the pole. So she was tied up in the
21 bathroom. He then left the bathroom, closed the door and
22 put furniture in front of that door so that she could not
23 get out. He confined her in that bathroom.

24 Ladies and gentlemen, the third crime this defendant
25 has been charged with is criminal sexual conduct. And

1 there are two parts in criminal sexual conduct. First
2 there must be a sexual battery. Sexual battery occurs --
3 is defined as sexual intercourse, cunnilingus, fellatio,
4 anal intercourse, or any intrusion however slight of any
5 person's body or an object into another person's genital
6 area or their anus. And that's what we have here.
7 That's the -- that's the first part of criminal sexual
8 conduct.

9 The second prong is that the sexual battery has to
10 occur by aggravated force, or while the victim is also a
11 victim of confinement, of kidnapping, or of robbery.

12 Ladies and gentlemen, this defendant went into --
13 took Megan into the bathroom. He told her to pull down
14 her pants and then inserted his fingers in her vagina.
15 That is a sexual battery. And he did this while also
16 committing a kidnapping and while also robbing Megan.

17 Ladies and gentlemen, there has been a lot of talk
18 of scientific and forensic evidence in this case. And I
19 just want to stress this is not TV, this is not CSI.
20 Police officers, they went to the scene. They attempted
21 to collect evidence and they did they collect
22 fingerprints. Those fingerprints did not match this
23 defendant. But I want you to remember that there were --
24 Gina Turcotte testified that there were 20 to 30 people
25 on any given day, customers inside that store. So there

1 is many other people who of course could have left
2 fingerprints in that store.

3 Gina Turcotte also testified that one of the duties
4 of the employees, including Megan, was to wash down
5 everything at the end of the their shift, after the store
6 had closed. Well, on May 12, 2004, Megan did not get to
7 close that store. So nothing was wiped down. Nothing
8 was cleaned.

9 Ladies and gentlemen, you heard from Sergeant
10 Sherbert who this Court qualified as an expert in
11 fingerprint science. And she gave you some reasons why
12 maybe fingerprint -- why a person could touch something
13 and he would not, or she would not leave fingerprints.
14 That includes sweaty -- sweaty hands, oily hands, there
15 is dirt on the surface. Maybe this defendant's hand were
16 sweaty. He was in the process of robbing somebody,
17 kidnapping somebody and committing criminal sexual
18 conduct.

19 But ladies and gentlemen, what this case comes down
20 to as connecting this defendant to the crime, on May 12th
21 of 2004, this defendant was at the Silver Closet. He
22 went in the store and there was another customer in the
23 store. So he waited for that other customer to leave so
24 he could be alone with Megan. Because when you commit
25 crimes such as strong armed robbery, CSC and kidnapping,

1 those are crimes that are done in secret. Those are
2 crimes that you do not want anybody else to see. So
3 there are not going to be other witnesses. The defendant
4 does not want other people in the store. He does not
5 want other witnesses to see what he is doing.

6 And he -- what the defendant did is he went in, he
7 spoke, he kind of milled around the store. He then went
8 and spoke to Megan. He talked to her about what kind of
9 jewelry he was looking for and wanted to know if they had
10 any. He took Megan off her guard. She was trying to
11 help this individual who was just a customer in the store
12 she worked. And while she was looking through that
13 catalog, this defendant went behind the counter, grabbed
14 Megan by the hair and said give me the money. And of
15 course Megan fumbled around trying to figure out how to
16 get the cash register open. She finally did. The
17 defendant took the money.

18 Ladies and gentlemen, Megan was shown a six-person
19 photo lineup and she picked this defendant out of the
20 photo lineup as the person who robbed her. Megan came to
21 court yesterday and again without hesitation pointed at
22 this defendant and said that the defendant was who robbed
23 her on May 12th of 2004.

24 But it wasn't good enough that the defendant just
25 robbed Megan, he had to kick it up a notch. He had

1 something else to take, something more than money. So
2 what he did, still -- still having Megan by the hair, he
3 took Megan through the store to try to find a place to
4 put her. He ended up in the bathroom. Once he got in
5 the bathroom he told Megan, take down your pants. And
6 what did he do when she pulled her pants down? He
7 inserted his fingers in her vagina.

8 Ladies and gentlemen, Megan picked -- looked at a
9 six-peson photo lineup and picked this defendant as the
10 person who inserted his fingers in her vagina. She came
11 to the court -- into the courtroom yesterday and without
12 hesitation identified this defendant as the person who
13 put his fingers in her vagina.

14 And ladies and gentlemen, that still wasn't enough
15 for the defendant. He had to kick it up even to the next
16 notch. So what did he do? He saw a vacuum cleaner. He
17 unwound the cord from the vacuum cleaner. He tied
18 Megan's hand up. He bound her hands. He then tied the
19 cord to her pants, to the belt loop, and then tied the
20 remaining part of the cord to a bar in the bathroom, such
21 as a handicap bar and left her there, bound and tied up.
22 And then what did he do? He went out, exited the
23 bathroom, closed the door. And he moved furniture in
24 front of that door, leaving her confined inside that
25 bathroom.

1 And ladies and gentlemen, Megan looked at a
2 six-person photo lineup and identified this defendant as
3 the person who went in the bathroom, tied her up. Megan
4 came into court yesterday and testified that this
5 defendant was the person who tied her up.

6 And ladies and gentlemen, Megan also testified that
7 when this defendant was in the store he was wearing an
8 orange exercise suit with a Clemson shirt on. Why is
9 that important? Ladies and gentlemen, you heard
10 testimony from Roland Deshaeis, who was an employee at
11 Congaree Self-Storage, which is down the road from the
12 Silver Closet. He testified on the night of May 12th of
13 2004, between 5:00 and 5:30, he had just closed up, went
14 to the top part of his business where he lived, he
15 looked out the window. And what did he see on May 12th
16 of 2004, around 5:00 or 5:30? He saw a black male
17 wearing an orange -- wearing orange, leaving from the
18 general vicinity of Quizno's, which is in the general --
19 is in the same shopping center where the Silver Closet
20 is.

21 And ladies and gentlemen, not only has the State
22 presented evidence that Megan George has positively
23 identified this defendant as who did these things to her,
24 and you heard from Roland Deshaeis who pointed out that
25 he saw an individual wearing orange, the same description

1 that Megan gave of his clothes, exiting the store on the
2 same night, the same time, but you also heard from Ms.
3 Denise Henderson.

4 On May 12th of 2004, Denise Henderson went to the
5 Silver Closet. She went to the Silver Closet to shop.
6 She was there picking something out, picking something
7 up. Ms. Henderson testified that when she walked in the
8 store this defendant was in the store and Megan was in
9 the store. And Ms. Henderson testified that even after
10 she picked up her jewelry, for some reason she felt
11 uneasy, so she stayed in that store a little longer. But
12 then eventually she did leave. And she left leaving this
13 defendant alone with Megan.

14 And Ms. Denise Henderson looked at a six-person
15 photo lineup and identified this defendant as the person
16 that she saw in the Silver Closet on the night of May 12,
17 2004. Denise Henderson then came into court yesterday
18 and identified this defendant as the person she saw in
19 the Silver Closet.

20 Ladies and gentlemen, I also want you to remember
21 what the defendant said in his own words when
22 Investigator Fortner spoke with him. The first thing he
23 said is, the hammer is going to fall because I'm black
24 and the clerk was a white girl. He then abruptly stopped
25 himself and asked Investigator Fortner, the clerk was a

1 white girl, wasn't she. You heard Investigator Fortner
2 sit up here and testified that at no time during the
3 interview did he tell the defendant that the clerk was a
4 white girl. I submit to you that the only way he knew
5 that was because on May 12th of 2004, he was inside the
6 Silver Closet.

7 Likewise during the interview Investigator Fortner
8 asked if he owned an orange exercise suit. The defendant
9 said he did, he owned an orange exercise suit. Megan
10 described that this defendant was wearing an orange
11 exercise suit when he did this to her. And Mr. Roland
12 Deshaeis said when he saw a person coming on May 12th,
13 5:00, 5:30 in the evening, coming from the general
14 vicinity of the Silver Closet, the person was wearing
15 orange.

16 Ladies and gentlemen, the State must prove this
17 defendant guilty beyond a reasonable doubt. What is a
18 reasonable doubt? There are few things -- there are a
19 few things in life that we know to an absolute certainty.
20 And that is not the State's burden. The burden is not
21 absolute certainty. It's a reasonable doubt. If you are
22 firmly convinced that this defendant is guilty then must
23 find him guilty.

24 Ladies and gentlemen, a trial, a criminal trial is
25 very much like a puzzle. The State presents you with all

1 the pieces through testimony and evidence. It is now
2 your job to take all these pieces back with you to the
3 jury deliberation room and put them together. And I
4 submit that when you put those pieces together, the
5 puzzle will read guilty. This defendant is guilty of
6 strong armed robbery. This defendant is guilty of
7 kidnapping. And this defendant is guilty of criminal
8 sexual conduct. Thank you.

9 THE COURT: Ms. Horlbeck.

10 MS. HORLBECK: Y'all may be tired of having me come
11 up here with my clipboard. But the prosecutor was right
12 about one thing. This is not CSI, or television. This
13 is real life. And this case is important to my client
14 and his family who sits behind him in support. And I'm a
15 little nervous. So bear with me if I tend to look at my
16 notes, because I don't want to miss anything. That's why
17 I have my notes with me.

18 At this point in the case some of y'all might think
19 that Kevin is not guilty, absolutely not guilty. Some of
20 y'all might think he's sort of not guilty. Maybe a
21 couple of you think he's kind of not guilty. But the
22 point is is whoever thinks that, you are required to
23 acquit him and find him not guilty in this case, if
24 that's how you feel.

25 At the beginning of this case I talked to you about

1 my car, and I talked to you -- or my old car. And I
2 talked to you about how I had a faulty fuel gauge that
3 was unreliable and inaccurate. I could no longer rely on
4 it to tell me how much fuel I had and I had to throw it
5 out.

6 Well, this case depends on accurate and reliable
7 evidence, just like that automobile depends on accurate
8 and reliable instruments. This is an identification
9 case. That's all it is. They can read y'all the fancy
10 charges and wave the indictments, but at the end of the
11 day this case is about identification. And the State has
12 the burden of proof, which means that their evidence and
13 their testimony has to be so reliable and so accurate as
14 to overcome any doubt that a reasonable person would
15 have, reasonable people like yourselves. Their evidence
16 has to be so accurate and so reliable that it overcomes
17 the presumption of innocence.

18 You will hear later on in the instructions that the
19 wonderful thing about our criminal justice system is
20 that anybody who stands trial is a cloaked in the robe
21 of righteousness, the cloak of innocence. And that
22 cloak can only be removed by proof of guilt beyond a
23 reasonable doubt. You won't find that in this
24 identification case.

25 An identification case is there is disputed evidence

1 and there is undisputed evidence. Let me tell what is
2 undisputed. It's undisputed that these identification
3 witnesses took the stand and to the best of their ability
4 tried their best to tell the truth. No one is calling
5 them liars. They're not bad people. It just so happens
6 in an identification case these witnesses can be mistaken
7 and that is what is in dispute today. Their memory,
8 their identification, their ability to register what
9 happened and describe it to you today, and the
10 reliability of their identification process.

11 Also in dispute is the statement Mr. Harbin gave.
12 We'll get to that in a little bit. Also in dispute is
13 the absence of physical evidence. We'll get to that in a
14 little bit too.

15 But I want to talk to you about first is the
16 identification evidence. You heard from Megan George.
17 She gave -- you heard from her. She gave a very vague
18 description of the culprit that was in the Silver Closet
19 that day. She described a black male, 30 to 40 years
20 old, shaved or bald head, had some sort of an orange wind
21 suit and a Clemson t-shirt. That was her description.
22 She did not provide any further details as to how -- the
23 shape of the head, did not provide details as to the
24 eyes, or the mouth, or the nose. And most of all --
25 Kevin, if you would stand up and come a little closer,

1 please. Most of all -- I want you to face them. Most of
2 all -- turn your heard. She missed a scar. This isn't
3 just a little scar. This is a couple inches. She
4 testified that at times he was on her right-hand side.
5 The left-hand side of the face would be visible. And
6 never once did she describe this scar. Have a seat.
7 Never once did she describe a scar at all.

8 Vague description. This case can't rely on vague,
9 inaccurate descriptions. Identifications rely on
10 accurate, reliable evidence and testimony. Sort of --
11 sort of bald, maybe he had this, maybe he had head --
12 hair closely shaved to the head. That is not enough.
13 That doesn't amount to proof beyond a reasonable doubt.

14 As you consider this case you are also entitled to
15 consider her demeanor, her state of mind when this
16 incident was going on. All of the witnesses that knew
17 anything about her demeanor agreed that she was crying,
18 she was upset. Her mother testified that she was nervous
19 even after the event. You could tell yesterday when she
20 testified that she was till upset by it and
21 understandably so. Ask yourselves, would a person with
22 that state of mind at that point be able to give an
23 accurate and reliable description? Or would that state
24 of mind get in the way and enable her only to provide a
25 sort of accurate, or a kind of accurate description?

1 Sort of, kind of, does not amount to proof beyond a
2 reasonable doubt.

3 You are also entitled to consider Megan's
4 opportunity to view the culprit. At her best opportunity
5 to view the culprit she was having a discussion with
6 another customer. They were chatting about the fact that
7 that other customer knew the boss, knew the owner of the
8 Silver Closet. They were chatting about how they knew
9 each other. They knew each other from the hospital. And
10 they were chatting about leaving a phone number, that
11 Denise Henderson was leaving a phone number and her name
12 for the owner of the Silver Closet.

13 At Megan's worse opportunity to view the culprit,
14 she was following her basic instincts. She was trying to
15 find a suitable place to hit him and get away. She was
16 trying to find a strategic portion of his body, the best
17 strategy she could use to find a way she could hit him
18 and get away from him. She was following her instincts
19 and trying to get away. That was her worse opportunity
20 to view him.

21 Now, ask yourself, would a description given after
22 those shaky opportunities to view, would they amount to
23 proof beyond a reasonable doubt? We submit to you that
24 they do not. We submit to you that they are not accurate
25 and they are not reliable. It's not a -- doesn't give

1 her a good reliable opportunity to view and later
2 describe.

3 You're entitled to consider Megan's degree of
4 attention. She testified that things were kind of
5 jumbled that night. She also couldn't remember whether
6 or not she turned off the lights, whether or not she had
7 turned off the sign, the open sign. And she could not
8 provide details as to how she got out from behind the
9 counter, which caused the police some concern. Some of
10 the details may have been small details, small gaps in
11 her memory, but they were gaps in her memory. Whether
12 they are small or they are gaping holes, they are gaps in
13 her memory. And they go to the reliability and the
14 credibility, and the accuracy of her memory and her
15 ability to later identify who did this.

16 You might ask yourselves, how was she able to go
17 from such a vague description to picking someone out of a
18 lineup? In identification cases the -- the witnesses
19 doing the identifying are not liars. They are doing --
20 telling the truth to the best of their ability. But they
21 are mistaken. Let me give you an example of what I'm
22 talking about.

23 Recall when you were in jury assembly yesterday and
24 y'all were in the big room, and you had attorneys on one
25 side and the judge on front of you. And then at some

1 point a lady stood up and she started calling names. And
2 when your name was called you had to stand up and give
3 your information, whether you were married, where you
4 worked, what your spouse did. That lady up there, you
5 didn't -- weren't paying any particular attention to her.
6 She was someone that you paid attention to some, maybe
7 for a fleeting few moments.

8 Well, let's say that you saw her again next week.
9 And you thought to yourself, I feel like I know her,
10 where have I seen her before. Let's say you get up the
11 courage to actually go up to her and say, haven't I seen
12 you at my nephew's graduation. And she says, no, but I
13 do manage the jury assembly room and you might have been
14 a juror, maybe you saw me there. It's easy when you have
15 fleeting moments to confuse the face and assign it to the
16 wrong event. And you're entitled to consider that when
17 you consider Megan George's testimony. Gaps in her
18 memory, her vague description and her opportunity to
19 view, do not amount to proof of guilt beyond a reasonable
20 doubt.

21 You also heard from Denise Henderson. Recall that
22 she is the witness who had a relationship with the store
23 owner, who knows the owner of the Silver Closet. You
24 recall that Denise Henderson was in the Silver Closet for
25 approximately five to seven minutes. Her description was

1 a black male, fair skinned, five seven or five eight.
2 And you also recall that she did not describe details to
3 the investigator. She did not describe the shape of the
4 head. She did not describe the eyes. She did not
5 describe the lips. Did not describe the nose. And she
6 couldn't remember whether or not the person she saw was
7 bald. She could not remember that. For all she knew he
8 could have had hair. And she did not describe to the
9 detective any sort of clothing at all.

10 Now, she remembered something yesterday. When she
11 talked to the detective, when it was close to the
12 incident, close after the incident, she did not describe
13 a bald person, and she did not describe what sort of
14 clothing the person wore. And she could not remember
15 whether this suit was orange, or had any color to it at
16 all.

17 Now, she testified about some unease that she felt.
18 But ask yourselves, if she felt that uneasy, what a great
19 opportunity for her to memorize and pay close attention
20 to the person that she saw. But all she could describe
21 was a black male, light skin, five seven or five eight.
22 She testifies she got a really, really good look at him,
23 but she sure missed a scar, a two inch scar on the side
24 of his head. And she sure couldn't remember what color
25 the outfit was that he wore.

1 And she sure couldn't remember whether the guy had
2 hair or whether he was bald. Strangely enough her
3 composite is all of bald, or very, very closely shaved
4 man. She is not shown anybody with hair. And she was
5 shown a bunch of bald guys, even though she couldn't
6 remember whether or not he was bald. And so it's either
7 choose a bald guy or choose no one. That's not proof
8 beyond a reasonable doubt. That's not proof beyond a
9 reasonable doubt at all.

10 She goes from a very shaky description, an
11 unreliable and inaccurate description to being shown a
12 lineup of someone that she didn't even describe. The
13 only two things that fit are the black male.

14 The only thing that Megan described that fits is the
15 fact that he was bald and a black male. Those are the
16 only two things.

17 Keep in mind also you're entitled to consider that
18 Ms. Henderson never described any sort of cap the
19 person was wearing. She testified that he had on a cap
20 and somehow she could tell underneath the cap he was
21 bald. But keep in mind she never described to the
22 detective a cap. All of a sudden yesterday she remembers
23 a cap.

24 And as you consider Ms. Henderson's choice in the
25 lineup, you're entitled to recall the relationship

1 between the owner of the store, also one of the victims
2 of this crime, that they work together, and that they
3 have each other's phone numbers, and they could be
4 communicating with one another. You're entitled to
5 consider that as you determine whether Ms. Henderson made
6 a valid choice on this lineup, whether she made an
7 accurate and reliable choice. And you're entitled to
8 consider the fact that Ms. Henderson looked at her lineup
9 approximately two hours after Megan made her choice on
10 the lineup.

11 Now, the State wants you, or they argue that the
12 only conclusion that you can draw from Mr. Harbin's
13 statement is that he knew she was white because he was
14 involved. And their argument asked you to assume
15 something that's not even in evidence.

16 The officers testified -- well, the officer
17 testified that he didn't tell him the clerk was white.
18 But that -- if you adopt the State's argument, you are
19 being forced to assume that that officer was the only
20 source of the information that that clerk was white.
21 But there was a newspaper article. There was an article
22 in the newspaper about this event. He can't tell you
23 what -- whether or not that article was read. He doesn't
24 know. He can only testify as to what he -- that
25 information he did or did not rely. But it was in the

1 newspaper. There is another source to that knowledge.
2 And if you adopt their argument, you are being forced to
3 assume facts that aren't even in evidence, and that's not
4 proof beyond a reasonable doubt. Keep that in mind.

5 You are also entitled to consider the absence of
6 physical evidence. You are entitled to consider the
7 absence of evidence and the absence of testimony.

8 There's -- we've heard a lot about fingerprints in
9 this case. We heard a lot about you can't develop
10 fingerprints if there's dust, and you can't develop
11 fingerprints if there's oil on your fingers, or grease,
12 or you've been eating food, and all of this other
13 nonsense. And then we find out that she only looked at
14 prints off of the doors and off of the counters. She
15 never analyzed prints of the porcelain toilet, or the
16 porcelain sink. So there is no way dust could impede the
17 leaving of a print. She never analyzed prints off of a
18 cash register. So there is no way that the plastic
19 material could get in the way of leaving a print. And
20 she performed no analysis as to the presence of oil, or
21 some kind of a counter cleaner, or the presence of sweat.
22 That analysis was never done. Yet the State wants you to
23 take this testimony and somehow use it in a case where it
24 doesn't even apply. It's got nothing to do with this
25 case. Nothing to do with this case.

1 What's more? She provided no statistics as to how
2 hard you have to press down to leave a print. She didn't
3 provide any statistics of the amount of oil that you have
4 to leave -- that you have to have on your fingertips to
5 leave a print. No evidence whatsoever. And at the end
6 of the day nothing that was lifted matched Kevin Harbin.
7 Nothing. But did they bother to try to match the prints
8 to any of these other guys? No. That's not proof beyond
9 a reasonable doubt.

10 And the prosecutor told you, maybe Kevin's hands
11 were kind of sweaty. Kind of, sort of, maybe is not
12 proof beyond a reasonable doubt. Kind of, sort of and
13 maybe is unreliable and inaccurate. It's not proof
14 beyond a reasonable doubt.

15 Now, the description you got in this case, keep in
16 mind we started out with a vague description. The only
17 thing Megan described that fits with Kevin Harbin is that
18 he's a black male and has bald -- a shaved head. Okay.
19 Keep in mind you're entitled to recall the lapses in
20 memory, the fact that she could not recall details of how
21 she got out from behind the counter, the fact that she
22 could not recall even small details like whether or not
23 she turned the lights off or not, whether or not her belt
24 loop was ripped.

25 And the same thing with Denise Henderson. You're

1 entitled to recall, or you're entitled to consider the
2 lapses of her memory as well. The fact that she didn't
3 describe certain characteristics. She failed to describe
4 a cap. She failed to describe the scar. Both of them
5 failed to describe the scar. And she failed to describe
6 what the culprit was wearing and the color he was
7 wearing. Those are holes. Okay. At the end of the day
8 their description and their case is full of holes. .

9 What the State is asking you to do -- and this is
10 just a copy of the lineup. What the State is asking you
11 to do is take this holy, unreliable, inaccurate
12 description and try to bandage it up with this composite.
13 But you know, if I were to take this jug of water and
14 dump it all in here, this piece of paper and this lineup
15 and this affidavit that they filled out, it's not going
16 to keep water from running out of the holes in this case.
17 It's not. There are so many holes in this case that it's
18 unreliable and inaccurate, and it doesn't amount to proof
19 beyond every reasonable doubt.

20 And I believe -- we believe that when you go to your
21 jury room and deliberate and consider all the evidence in
22 the case that it will be clear that the appropriate
23 verdict in this case is not guilty on all the charges.
24 Because he may have a bald head, but that's it. He had
25 nothing to do with this case. They've got the wrong guy.

1 Thank you.

2 THE COURT: All right. Mr. Foreman, ladies and
3 gentlemen, you have heard the evidence and testimony now
4 I will go over the law with you and you'll go back and
5 deliberate until you reach a verdict in the case.

6 This -- these indictments in the case charges the
7 defendant with kidnapping, criminal sexual conduct in the
8 first degree, and robbery. These just contain the
9 charges against the defendant. These indictments are not
10 evidence in the case. You should not consider them as
11 evidence. These are just simply the vehicles that brings
12 the case to court, and eventually you will report your
13 verdict back on these pieces of paper.

14 Now, ladies and gentlemen, to these indictments the
15 defendant has plead not guilty. His plea of guilty
16 places the burden of proof upon the State to prove the
17 defendant guilty of each charged beyond a reasonable
18 doubt. A person charged with committing a criminal
19 offense in South Carolina is never required to prove
20 himself innocent.

21 Now, Mr. Foreman, and ladies and gentlemen, that is
22 a cardinal and an important rule of the law of evidence
23 in a criminal case. No matter what the seriousness of
24 the charges are, a defendant in a criminal trial is never
25 required to prove himself innocent. He's presumed

1 innocent until you the jury hears evidence that satisfies
2 you of his guilt beyond a reasonable doubt.

3 Now, that is not a mere legal theory, or legal
4 phrase, but a substantial right which all of us are
5 entitled to, that is the presumption of innocence unless
6 you are satisfied from the evidence in this case of his
7 guilt beyond a reasonable doubt.

8 Now, ladies and gentlemen, as jurors in this case
9 you have different functions and responsibilities than
10 mine, or anyone else in the courtroom. I am prohibited
11 by the Constitution from discussing the facts with you,
12 and I would not do that. If I have done anything or said
13 anything during this trial or indicated to you in any way
14 that I have a feeling about the facts of this case, you
15 disregard that, because if I did anything I did not mean
16 to. I would not do anything to infringe upon your
17 responsibility to determine the facts, to pass upon the
18 credibility and the believability of the witnesses and --
19 because I appreciate you being there more than any person
20 here. And I do not believe -- and you should not let me
21 influence you in that way. You, ladies and gentlemen,
22 are the sole judges of the facts and the credibility and
23 the believability of the witnesses.

24 On the other hand, my responsibility is to explain
25 the law to you. You have to accept the law as I explain

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

3 Now, ladies and gentlemen, it's your duty and yours
4 alone to weigh the testimony and the evidence and pass
5 upon the credibility and the believability of each and
6 every witness, regardless of who the witness is.

7 Now, these witnesses have testified under oath, in
8 your presence. You were able to observe the demeanor of
9 the witnesses, their facial expressions. You can ask
10 yourself, was the witness forthright? How did the
11 witness come to know about the facts which they
12 testified? Was there other evidence and testimony in the
13 case to make the testimony of that witness stronger or
14 weaker? Was there any reason for the witness to be
15 biased or prejudiced in the case? I just mention these
16 things to you to emphasize the weight you see fit to give
17 to the testimony, credibility and the believability of
18 witnesses is for your sole determination.

19 And I know you wouldn't do it lightly, but you can
20 believe everything a witness tells you, or you can
21 disbelieve everything a witness told you. You can
22 believe part of what a witness told you and disbelieve
23 part of what a witness told you. You can believe one
24 witness as against several or several as against one.
25 Ladies and gentlemen, you are the sole judges of the

1 facts of this case, the testimony and the believability
2 of the witnesses.

3 Now, the State has the burden of proving each and
4 every element of a crime charged beyond a reasonable
5 doubt. Any reasonable doubt that you have in your
6 deliberations should be resolved in favor of the
7 defendant. A reasonable doubt may exist because of the
8 evidence and testimony you have heard, or the lack of
9 evidence and testimony in the case. If you have a
10 reasonable doubt as to the guilt of the defendant as to
11 any charge or all charges, he is entitled to that doubt
12 and would be entitled to an acquittal, or a verdict of
13 not guilty.

14 Now, ladies and gentlemen, what is a reasonable
15 doubt? The State Supreme Court says a reasonable doubt
16 is the kind of -- the kind of doubt that would cause a
17 reasonable person to hesitate to act. The United States
18 Supreme Court has stated this. The government has the
19 burden of proving a defendant guilty beyond a reasonable
20 doubt. Some of you may have served in civil cases.
21 Judge Miller is having a civil case -- civil court
22 downstairs. The burden of proof in a civil case is by
23 the greater weight or preponderance of the evidence, or
24 that a fact is more likely true than not true. In a
25 criminal case the State's proof is more powerful than

1 that. It's beyond a reasonable doubt. Proof beyond a
2 reasonable doubt is proof that leaves you firmly
3 convinced of the defendant's guilt.

4 Now, there are very few things in this world that we
5 can know with absolutely certainty, and the law does not
6 require proof that overcomes every possible doubt. If,
7 based on your consideration of the evidence, you are
8 firmly convinced that the defendant is guilty of the
9 crime charged, you must find him guilty. If, on the
10 other hand, you think there is a real possibility that he
11 is not guilty, you must give him the benefit of the doubt
12 and find him not guilty. That's the definition of
13 reasonable doubt.

14 Now, ladies and gentlemen, no statement may be
15 considered by you against the defendant unless the State
16 has proven beyond a reasonable doubt that the defendant
17 was first given an explanation of his Miranda rights
18 before making a statement, that he fully understood the
19 warnings, and he knowingly and voluntarily elected to
20 waive those rights. You must further find beyond a
21 reasonable doubt that the statement was made and that it
22 was made freely and voluntarily under a totality of the
23 circumstances.

24 In that regard I would charge you that an alleged
25 statement of the defendant cannot be considered unless

1 he was first advised of his right to remain silent,
2 advised that anything he said could be used in evidence
3 against him in a court of law, that he had a right to
4 counsel and that if he could not afford counsel that one
5 would be provided to him without charge, and that if
6 elected to talk he could stop at any time. If you find
7 that the defendant was so advised, you may only
8 consider his statement if you also find beyond a
9 reasonable doubt that he fully understood the warning
10 and nevertheless intelligently and knowingly elected to
11 waive his rights.

12 Now, ladies and gentlemen, an issue in this case is
13 the identification of the defendant as the person who
14 committed the crime charged. The State has the burden of
15 proving identity beyond a reasonable doubt. You must be
16 satisfied beyond a reasonable doubt of the accuracy of
17 the identification of the defendant before you may
18 convict the defendant. Identification testimony is an
19 expression of belief or impression by a witness, or
20 witnesses. You must determine the accuracy of the
21 identification of the defendant. .

22 You must consider the believability of each
23 identification witness in the same manner as any other
24 witness. You may consider whether a witness had an
25 adequate opportunity to observe the offender at the time

1 of the offense. This can be effected by things like how
2 long or short a time was available, how far or close the
3 witness was, the lighting conditions, and whether a
4 witness had the chance to see or know the person in the
5 past.

6 Once again, I would instruct you the burden of proof
7 is on the State and they must specific -- that includes
8 proving beyond a reasonable doubt the identify of the
9 defendant as the person who committed the crime. If
10 after examining the testimony and the evidence you have a
11 reasonable doubt as to the accuracy of the identification
12 you must find the defendant not guilty.

13 Now, ladies and gentlemen, the fact that a defendant
14 does not testify in his own behalf cannot and must not be
15 considered against him under any circumstances, or in any
16 manner whatsoever. The fact that a witness does not take
17 the witness stand in his own behalf does not create any
18 presumption against him. And I charge you that you must
19 not permit that fact to weigh in the slightest degree
20 against the defendant, nor should this fact enter into
21 the discussions or the deliberations of the jury in any
22 manner. Why? Under the Constitution of South Carolina
23 and under the Constitution of the United States, it is
24 the prerogative of a defendant to testify or to remain
25 silent. And the burden of proof is always upon the State

1 of South Carolina to establish his guilt by competent
2 testimony beyond a reasonable doubt.

3 Ladies and gentlemen, I would charge you that you
4 must consider each one of these indictments separately.
5 The State must prove each and every element of the crime
6 charged beyond a reasonable doubt. Failure to prove any
7 element of the crime charged beyond a reasonable doubt
8 would result in a verdict of not guilty.

9 Now, robbery. In order to prove robbery the State
10 must prove beyond a reasonable doubt that the defendant
11 took the personal property from the person, or presence
12 of another person without that person's consent and
13 carried it away. Now, property is in the presence of a
14 person if it is within that person's reach, observation
15 or control so that the person could, if not overcome with
16 violence, or prevented by fear, that person could retain
17 possession of the property. That's the definition of
18 property in the presence of another person.

19 The State must show that the defendant carried the
20 property away with the intent to permanently deprive the
21 owner of the property and to convert the property to the
22 defendant's own use.

23 The slight removal of the property or the complete
24 possession of the property by a defendant is sufficient
25 to show a taking and carrying away of the property.

1 The taking and carrying away of the property must
2 have been done with violence or by putting the person in
3 the presence of the property, or the owner of the
4 property in fear of violence.

5 Now, the allegations in this case that by means of
6 force, threats, or intimidation, the defendant took from
7 the person or presence of Megan E. George, at the Silver
8 Closet in Greenville, on May the 12th of 2004, cash money
9 with the intent to permanently deprive the owner of that
10 property. If the State has failed to prove each and
11 every element of this offense beyond a reasonable doubt,
12 your verdict would be not guilty as to robbery. If they
13 have proven each and every element, your verdict would be
14 guilty. Those are the only two possible verdicts.

15 Now, the defendant is charged with kidnapping in
16 violation of 16-3-910 of the South Carolina code of
17 laws. The State must prove beyond a reasonable doubt
18 that the defendant knowingly and unlawfully seized,
19 confined, kidnapped, abducted or carried away another
20 person, in this case Megan E. George, without authority
21 of law.

22 To do a thing unlawfully is to do it willfully,
23 against the law. Knowingly means with knowledge,
24 consciously doing it, not accidentally. To seize someone
25 means to take hold of, suddenly or forcibly. Confine

1 means to limit, restrict, or enclose someone within
2 bounds, or shut -- or keep the person up. To -- kidnap
3 is to remove a person against that person's will by
4 unlawful force or by fraud. Abduct means to carry off
5 secretly or by force for an illegal purpose. Carrying
6 away means to remove. I'm defining the terms alleged in
7 the kidnapping indictment.

8 Now, the State must prove to you beyond a reasonable
9 doubt that Kevin Lamar Harbin, did, in Greenville County,
10 on or about the 12th day of May, 2004, unlawfully seize,
11 abduct, confine or carry away Megan E. George, without
12 the authority of law.

13 Now, the State does not have to prove that the
14 defendant did all of those things. If you find beyond a
15 reasonable doubt that the defendant did any of these
16 things that amount to kidnapping, you may find the
17 defendant guilty of kidnapping. If the State has failed
18 to prove any element of the crime of kidnapping, your
19 verdict would have to be not guilty.

20 Now, the State charges the defendant with criminal
21 sexual conduct in the first degree in violation of
22 16-3-652 of our South Carolina code of laws. The first
23 element which the State must prove beyond a reasonable
24 doubt is that the defendant engaged in a sexual battery
25 with the victim.

1 A sexual battery includes several things, that being
2 sexual intercourse, oral sex, or -- but in this case the
3 allegations are, and the sexual battery is defined under
4 our statute as the intrusion however slight, of a
5 person's body, or of an object into the genital or anal
6 openings of another person's body, except when the
7 intrusion is accomplished for medical purposes. If you
8 find that the State has proven or -- beyond a reasonable
9 doubt that the sexual battery occurred, you may go to the
10 other elements of the crime. If the State has not shown
11 beyond a reasonable doubt that a sexual battery occurred,
12 you would stop deliberating and your verdict would be
13 not guilty as to criminal sexual conduct in the first
14 degree.

15 If you find that a sexual battery did occur you must
16 then decide whether the State has proven beyond a
17 reasonable doubt one of two things, that the defendant
18 used aggravated force to accomplish the sexual battery.
19 Aggravated force means the use of physical force, or
20 physical violence of a high and aggravated nature to
21 overcome the victim. Or the victim submitted to the
22 sexual battery while the victim was also the victim of a
23 kidnapping, confinement or robbery.

24 Now, if the State has proven each and every element
25 of criminal sexual conduct in the first degree as stated

1 in the indictment on the 12th day of May, 2004, then your
2 verdict would be not guilty -- your verdict would be
3 guilty. If the State has failed to prove any element of
4 criminal sexual conduct in the first degree your verdict
5 would be not guilty.

6 The only possible verdicts on each of these
7 indictments is guilty or not guilty. Either not guilty
8 or guilty. One or the other. I'm not indicating what
9 your verdict should be. I would ask you to consider each
10 indictment separately and write a verdict on each
11 indictment. Each verdict on each indictment must be
12 unanimous. All 12 of you have to agree. Each person has
13 an equal vote, equal voice, equal input into the case,
14 but the foreperson has to preside in the jury room.

15 If you have any question about the law I'll be happy
16 to answer those questions. But you have heard all the
17 evidence and testimony. You have to decide this case on
18 what you have heard in the courtroom. You determine the
19 facts, apply the facts to the law and write a verdict in
20 each case that speaks the truth.

21 I'm going to let you step back, and if the attorneys
22 want me to say anything else about the law I'll bring you
23 back out. If not you can begin your deliberations.

24 Okay.

25 (The jury exited the courtroom at 11:55 a.m.)

1 THE COURT: Any additions or exceptions?

2 MR. NEWKIRK: None ---

3 THE COURT: Mr. Newkirk?

4 MR. NEWKIRK: None from the State, Your Honor.

5 MS. HORLBECK: Your Honor, I don't recall in the
6 beginning of the case prior to opening if you explained
7 to the jury that the indictments were not evidence. Did
8 you do that already? Okay. I would just request that
9 you make that charge again now. And if you deny that
10 then I just note -- I just want my objection noted for
11 the record.

12 THE COURT: I did tell them that at the very
13 beginning.

14 MS. HORLBECK: Okay. All right.

15 THE COURT: And -- that they could not be considered
16 as evidence. Plus I told them I think at the beginning
17 of the case also. Okay.

18 MS. HORLBECK: All right. I may have missed that.

19 THE COURT: I will note your exception.

20 MS. HORLBECK: Thank you.

21 THE COURT: And we'll be in recess until they reach
22 a verdict. I'm going to ask them if they want to order
23 lunch and I'll let you know what their response is.
24 Okay.

25 MS. HORLBECK: Um-hm.

1 THE COURT: Thank you. Would y'all look over the
2 evidence that's been introduced and make sure we got it
3 all. Okay.

4 MS. HORLBECK: Your Honor, I don't know what you
5 want to do about the alternate in the case?

6 THE COURT: We're going to bring her out. Would one
7 of you tell the alternate to come out in the hallway? Is
8 that it, all the evidence?

9 MR. NEWKIRK: Yes, sir.

10 THE COURT: These are not in evidence?

11 MS. HORLBECK: No, sir.

12 THE COURT: All right. We'll be in recess until
13 they reach a verdict. I'm going to dismiss the alternate
14 from the hallway and then ask them if they want to order
15 lunch.

16 MR. NEWKIRK: Okay.

17 THE COURT: If they want to order lunch I'll let
18 y'all leave, otherwise stick around. Okay.

19 MR. NEWKIRK: Okay.

20 (The jury began their deliberations at 11:57 a.m.)

21 THE COURT: The jury question was define reasonable
22 doubt and we have the simple -- the definition by the
23 South Carolina Supreme Court, and then the federal
24 definition out of the federal jury instructions from
25 Justice Ginsburg in Victor Versus Nebraska. It's -- both

1 lawyers know what it is. And the jury wants to know the
2 definition of reasonable doubt. So we're just going to
3 send a copy of it back to them. Okay. Thank you.

4 (Court's Exhibit Number 1 was marked and filed.)

5 (Court's Exhibit Number 2 was marked and filed.)

6 THE COURT: Okay. As the attorneys know, the jury
7 said they would like to come back in the morning and
8 finish deliberating. So they're probably tired of each
9 other for a little while. So I'll let them come back
10 tomorrow morning.

11 (The jury entered the courtroom at 5:32 p.m.)

12 THE COURT: Okay. Y'all have had a long day, I
13 know. And -- what time do you want to come back in the
14 morning, at 9:00 or 9:30? Does it matter?

15 MR. GOURDIN: I think 9:00 will be fine.

16 THE COURT: Nine o'clock will be fine. Anybody got
17 any problem with that? Okay. Y'all have a good night's
18 rest. I have to admonish you, don't discuss it with
19 anyone tonight again. I have to trust you not to do
20 that, because you are the only folks who have seen the
21 witnesses and heard the testimony. So if you got
22 influenced by anyone outside the court I would have to
23 declare a mistrial and that wouldn't be good. So go home
24 tonight, come back at nine o'clock in the morning, and
25 I'll let you deliberate a little bit longer. Okay.

1 Thank you so much. I think y'all know how to get out and
2 get back in. All right. Do not discuss the case with
3 anyone. All right.

4 (The jury exited the courtroom at 5:34 p.m.)

5 THE COURT: Okay. Nine o'clock in the morning.
6 And -- all right. I'll see y'all at nine o'clock in the
7 morning.

8 (Court's Exhibit Number 3 was marked and filed.)

9 (Court adjourned for the evening.)

10 (The following proceedings were held on September 8,
11 2005, as follows:)

12 (The jury resumed their deliberations at 9:15 a.m.)

13 THE COURT: I'm told they have a verdict.

14 (The jury entered the courtroom at 10:35 a.m.)

15 THE COURT: All right. Mr. Foremen, I understand
16 you have reached a verdict, is that correct?

17 MR. GOURDIN: That's correct.

18 THE COURT: All right. Would you give it to the
19 bailiff, please, sir? Okay. Would you publish the
20 verdict, please?

21 THE CLERK: Your Honor, case number 2004-6123, the
22 State versus Kevin Lamar Harbin, indicted for strong
23 armed robbery, the verdict guilty, signed Dexter Gourdin,
24 foreman; 2004-6124, indicted for criminal sexual conduct,
25 first degree, the verdict guilty, signed Dexter Gourdin,

1 foreman; 2004-6122, indicted for kidnapping, the verdict
2 guilty, signed Dexter Gourdin, foreman. If these are
3 your verdicts, please raise your right hands.

4 (All jurors raised their right hands.)

5 THE COURT: Okay. Thank you. Any question as to
6 the form of verdict, Mr. Newkirk?

7 MR. NEWKIRK: Nothing, Your Honor.

8 MS. HORLBECK: Nothing from the defense.

9 THE COURT: Ladies and gentlemen, thank you so much
10 for your service this week. I'm going to excuse you for
11 the week. You do not have to come back. And we do
12 appreciate it. I know y'all deliberated and paid close
13 attention to the case. And the attorneys do appreciate
14 that. Okay. The clerk will mail you a check for your
15 jury service and your mileage. You need to turn your
16 badges in to the bailiff or the lady downstairs. But if
17 you need a statement to show your employer that you were
18 here on jury service, the clerk can give you that today.
19 If not it will be included in the check which they
20 should get mailed out tomorrow. Thank you so much.
21 Y'all are -- may be excused.

22 (The jury exited the courtroom at 10:34 a.m.)

23 THE COURT: Okay. Y'all want to come forward? Mr.
24 Newkirk, anything else from the State?

25 MR. NEWKIRK: Your Honor, the defendant does have a

1 prior record if you would like to hear that, and again at
2 the appropriate time the victim would like to address the
3 Court.

4 THE COURT: All right. Let me hear his prior
5 record, then I'll hear from her and then I'll hear from
6 the defense.

7 MR. NEWKIRK: Your Honor, the defendant, 1995, has
8 two fraud checks, one petty larceny; 1998, he has 13 --
9 he has 26 fraud checks; and 2004, he has a conviction for
10 strong armed robbery.

11 THE COURT: In 2006?

12 MR. NEWKIRK: In 2004, Your Honor, 2004.

13 THE COURT: Okay.

14 MR. NEWKIRK: Would you like to hear from the victim
15 at this time?

16 THE COURT: Yeah.

17 MS. GEORGE: Your Honor, this week only reminds me
18 of the worse day of my life. It victimized me all over
19 again. The defense implied that I was vague in my
20 memory, which I'm sure I was not. I will never forget
21 this man's face or what he did to me on May 12th. He's
22 stole more from me than just money and my dignity. He
23 stole the basic freedom of feeling safe. While I will
24 not allow him to destroy what is within me, I have felt
25 threatened by him and fear what he will do to others. He

1 has proven that he has little regard for those in this
2 community and feels little about the consequences of his
3 crimes. Today I ask that rather this Court evidence in
4 his sentencing so that the defendant knows the full
5 impact of his crimes and the results of the pain he has
6 caused. This has been an extremely long and difficult 16
7 months for me and my family and my friends. I need to
8 start healing and moving on with my life. Knowing that
9 he could get off easy for what he's done to me only
10 victimizes me again. I want him to have a long time to
11 reflect on what he's done to me, so that I can have time
12 to heal.

13 THE COURT: Okay. Anything else from the State?

14 MR. NEWKIRK: Your Honor, I just want to make sure
15 that on the sentencing sheets, that I checked the correct
16 boxes. Both the kidnapping and the CSC are both violent
17 and most serious. I'm not sure if I checked the boxes
18 on ---

19 THE COURT: You did. What that essentially means is
20 that they're 85 percent sentences.

21 MS. HORLBECK: I believe so, yes, sir, Your Honor.

22 THE COURT: All right.

23 MS. HORLBECK: Thank you, Your Honor. I've had Mr.
24 Harbin as a client for approximately a year now. And he
25 has maintained his innocence the entire time. I thought

1 that we had some good issues and we pursued them
2 diligently and to the best of our ability. He is
3 supported here today by his entire family, in particular
4 his mother and his sister, and his uncle as well. And
5 he's got a great deal of support out there.

6 Again, he did maintain his innocence the entire
7 time, and I just -- that is why we -- we took the case to
8 trial. The original offer in this case was 15 years. ,
9 And as Your Honor knows whatever sentence he gets he will
10 serve 85 percent of it. And I just ask Your Honor to
11 consider the original offer of 15 years, or you know
12 maybe somewhere in the neighborhood of 20 years. Thank
13 you, Your Honor.

14 THE COURT: Mr. Harbin, do you have anything you
15 want to say before I sentence you?

16 MR. HARBIN: I just want to say I did not do this
17 crime. And one thing I learned is that the law is not
18 honest, because virtually that's probably what convicted
19 me, that Detective Fortner, he openly lied. He lied.
20 And that's all I have to say.

21 MS. HORLBECK: But Your Honor, we understand that
22 the jury has spoken.

23 THE COURT: You think -- are you saying he was not
24 truthful in his statements?

25 MR. HARBIN: No, sir, he was not. Even what he said

1 in his pretrial motion isn't what he said in the motion
2 of discovery. That man lied. And I think that what is
3 sealed my fate. I did not commit this crime. And I know
4 you have a duty to do, but I didn't do it, but ---

5 THE COURT: Okay. Well ---

6 MS. HORLBECK: Your Honor, we understand the jury
7 has spoken. We just ask you to consider the things that
8 I did mention.

9 THE COURT: The jury has spoken, and 12 citizens
10 unanimously have found -- there were two witnesses
11 that -- that testified in regard to the identification,
12 Mr. Harbin. That was the key issue in the case. And
13 there was never any question that she pointed the orange
14 outfit, that you admitted having.

15 It would be -- it's hard for me to believe that both
16 the victim and the independent witness who testified that
17 was -- she identified you, the black lady, it's just very
18 difficult for me to believe that they would -- that they
19 all three are not telling the truth, Mr. Harbin. The
20 jury apparently believed them. And that's their role and
21 not mine. The way the facts came out it's just a
22 horrible type of crime.

23 On the criminal sexual conduct and the kidnapping,
24 I'm going to sentence to him to the State Department of
25 Corrections for 30 years, concurrent, not consecutive.

1 I'll give him 15 years on the robbery, concurrent. Thank
2 you.

3 MS. HORLBECK: Thank you, Your Honor.

4 MR. NEWKIRK: Thank you, Your Honor.

5 (Court's Exhibit Number 4 was marked and filed.)

6 - - -END OF TRANSCRIPT OF RECORD- - -

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C E R T I F I C A T E

I, the undersigned Mary E. Sprague, 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 6th through the 8th day of September, 2005.

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

May 3, 2007



Mary E. Sprague

Official Court Reporter

006122

DOCKET NO. 2004-GS-23-

MLH

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

AUGUST TERM 2004

WITNESSES

FORTNER *h. fortner/s*

GCSO

06/04/04

THE STATE
GUILTY vs.

KEVIN LAMAR HARBIN

ARREST WARRANT NUMBER

1340767

ACTION OF GRAND JURY

TRUE BILL

James D. McShane
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

✓
0095

Indictment for

KIDNAPPING

VIOLATION § 16-3-910

GUILTY

Debra H. Harbin
Foreperson of Petit Jury
Date: *09/08/05*

419

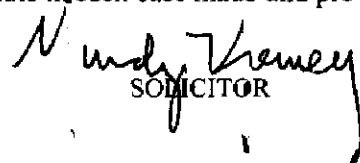
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
KIDNAPPING

At a Court of General Sessions, convened on AUGUST 17, 2004 the
Grand Jurors of Greenville County present upon their oath:

That KEVIN LAMAR HARBIN did in Greenville County, on or about the 12th day of May, 2004,
unlawfully seize, abduct, confine, inveigle, decoy or carry away Megan E. George, without the authority
of law. This is in violation of §16-3-910 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

DOCKET NO. 2004-GS-23-

MLH

006123

WITNESSES

The State of South Carolina

County of Greenville

FORTNER *for*

GCSO

06/04/04

COURT OF GENERAL SESSIONS

AUGUST TERM 2004

THE STATE

GUILTY

vs.

KEVIN LAMAR HARBIN

ARREST WARRANT NUMBER

I 340766

ACTION OF GRAND JURY

TRUE BILL

[Signature]
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Indictment for

0137

STRONG ARM ROBBERY

VIOLATION § COMMON LAW

GUILTY

[Signature]
Foreperson of Petit Jury

09/08/05
Date:

420

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

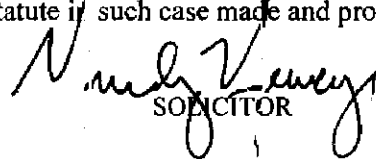
INDICTMENT FOR
STRONG ARM ROBBERY

At a Court of General Sessions, convened on AUGUST 17, 2004 the

Grand Jurors of Greenville County present upon their oath:

That KEVIN LAMAR HARBIN did in Greenville County, on or about the 12th day of May, 2004, feloniously take from the person or presence of Megan E. George at the Silver Closet, by means of force, threats or intimidation, goods or monies being described as follows: cash money with the intent to permanently deprive the owner thereof. 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

WITNESSES

Michael Fortner

Greenville County Sheriffs Office

6/4/2004

DOCKET NO. 2004-GS-23-006124

AMENDED INDICTMENT JDN

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

August TERM 2005

THE STATE

vs.

KEVIN LAMAR HARBIN

GUILTY

ARREST WARRANT NUMBER

I 340768

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

GUILTY

Foreperson of Petit Jury

Date:

Indictment for

0160

CRIMINAL SEXUAL CONDUCT FIRST DEGREE

VIOLATION § 16-03-0652

796

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

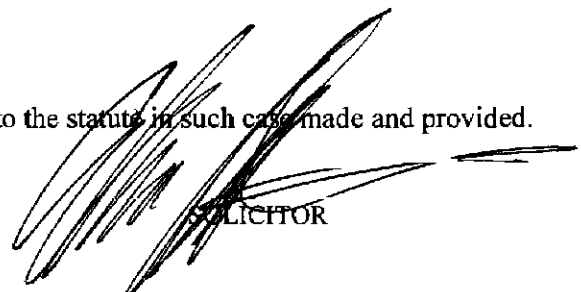
INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT FIRST DEGREE

At a Court of General Sessions, convened on August 23, 2005 the Grand Jurors of Greenville

County present upon their oath:

That KEVIN LAMAR HARBIN did in Greenville County, on or about the 12th day of May, 2004, engage in sexual battery, with Megan E. George, and used aggravated force to accomplish this sexual battery and/or the victim submitted to sexual battery committed by KEVIN LAMAR HARBIN, under circumstances where the victim is also victim of forcible confinement, and/or kidnapping, and/or robbery. This is in violation of South Carolina Code of Laws Section 16-3-652 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

344
STATE OF SOUTH CAROLINA
COUNTY OF Greenville
STATE VS.
Kevin Harbin

AKA:
Race: B Sex: M Age: 31
DOB: [REDACTED] SS#: [REDACTED]
Address: [REDACTED] STREET
WESTMINSTER, SC 29693
DL#: 999999999 SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2004GS2306122
A/W#: I340767
Date of Offense: 05-12-2004
S.C. Code § : 16-03-0910
CDR Code #: 0095

☐ CASE RESTORED
SENTENCE

☐ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Kidnapping / Kidnapping

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
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 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

days/hours Public Service Employment

Payment Terms:

☐ set by SCDPPPS

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:

Recipient:

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv Surcharge \$100 \$ 100

§ 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

§ 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 \$ _____

Paul B. Wicker
Clerk of Court/ Deputy Clerk

Court Reporter: Sprague

PRESIDING JUDGE

Judge Code: 2131315

Sentence Date: September 8, 2005

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.
Kevin Harbin

AKA:

Race: B Sex: M Age: 31

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED] STREET
WESTMINSTER, SC 29693

DL#: 999999999 SID#:

IN THE COURT OF GENERAL SESSIONS **345**

INDICTMENT/CASE#:

2004GS2306123

A/W#: I340766

Date of Offense: 05-12-2004

S.C. Code § : 16-11-0325

CDR Code #: 0137

☐ CASE RESTORED
SENTENCE

☐ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Robbery / Common law robbery, strong arm

in violation of § 16-11-0325 of the S.C. Code of Laws, bearing CDR Code # 0137

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.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 15 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.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fec: \$ _____

days/hours Public Service Employment

Payment Terms:

☐ set by SCDPPPS

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:

Recipient:

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv Surcharge \$100 \$ 150

§ 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

§ 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 \$ _____

Paul B. Wick
Clerk of Court/ Deputy Clerk

Court Reporter: *Spang*PRESIDING JUDGE *L.R. Bell*Judge Code: *2101515*Sentence Date: *September 8, 2005*

346
STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.
Kevin Harbin

AKA:
Race: B Sex: M Age: 31
DOB: [REDACTED] SS#: [REDACTED]
Address: [REDACTED] STREET
WESTMINSTER, SC 29693
DL#: [REDACTED] SID#: [REDACTED]

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2004GS2306124
A/W#: I340768
Date of Offense: 05-12-2004
S.C. Code § : 16-03-0652
CDR Code #: 0160

☐ CASE RESTORED
SENTENCE
☐ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct - First degree

in violation of § 16-03-0652 of the S.C. Code of Laws, bearing CDR Code # 0160

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
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 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

days/hours Public Service Employment

Payment Terms:

☐ set by SCDPPPS

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:

Recipient:

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv Surcharge) \$100 \$ _____

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35.13 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

§ 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 \$ _____

Paul B. Wick
Clerk of Court/ Deputy Clerk

Court Reporter: *Page*

PRESIDING JUDGE *L. R. Pitt*

Judge Code: *210315*

Sentence Date: *September 8, 2005*