CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JUN 23 1978
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

780214

OPAL MARIE HALE MCGHEE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPENDIX

John L. Gregory, III
Young, Kiser, Haskins, Mann,
Gregory & Young, Ltd.
60 West Church Street
Martinsville, Virginia 24112

Counsel for Appellant

J. Marshall Coleman,
Attorney General of Virginia
James T. Moore,
Assistant Attorney General
Supreme Court Building
Richmond, Virginia 23219

Counsel for Appellee

TABLE OF CONTENTS

	APPENDIX PAGES
INDICTMENT	1-2
EXCERPTS FROM TRANSCRIPT OF TESTIMONY	
TESTIMONY OF DR. DAVID W. OXLEY	3-9
TESTIMONY OF W. E. GIESLER	9-12
TESTIMONY OF SANFORD COOKE	12-15
TESTIMONY OF JAMES W. NESTER	16-28
TESTIMONY OF EARL L. STEELE	28-34
TESTIMONY OF OPAL MARIE HALE MCGHEE	34-57
TESTIMONY OF OPAL MARIE HALE MCGHEE (recalled)	58
TESTIMONY OF NOEL AUSTIN PRATER	59
ARGUMENT OF COUNSEL AND RULINGS OF TRIAL COURT	60-61
JURY VERDICT AND ARGUMENT OF COUNSEL	62-64
INSTRUCTION D	65
INSTRUCTION D(1)	66
INSTRUCTION 13	67
INSTRUCTION 14	68
INSTRUCTION 15	69
ARGUMENT AND RULING ON MOTION TO SET ASIDE VERDICT	70-78
FINAL JUDGMENT ORDER	79-80
ASSIGNMENT OF ERROR	81

INDICTMENT

COMMONWEALTH OF VIRGINIA :
COUNTY OF HENRY : TO-WIT:
IN THE CIRCUIT COURT OF HENRY COUNTY : CASE # 21,072

The grand jurors of the Commonwealth of Virginia, in and for the body of the County of Henry, and now attending the Circuit Court of said County, upon their oaths present:

COUNT ONE:

That OPAL MARIE HALE MCGHEE on or about the 22nd day of May, 1977 in Henry County, Virginia, did unlawfully and feloniously kill and murder one Ruben Anderson Boyles.

Va. Code 18.2-30

COUNT TWO:

That OPAL MARIE HALE MCGHEE on or about the 22nd day of May, 1977 in Henry County, Virginia, did unlawfully and feloniously use a firearm in the commission of a felony, to-wit: murder.

Va. Code 18.2-53.1

Upon the evidence of _____

_____

Witnesses sworn in open court and sent to the grand jury to give evidence.

OCTOBER TERM, 19 77

COMMONWEALTH VS. OPAL MARIE HALE MCGHEE

ON AN INDICTMENT FOR

COUNT ONE: MURDER
COUNT TWO: USE FIREARM IN COMMISSION OF FELONY

A TRUE BILL

James H. Mulgrew
Foreman

Case A

DR. DAVID W. OXLEY

~~MR. GREGORY: We would object to that particular picture.~~ I see no reason for that whatsoever. Dr. Oxley is here.

THE COURT: Do we have anything else that relates to the injury to the head? One will be admitted.

MR. REYNOLDS: That's all I intend to offer this morning.

THE COURT: This picture will be admitted and let me mark this. This picture shows the deceased and it shows the injury, it shows the partial decapitation, but it's the only picture that will be offered and the only picture that will be admitted that shows the injury. And this is being admitted over the objection of the defendant, so please--this is Commonwealth Exhibit A and please let the record show that the defendant objects and excepts to the admission of this particular picture on the ground that it would tend to inflame the jury.

IN COURTROOM

Opening statements not transcribed at this time.

The first witness for the Commonwealth, DR. DAVID W. OXLEY, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Would you state your name, please, sir?

A. I'm Dr. David W. Oxley.

Q. Dr. Oxley, by whom are you employed and what is your position of employment?

A. I'm a forensic pathologist, I'm employed by the Virginia State Health Department and I'm Deputy Chief Medical Examiner for Western Virginia.

Q. Did you have some special training before you became Deputy Chief Medical Examiner for the State of Virginia?

MR. GREGORY: Judge, I'll be happy to stipulate that he's an expert in the field of forensic pathology.

MR. REYNOLDS: Thank you, Mr. Gregory.

THE COURT: So be it.

Q. As a result of your occupation did you have reason to see the body of Ruben Boyles in the month of May, 1977?

A. Yes, I did.

Q. Where and when did you see the body?

A. At the medical examiner's morgue at Community Hospital in Roanoke. The body was delivered by Stone Funeral Home on 5/23/77 at 10:45 in the morning. The autopsy was performed the same day at 4:00 in the afternoon.

Q. All right. Doctor, would you describe what you found when you examined the body in question?

A. The body was that of a normally developed poorly nourished white male. The body at the time I received it was clothed, do you want the clothing described?

Q. No, sir, that won't be necessary.

A. The body was sixty-seven inches long and weighed an estimated one hundred thirty to one hundred forty pounds. There was a massive shotgun wound involving the head, the upper portion of the head down to the level of the eyebrows was missing, the brain had been completely evulsed or blown out of the cranial cavity. Examination of the internal organs revealed no significant pathologic changes of any of the internal organs of the body.

Q. Do you have a pathological diagnosis as to the cause of death of the deceased, doctor, as an expert in this area?

A. Yes. The cause of death was a shotgun wound to the head.

Q. Doctor, were you able to establish the point of impact

of the shotgun blast?

A. Reconstruction or attempted reconstruction of the remaining portions of the head indicated that the point of entry was probably in the area of the left temple.

Q. All right, sir. Doctor, did it come to your attention that a blood alcohol test was performed on the body of the deceased?

A. Yes, sir, blood was drawn and submitted for blood alcohol determination.

Q. What was the results of that test?

A. The blood contained .23 percent alcohol.

Q. All right, sir. Do you have a report that you have prepared in this case that includes that report as well as the autopsy?

A. Yes.

(Mr. Gregory examines report)

MR. REYNOLDS: If the Court please,we would offer those as Commonwealth Exhibit B.

THE COURT: So be it.

CROSS EXAMINATION - QUESTIONS BY MR.GREGORY

Q. Dr. Oxley, from your examination of the body, do you have an opinion as to what range the shotgun was fired from?

A. Less than ten feet.

Q. Are you able to determine any closer than that, could it have been as close as five feet?

A. It could have been as close as five feet, yes.

Q. Also, Dr. Oxley, you have testified that the blood alcohol content as was found in the deceased at the time of his death was .23 percent.

A. That is correct.

Q. In your expert opinion, what does that mean?

A. Well, of course the level of alcohol in the State of Virginia for presumptive intoxcation is .1. This is more than twice as high as that. Subjectively and objectively a person with a blood alcohol of this level would be quite intoxicated.

Q. It's not unusual to have a .3 blood test though, is it?

A. That's true.

Q. Now...

THE COURT: Point what, Mr. Gregory.

MR.GREGORY: Point 3, Your Honor, blood test.

THE COURT: Point 23?

MR. GREGORY: This is .23, but I say it's not unusual even to have .30 blood test, is it.

THE COURT: Is it unusual to have a blood alcohol content of .30.

MR. GREGORY: Of as much as .30, yes, sir.

THE COURT: Your question was, is it unusual to have one that high?

MR. GREGORY: Yes, sir.

THE COURT: All right, go ahead.

Q. It's not unusual, is it?

A. In my practice it's not unusual.

Q. Now, with a blood alcohol content of .23, is a person normally able to walk and talk and things of that nature even though they may be impaired in that?

A. With a good deal of impairment, yes.

Q. All right. Is the, what about, what mental effect in your experience would .23 blood test have on a person?

A. Well, it could have any of a wide range of mental effects depending on a person's personality when he was sober.

Q. In other words, if a person is, it is not unusual for a

person with a .3 blood test to become belligerant, is it?

A. No, it's not unusual, no.

RE-DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Doctor, that would depend on the individual, though, wouldn't it?

A. It would depend on the individual, basic personality type. Yes.

Q. If I understand what you're saying, that there would be no way that you could relate the blood alcohol content that you found the deceased to have with what his activity might have been on this occasion.

A. Not in terms of his personality, no.

Q. Right. Thank you.

RE-CROSS EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Dr. Oxley, in regard to the blood test also, it's true is it not that a person who drinks frequently would probably have more mobility and possibly to be able to mask the effects of this alcohol better than someone...

A. People who are habitual drinkers become more able to hide the, the signs of intoxication, yes.

Q. And as I understand your response to the question Mr. Reynolds asked you, you're simply not able to determine what the effect on this particular man was, whether he was belligerant or whether he was, ah, passed out.

A. That's correct.

Q. Dr. Oxley, if a, I believe it will become in evidence later from some of the police officers as to this woman's condition when they talked with her, that she was very talkative, that she on occasion made a laugh or something to that effect, is this

unu--are these unusual effects for shock?

A. For shock, after mental trauma? I would say not, but I'm not an expert in that field.

MR. REYNOLDS: If the Court please, I would object to the question and I think Dr. Oxley...

THE COURT: I'm not sure that I followed the question.

MR. REYNOLDS: I'm not sure that I did either...

MR.GREGORY: If the Court please, my question basically was later police officers will testify as to the condition of this woman when they talked with her immediately after this, after this (two words unintelligible) and they will testify as to what her condition was at that time. Basically they will say that she was very talkative, that she, she had a nervous laugh, something to that effect. I simply asked Dr. Oxley here if these were unusual side effects for a state of mental shock, and that's all.

MR. REYNOLDS: If I understood his answer correctly, his answer was that that's not an area he's qualified to give an answer in.

THE COURT: That was his answer. That's correct, isn't it, Doctor?

A. That's correct.

THE COURT: Right. Thank you. Any further questions, Mr. Gregory?

Q. Dr. Oxley, in your medical practice, you are an MD, are you not?

A. Beg pardon?

Q. You are an MD, are you not?

A. I am.

Q. Now, do you feel that you're not qualified to speak on--you know what the physical effects of shock are?

A. The physical effects, yes. The psychological effects could have a whole wide range of psychological spectrum which I don't feel qualified to discourse about.

The next witness, W. E. GIESLER, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Would you please state your name, sir?

A. W. E. Giesler.

Q. Mr. Giesler, where do you live, sir?

A. Morgan Ford Road, Route 2,

Q. Is that in Henry County?

A. Yes.

Q. Do you know the defendant in this case, Mrs. McGhee?

A. Yes.

Q. How long have you known her?

A. Approximately three years, I suppose.

Q. Did you know the deceased, Mr. Ruben Boyles?

A. Yes.

Q. How long had you known Mr. Boyles?

A. Oh, I'd say ten, fifteen years.

Q. Did he live in the same vicinity that you did?

A. I would say about a quarter of a mile or a fifth, around there.

Q. Somewhere between a quarter and a fifth of a mile away from your house?

A. Yes.

Q. Would you tell the Court please where your house is located with regards to Bethel United Methodist Church?

A. It's about, say five hundred yards from the church toward Smith River.

Q. Did you have reason to see the defendant in this case on May 22nd, 1977?

A. Yes.

Q. Where did you see her?

A. At our door, home door.

Q. Do you recall the approximate time it was when you saw her?

A. I would guess 9:00 o'clock, I really don't know.

Q. Do you recall whether it was light or dark at that time?

A. I believe it was dark.

Q. All right, sir. Would you relate, please, what happened on this occasion?

A. Well, Opal came to the door and knocked and I went and she said she had shot Ruben. What must she do. I told her we would have to call the police. We did call the police and asked them to send an ambulance because I did not know what sort of condition Ruben was in. And then Opal went out on the porch and waited for the police and ambulance.

Q. What was her condition with regards to being drinking or not drinking on this occasion?

A. I would say she'd been drinking.

Q. Could you, were you able to understand her when she talked?

A. Yes.

Q. Did she have any difficulty walking?

A. I didn't detect it but I didn't see her walk that much.

Q. Did she, did you see any injury, any hurts, to her?

A. No.

Q. Approximately how long were you there on this occasion with her?

A. I suppose it took twenty minutes for the rescue squad and police to get there, just estimating the time.

Q. Mr. Giesler, do you know where the defendant herself lived at this time?

A. Yes.

Q. Where did she live?

A. I mean, uh, well, I don't know how to tell you. It was a small house off the main highway down in the woods sort of.

Q. Is this the same house that Mr. Boyles lived in?

A. Yes.

Q. Did anyone else live there other than the defendant and Mr. Boyles?

A. Not that I know of.

Q. All right, sir. Do you know approximately how long she had been living with the defendant, with the deceased, I'm sorry?

A. No.

CROSS EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Mr. Giesler, it's a fair statement on this occasion that you could tell that she had been drinking but she was not drunk. Is that correct?

A. I--you know, there's all sorts of fine lines, I would say yes.

Q. All right. Now, during the period of time that she was there at your house that night, did, did you and she discuss how the crime itself occurred, how the, how the shooting occurred?

A. Well, uh...

Q. Did she tell you why she shot him?

A. Yes, I asked her...

Q. What did she say?

A. Well, I asked her why she shot him and she said that he was beating on her and calling her an SOB.

RE-DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Mr. Giesler, did you see any sign there that would indicate that she had been beaten?

A. No.

RE-CROSS EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Mr. Giesler, did you look for any signs that she had been beaten?

A. No.

Q. Did you at any time look at her legs?

A. No.

The next witness, SANFORD COOKE, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Would you state your name, please, sir?

A. Sanford Cooke.

Q. Mr. Cooke, where do you live, sir?

A. Down at Axton, Route 3.

Q. Do you know Mr. Giesler, the witness that just testified?

A. No, sir.

Q. Did you see him on May 22nd, 1977?

A. Yes, sir, I did.

Q. Where did you see him?

A. At his home on State Route 622 in Henry County.

Q. Approximately what time did you arrive there?

A. Approximately 9:30.

Q. Is that am. or p.m.?

A. P.m.

Q. Do you recall whether it was light or dark when you got there?

A. It was dark.

Q. All right, sir. Was there any other police officer with you on this occasion?

A. No, sir, there wasn't.

Q. Was there any police officer there when you arrived?

A. No, sir, it wasn't.

Q. All right, sir. Did you see a police officer there after you arrived?

A. Yes, sir. One pulled in the driveway after I did.

Q. Had you gotten out of your car?

A. Yes, sir.

Q. Had you seen the defendant at that time?

A. Yes, sir, I had.

Q. All right, sir. Would you describe her appearance and condition when you saw her?

A. Yes, sir. When I got out of the car she met me and she had a strong odor of alcohol on her breath. Her clothes were disarranged. She, she didn't seem drunk to me but she had been drinking. And she walked up to me and stated he won't call me a ugly SOB no more.

Q. He won't call me...

A. An ugly SOB no more.

Q. Did you ask her--had you asked her anything, was this, how did this come about that she said this to you?

A. She just walked up to me, I hadn't asked her the first question and she spoke that to me.

Q. All right, sir. Did you notice other than the alcohol

did you notice anything else about her appearance and condition? Did she have any injuries?

A. No, sir.

Q. Any bruises or red places on her anywhere?

A. No, sir, I didn't see none at all.

Q. Did you interrogate the defendant at all?

A. No, sir, I didn't.

Q. All right, sir. Did you see the body of Ruben Boyles on this occasion?

A. No, sir, I didn't.

Q. Did you go down to the house where the body was found?

A. Yes, sir.

Q. Where was the house located?

A. It was aporoximately, I'd say five hundred yards from Mr. Giesler's house up above it on a dirt road.

Q. Located in Henry County?

A. Yes, sir.

Q. What kind of house was this, do you recall?

A. Just a old frame house, weatherbeaten. Two or three rooms.

Q. All right, sir. Did you interrogate the defendant at any time?

A. No, sir, I didn't.

Q. Did she say anything to you at any time other than he won't call me an ugly SOB anymore?

A. No, sir.

Q. How did you get down to the house, who told you where the house was?

A. She got in the car with Officer Nester and he, when he

arrived there after I did, and she got in the car with him and I followed her and Officer Nester down to the house.

Q. Was Officer Nester the police officer that arrived just after you arrived?

A. Yes, sir.

CROSS EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Where did you talk with Mrs. McGhee?

A. It was in the yard of Mr. Giesler's.

Q. Was it dark when you arrived?

A. Yes, sir, but he did have a night light.

Q. Did you actually examine her for marks of any kind?

A. No, sir.

Q. Now you've already indicated that you didn't ask her any questions.

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

Q. So you didn't ask her why she shot him?

A. No, sir.

THE COURT: May I ask you why you didn't ask--were you in uniform, were you investigating this?

A. I was called to back-up Officer Nester, he was assigned to it.

THE COURT: As a matter of information, would you tell me why you didn't ask her questions, was that not your duty?

A. Yes, sir, I'd only been working for a month and a half at the Sheriffs Department at that time.

THE COURT: I see. All right, thank you.

The next witness, JAMES W. NESTER, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Would you state your name, please, and occupation?

A. James W. Nester, Deputy Sheriff, Henry County.

Q. Officer Nester, were you working on May 22nd, 1977?

A. Yes, sir, I was.

Q. Do you recall the day of the week this was?

A. It was a Sunday night, I believe.

Q. Did you see the defendant, Mrs. McGhee, on this occasion?

A. Yes, I did.

Q. Where did you see her?

A. First it was at the home of W. E. Giesler on 622 in Henry County.

Q. All right, sir. Approximately what time was that?

A. It was approximately, ah, about twenty minutes after 9:00 p.m.

Q. Would you state whether or not there was any police officer other than you there when you arrived?

A. Deputy Cooke from the Henry County Sheriffs Department.

Q. Other than you and Deputy Cooke, who else did you see on that occasion?

A. Mr. Giesler there at his house and, ah, also there was an ambulance from the Ridgeway Rescue Squad but nobody got out of it.

Q. All right, sir. Did you see the defendant there?

A. Yes, I did.

Q. Where did you see her?

A. She was standing on the front porch, stepped down in the

driveway when we pulled up into the driveway of the Giesler home.

Q. How long were you with the defendant on this occasion?

A. There at the house she got into my car and gave me directions, showed me the way, to another house just off of 622 where she and, showed me where Ruben Boyles was, the time period would have been from the time we left there until we got to the house, maybe ten minutes at the most.

Q. All right, sir. And how much of that was spent inside your car?

A. Well, it probably wasn't quite ten minutes, just the entire time from the time I arrived, ah, and Mr. Giesler related to me what had happened and I put her in my car and she said she would show me the way back down to the house. And it's not but just, maybe several hundred yards back up 622 and then down a dirt road to the house where Ruben was.

Q. All right, sir. So she told you how to get down there?

A. Right.

Q. Was there anyone else in the automobile other than you and she when you drove down to the house...

A. Just the defendant and myself.

Q. All right, sir. How would you describe the house in question?

A. The Giesler home or...

Q. Where you found the body of Mr. Boyles.

A. It was a three room house with asbestos siding, the doors were locked, there was a window on the front from the direction that we pulled up that was open from the top.

Q. Let me interrupt you just a minute, please, sir. Is this home located in Henry County?

A. Yes, sir, it is, off of 622.

Q. Is it visible from Mr. Giesler's home?

A. No, sir.

Q. All right, sir. Now you've testified I believe that the defendant showed you the way down there?

A. Yes, sir.

Q. Had you ever been to that home before?

A. No, sir.

Q. Would you tell the Court please what happened after you arrived there?

A. As soon as I pulled up in front of the house the defendant, Opal McGhee, jumped out of my car and ran up to this open window on the front of the house and jumped up in the window, climbed back in the window and opened the door from the inside for me to come in.

Q. All right, sir. Did she have any difficulty climbing the window, getting into the house?

A. No, sir.

Q. Officer Nester, have you seen these two pictures, Commonwealth Exhibit D and Commonwealth Exhibit E.

A. Yes, sir.

MR. REYNOLDS: If the Court please, we would offer these as Commonwealth Exhibits D and E.

THE COURT: Any comment, Mr. Gregory?

MR. GREGORY: No, sir.

Q. Does this appear to be a picture of the house that you described as a three room frame dwelling?

A. Yes, sir, it is.

Q. All right, sir. Would you point out as shown in Commonwealth Exhibit D the window you're talking about that the defendant climbed into?

A. This is the one here, it's open from the top.

Q. We should point it out to the jury. You indicated this window here?

A. Yes, sir.

Q. Was that, is that in the shape it was when she climbed in there?

A. Yes, sir, it is.

Q. All right, sir. Now where did she go after she climbed in the window?

A. When she climbed in this window, there's a door that you can see in the background here. She went through that door and then turned right and came back into this room, opened this door here for me to come in.

Q. All right, sir. I'm showing to you now Commonwealth Exhibit E. Does that appear to be a picture of the door through which you went to get into the house?

A. Yes, sir.

Q. All right, sir.

MR. REYNOLDS: If the Court please, we would offer these?

MR. GREGORY: I have no objection, Your Honor.

Q. Would you describe, please, what you found when you went into the house?

A. When I went into the house, I went into the back bedroom of the house. I found the body of Ruben Boyles laying at the foot of the bed and he had been shot one time or had been shot, and I asked Opal to come back outside. Took her back outside. And to my car. And then called the office and asked for the investigators to be sent.

Q. I believe Officer Steele came down there?

A. Yes, sir.

Q. Was the body still there when Officer Steele arrived?

A. Yes, sir, it was.

Q. All right, sir. Now, at some point in time did you interrogate the defendant?

A. After coming back outside I advised the defendant of her rights. From a card that I carry with me, that most of the deputies carry with them at all times so that...

THE COURT: Any question about...

MR. GREGORY: I have no question about that.

Q. Did you advise the defendant on this occasion of her rights from that card?

A. Yes, sir, I did.

Q. All right. Did she indicate whether or not she understood her rights?

A. Yes, sir, she did.

Q. Did you tell her what you were talking with her about?

A. Yes, sir, I did, and I explained to her what was going on and asked her if she understood and she explained to me, she stated to me that she did and that there wasn't anything for her to do but to tell the truth.

Q. Did you tell her that you were talking with her about the killing of Mr. Boyles?

A. Yes, sir, I did.

Q. All right, sir. Did she make a statement to you on that occasion?

A. She, ah, she made a statement to me immediately after that explaining, she had been making the same statement over and over from the Giesler home down in the car and...

Q. Had that been in response to any questions that you had asked her?

A. No, sir. Not--I didn't ask her any questions at all until after she had given me part of this statement and I asked her if Ruben had had a gun or anything.

Q. What did she say to you then as you came down the road there?

A. She repeated the same, basically the same statement over and over agin. She stated that she and Ruben had been arguing and that Ruben called her a son of a bitch. Opal said she told Ruben that she couldn't be a son of a bitch because her mother was dead. She stated she picked up a shotgun from the side of the bedroom window in the same room where Ruben was found and pointed at Ruben's head. Opal said that Ruben told her, said you won't shoot me, said I know it won't go off or you won't shoot me. And she said she pulled the trigger and she said blooey, blood and brains went everywhere. And then she laughed and said he won't call me no son of a bitch no more. And that's when I asked her if Ruben had a gun or a knife or anything or was threatening her when she pulled the trigger.

Q. What did she say in response to that?

A. She said no.

Q. Said he had not threatened her or had any kind of weapon of any kind?

A. That's correct.

Q. All right, sir. What else did she say to you there if anything?

A. She told me that she had climbed out the window, the same window that I saw her climb back in, out the kitchen window, and in the process she knocked a considerable amount of stuff off on the floor, she had shown me when we first went in the house, and

she walked to the home of Mr. Giesler and had Mr. Giesler call the Sheriffs Office.

Q. All right, sir. Now were you there at the scene until Officer Steele arrived?

A. Yes, sir, I was.

Q. Did anyone else go inside the house before Officer Steele arrived?

A. One member of the rescue squad walked in with me, looked at the body and turned and walked out.

Q. Other than that, did anyone else go inside?

A. No, sir.

Q. Did you notice whether or not there were any weapons in the house when you went in, Officer Nester?

A. There was, beside the bedroom window, it would be on the back side of the house, there was a shotgun, a bolt action shotgun on the left side of the window. There was some type of rifle on the right side. And in the corner was a pump action shotgun, I'm not sure what gauge it was.

Q. All right, sir. Officer I'll show to you Commonwealth Exhibit A. Does this appear to be the body of Mr. Boyles that you saw in there that night?

A. Yes, sir.

MR. REYNOLDS: If the Court please, we would offer this as Commonwealth Exhibit A.

Q. Officer Nester, does this--how many weapons did you say you saw in the house on this occasion?

A. I believe there were three.

Q. Does this Commonwealth Exhibit F appear to be a picture of those three weapons?

A. Yes, sir.

Q. Is that the position that you found them in when you arrived there?

A. Yes, sir.

Q. Do you recall which of these was the bolt action shotgun?

A. This was a Marley bolt action goose gun, it's a regular--rather large shotgun with an extra long barrel.

Q. It's the one on the left there near the chair with the Schlitz can in it?

A. Yes, sir.

Q. All right, sir.

MR. REYNOLDS: If the Court please, we would offer these all for the jury.

Q. All right. Now Officer you testified there to something that I want to make sure that we've got an understanding about. Would you relate, please, again what the defendant's conversation was with you about what happened after she got the shotgun and said that she would kill the defendant?

A. She said she picked up the shotgun and pointed it at Ruben's head. Opal said Ruben told her that he knew that she would not shoot him. So she pulled the trigger. She stated to me that the gun went off and blooey, blood and brains went everywhere. She then laughed and said he won't call me no son of a bitch no more.

CROSS EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Officer--first let me ask you something about this picture. Referring to Commonwealth Exhibit F. You pointed out the three shotguns in this picture. There's a window between two of the shotguns. Is that the window that she was crawling in and out?

A. No, sir. This window is on the back side of the house.

Q. All right. Was the body found in this room?

A. At the foot of this bed. It was lying at the foot of the bed, his feet were just barely sticking out past the edge of the bed when you came in the door from this side. His head was laying pretty near the post on this end of the bed.

Q. All right. Do you know--now you've testified that there were three guns in this room. Do you know how many guns there were in the rest of the house? Did you have occasion to look?

A. No, sir, I don't.

Q. OK. Now you testified as to a conversation that you had with this lady right here. Was that conversation taped?

A. The first conversation that I had, no, sir, It was not.

Q. Did you take notes there at the time?

A. Yes, sir.

Q. At the time? You were taking notes while she was talking to you?

A. No, after it was all, after Captain Steele had got there and after I got back to the office I made up this note that I have here on that.

Q. This was after you got back to the office then that you made up those notes?

A. Yes, sir.

Q. Were those notes made before or after she was questioned, when you and Officer Steele questioned her?

A. I typed this up after Captain Steele...

Q. After Captain Steele had talked to her?

A. Correct.

Q. Now you were present when Officer Steele interrogated her, were you not?

A. Yes, sir.

Q. That conversation was taped?

A. Yes, sir, it was.

Q. Isn't it true that at that time she stated, he kicked me and he slapped me and I said don't do it any more, Ruben? I said my mother and father is dead, I said you think I won't kill you, and that's what I said to him, so he slapped me and he hit me again.

MR. REYNOLDS: If the Court please, Earl Steele is the next witness and he will testify fully of that interview.

THE COURT: I gather that Mr. Gregory is asking...

MR. REYNOLDS: There won't be any issue about whether or not that was said. That will be Officer Steele's testimony that...

A. That was something that she kept, she repeated several times. She did in the taped statement, she did in the car from the Giesler's house down to her house and there after I had viewed the body.

RE-DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Officer Nester, how long with you with the defendant on this occasion?

A. Before Captain Steele arrived I would say twenty minutes, twenty, twenty-five minutes, approximately.

Q. All right, sir. After Captain Steele arrived how long were you with the defendant on this occasion?

A. Long enough to go from the scene back to the magistrate's office to, where Captain Steele swore out the warrants and then to the Sheriff's Office where she was, she gave a statement which was taped. A time period of an hour to an hour and a half.

Q. During this period of time was she where you could see her?

A. Yes, sir.

Q. Did you see any bruises, any red marks, or any injuries to her of any kind?

A. No, sir, I didn't. Not, she didn't relate anything to me to begin with about him assaulting her in any way. She did, after we got at the Sheriff's Office she said something about him hitting her but she didn't have any visible bruises or anything that I could see or any signs of a fight or anything.

Q. When she made the first statement to you at the house, did she make any comment at all about the deceased beating her or striking her in any manner?

A. No, sir, she did not.

RE-CROSS EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Officer, did you ask her whether he beat her?

A. No, sir. The only question that I actually asked her was did he have a gun or a knife or anything like that.

Q. All right. And she stated that he did not.

A. She simply answered no. And then I didn't ask her any further questions.

Q. In your statement...

MR. REYNOLDS: If the Court please, there was more to what he asked her than that.

MR. GREGORY: If the Court please, he's testified as to what he asked her.

MR. REYNOLDS: He did not have time...

MR. GREGORY: I don't think Mr. Reynolds has a right to testify in this case.

THE COURT: Mr. Reynolds is not testifying. I'd like for this officer to elaborate on the questions that he asked of her and her answer.

MR. REYNOLDS: The only thing I was trying to say, Your Honor,

was that Mr. Gregory cut him off before he answered the question completely.

THE COURT: All right. Let's repeat the question and give the officer full opportunity to answer it.

Q. Officer, in questioning her, what was the question, the one question that you asked her?

A. I asked her after she had related to me what happened, I asked Opal if Ruben had a gun or a knife, anything, or if he had threatened to get one, when she shot him. And she stated no.

Q. Did you ever ask her if he was beating her at the time this took place?

A. No, sir, I did not.

THE COURT: Did she ever tell you that he was beating her at the time that she shot him?

A. No, sir, she did not.

Q. Officer, you've just stated that you were present when she was being questioned by Officer Nester.

MR. REYNOLDS: This is Officer Nester.

A. At the time that I was by myself with her, before Captain Steele arrived, she never did relate to me that she had been beaten or anything. She did in the taped statement which under the questions that Captain Steele asked her.

Q. All right. And in that statement that's when she stated he kicked me and he slapped me and I said don't do it any more, and ends up, so he got up and was going to make the last lick so I shot him.

A. That's correct.

Q. So she did make that statement?

A. That was at the office when Captain Steele was interrogating her.

Q. Approximately how long was that after you arrived on the scene?

A. I arrived at the scene approximately 9:30 or 9:35.

Q. And this was before midnight that you talked to her, wasn't it?

A. Just before midnight, I think, or right around, very close to midnight.

Q. Had she talked with anyone besides Mr. Giesler and police officers, to your knowledge?

A. To my knowledge, no. She gave a statement at the office at, immediately after 11:50 p.m.

The next witness, EARL L. STEELE, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Would you state your name and occupation for the record, please, sir?

A. Earl L. Steele. I'm a captain of investigation in Henry County Sheriff's Department.

Q. Officer Steele, did you see the body of Ruben Boyles on May 22nd, 1977?

A. Yes, I did.

Q. Where did you see it?

A. At Ruben Boyles' home which is located off of State Route 622, which is known as the Morgan Ford Road.

Q. Is that in Henry County?

A. Yes, it is.

Q. What time of the day or night did you arrive there?

A. It was approximately 10:00 p.m.

Q. Do you recall the day of the month this was, I mean the day of the week this was?

A. No, sir, I don't.

Q. Who else was there when you arrived?

A. Officer Nester was there, and Officer Cooke.

Q. Did you see the defendant, Mrs. McGhee, there?

A. Yes. She was sitting in Officer Nester's car when I arrived.

Q. All right, sir. Would you describe the residence you saw the body in?

A. Yes. It was a brick veneered, or brick siding, one storey, home, three room home.

Q. The exhibit shown in this case, Commonwealth Exhibit D and Commonwealth Exhibit E, do these appear to be pictures of the home in question?

A. Yes, sir.

Q. All right, sir. Did you see the body of Mr. Boyles?

A. Yes, I did.

Q. Where was that in the home?

A. It was laying, the body was lying at the foot of the bed in the bedroom.

Q. Officer Steele, does this, Commonwealth Exhibit A appear to be a picture of the body of Mr. Boyles?

A. Yes, sir.

Q. Would you describe the injury to him that you saw there?

A. Yes. The whole top of his head had been blown off.

Q. Did you find any weapons there at the house?

A. Yes, there were three weapons in the bedroom there. There was a 16 gauge pump shotgun and there was a 22 rifle and a 12 gauge Marlin goose gun they call it.

Q. Do you have the 12 gauge Marlin goose gun here today?

A. Yes, I do.

(The shotgun, shells and clip are brought into Courtroom)

Q. Officer, have you seen this shotgun and these shells and this clip before?

A. Yes, sir. This clip was in the gun. It had two full 12 gauge shells in it, one spent 12 gauge cartridge in the barrel.

Q. The other two weapons that you've described, were they loaded or unloaded?

A. They were unloaded.

Q. Were there any firearms in the house other than those three weapons?

A. I did not see any more.

Q. Did you look for more than that?

A. No, sir, I didn't.

Q. All right, sir. Are the three firearms in question shown in this picture, identified as Commonwealth Exhibit F?

A. Yes, sir. This is the 12 gauge Marlin goose gun.

Q. This is the weapon you have here?

A. That's correct.

Q. Where was the body of Mr. Boyles found with regards to the bed?

A. The body was laying, this is the head of the bed here, the body was laying just at the foot of the bed.

Q. Officer, in Commonwealth Exhibit A, does this appear to be the foot of the bed?

A. Yes, sir. That photograph was taken standing up on the bed looking down.

Q. All right, sir. You were standing there on the bed when that picture was taken?

A. Yes.

Q. All right, sir. Now did you see the defendant, Mrs.

McGhee, there at that time?

A. Yes, I did.

Q. Did you subsequently make an interrogation of her?

A. Yes, I did.

Q. Where did this interrogation take place?

A. It was at the Sheriff's Office.

Q. Have you provided Mr. Gregory with a copy of that?

A. I have.

Q. Interrogation. Who else was present when that interrogation took place?

A. Opal Marie McGhee and Officer Jimmy Nester and myself.

Q. All right. Did you make a recording of that interrogation?

A. I did.

Q. And has that been transcribed and do you have a copy of that, the original transcription there today?

A. I do.

Q. All right, sir. Would you please read that to the jury, sir?

A. Yes. This is dated May the 22nd, 1977, 11:50 p.m. I have already advised Mrs. McGhee of her constitutional rights and she signed a waiver of rights. I told her I was going to question her with reference to the shooting that happened up there earlier that night. And I told her to go ahead in her own words and tell me what happened. She said I rode his lawn mower up to his mother's and mowed part of the grass up to his home. We came back and he said he'd lost the keys to the house. This is the front door. So he jerked the window out and went in from there and went through the window. He said you son of a bitch, she's the one that had

the house keys. I said Ruben don't call me a bitch, don't call me no son of a bitch. And he kicked me and slapped me and I said don't do it no more. I said my mother and father is dead, I said you think you won't kill you. That's what I said to him. So he slapped me, slapped and hit me again. I said Ruben, don't do it. So he got up and was going to make the last lick so I shot him. I asked her what she shot him with, she said a 12 gauge. I asked her a 12 gauge shotgun and she said correct. I said do you know where you hit him at with the shotgun. She said yes, I know where I hit him, I meant to kill him. I asked her, I said you meant to kill him. She said yes. I asked her did you know where the shot hit him. She said yes, the side of the head. I asked her was he standing up, sitting down or standing up. She said that he was standing up. I asked her was she standing up too. She stated yes, I was standing up. I asked her did it happen right there in the bedroom. She said yes, right where he was lying. I asked her where the gun was at. She said it was setting right back there beside the window. I asked her behind the bedroom, she said yes. I asked her did he ever say anything to you after you shot him. She stated not a word. I asked did he fall right then. SHe said yes. I asked her then what did you do. She said who, me. I said yes. I sat there and looked at him, she stated. I asked her what did she think. I said well, he's dead, that's all I thought, so I crawled back and got up on the table and came out the window. I didn't bring any cigarettes or nothing, I came up there and called you all. I asked her where she went to. She said Geesleys. I said Mr. Geesleys. She said yes. I asked her did Ruben live there at the house. She said yes, we both lived there. She said off and on. She said sometimes she had five younger sisters and my daughters would come up here and stay some time like Mothers Day.

I asked her how long she'd been living up there with you. She said going on seven years. I asked her when you picked up the gun what did he say. She said I don't believe, Opal, you'll kill me. And that's when you shot? Yes. I asked her had any threats been made on her, any promises, she stated no.

MR. REYNOLDS: If the Court please, we would offer this as Commonwealth's Exhibit G.

Q. Officer Steele, what was the appearance and condition of the defendant during the time that you were present with her on this occasion?

A. She appeared to have been drinking.

Q. Did she have any injuries?

MR. GREGORY: If the Court please, I object to that. I think the only thing that he can answer is whether or not he saw whether she had any injuries.

MR. REYNOLDS: Of course, that's what I mean, Your Honor.

Q. Did she have any injuries that you saw?

A. No, sir. None visible.

Q. Did she have any bruises or any red places on her face or anywhere else that you saw?

A. No, sir.

CROSS EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Officer Steele, did you examine her legs or her body or anything of that nature?

A. You could see her legs while she was sitting there in my office but I didn't notice any.

Q. She had on slacks, didn't she?

A. No, she had on--she was bare footed.

Q. I know she was bare footed but she had on slacks, didn't she, Officer Steele?

A. I don't recall whether she had on slacks or not, but they were pulled up. She didn't have any shoes on.

Q. Officer Steele, I know she didn't have shoes on. What I'm asking you is if she had slacks on?

A. I don't recall the slacks or dress, but they were pulled up where you could see the calf of her leg.

Q. Half a leg. You mean up to her knee?

A. Yes.

Q. Officer Steele, did you go back the next day to determine if any bruises were there?

A. No, I did not.

MR. REYNOLDS: That's the evidence for the Commonwealth, Judge.

The first witness for the defense, OPAL MARIE HALE McGHEE, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. GREGORY

Q. I want you to speak loud enough so that I can hear you because if I can hear you then all the members of the jury can too. All right. You're Opal McGhee?

A. Yes.

Q. How old are you, Opal?

A. Forty-two.

Q. How far did you get in school?

A. Seventh.

Q. Seventh grade?

A. Yes.

Q. Did you complete the seventh grade?

A. No, sir.

Q. All right. So the highest grade that you finished, then, was sixth grade?

A. That's right.

Q. All right. Now, Opal, it's in evidence that you were, that you admitted living with Ruben Boyles. For what period of time did you live with him?

A. Well, I didn't stay there all the time.

Q. Well, how long had you been staying there off and on?

A. Well, I'd been down there about the last time about close to a month, 'cause I'd planted a garden.

Q. All right. For what period of time had you been staying down there on and off? Had you known him for a period of time?

A. Yes, going on seven years.

Q. Going on seven years?

A. Yes.

Q. All right. Now, Opal I want to call your attention to May 22nd. Where had you been earlier in the day? What had you--had you been staying with Ruben then?

A. Well, I had been down there pretty close that time about a week, I'd say.

Q. All right. And what did you and Ruben do on the 22nd, the day that this happened?

A. We went out to his mother's and mowed some grass.

Q. You went up to his mother's and did what?

A. Mowed grass.

Q. All right. How did you get out to his mother's?

A. On a riding mower.

Q. All right. Did you drive the mower or did Ruben?

A. I did.

Q. All right. What time did you arrive at his mother's?

A. Oh, it was approximately about 10:30 I'd say or something.

Q. In the morning?

A. Yes, sir.

Q. All right. What time did you leave there, if you recall?

A. Well, that was about, I'd say between 6:00 or 7:00 o'clock, something like that.

Q. All right. Had any trouble developed between you and Ruben while you were there at his mother's house?

A. No, sir.

Q. OK. Had you all had anything to drink?

A. Yes.

Q. This was a Sunday, was it?

A. Yes, sir.

Q. All right. What had you all had to drink?

A. Beer.

Q. All right. Were you drunk?

A. Well, I had drank some beer but I wasn't drunk.

Q. You weren't drunk?

A. No, sir.

Q. And when you--how did you get from his mother's house back to the house where you and Ruben were staying?

A. Well, it was three women up there from Richmond having their fortunes told and we rode part of the way back down the road with 'em and then we got out and walked the rest of the way.

Q. All right. What happened when you got back to the house? Where you and Ruben were staying?

A. He accused me of having the house key to the front door and I said no, Ruben, I don't have 'em. I said you put 'em in your pocket. And so he up and slapped me. He said yes, you do have 'em. And I said no, I don't. So he jerked the window out and we went in the house.

Q. He did what to the window?

A. Jerked the top to the window out.

Q. All right. Did both of you all go in the window then?

A. Yes, sir.

Q. All right. What happened when you got in the house?

A. Well, that's when he started kicking and beating on me and jarring me against the wall, my head against the wall.

Q. Why--did he explain to you why he was doing this, did he tell you why he was beating you like he was?

A. Thought I had the keys.

Q. All right. Did he ever beat you like this before?

A. No, sir?

Q. Has he ever beat you before?

A. Yeah, he had slapped me before and all.

Q. Never like this?

A. No, sir.

Q. Describe for the jury, if you would please, just how he was beating you.

A. Well, he was kicking me and he had on these safety boots where you wear in the mills, steel, I don't know what they have in the toes. And he me by my arm hitting me against the wall and kicking me all at the same time. And it just scared me to death. I thought he was going to kill me. So I asked him please not to do it no more. So he up and kept on and I told him, I says Ruben, I'm going...

Q. Let me stop you right there, Opal. You said that he was hitting you?

A. Yes, sir.

Q. Was he hitting you with his hand?

A. Yes, sir.

Q. Was his hand open or closed?

A. No, it was open.

Q. He was slapping you?

A. Yes.

Q. All right. Where was he kicking you?

A. On my legs.

Q. What part of your legs?

A. The left and the right one.

Q. Upper part or lower part of your legs?

A. The top part.

Q. How were you dressed?

A. Had on slacks.

Q. Now as he was beating you there, did you ever ask him to stop?

A. Yes, sir, I did. I asked him twice.

Q. Were you afraid of him?

A. Yes, I was afraid.

Q. Why did you shoot him?

A. Because I was afraid he was going to kill me.

Q. Did you tell the police that last?

A. Yes, I did.

Q. Did he call you any names during this period of time?

A. Yes, sir.

Q. What did he call you?

A. Son of a bitches.

Q. Is that the reason you shot him is because he called you a son of a bitch?

A. No, sir.

Q. Why did you shoot him?

A. Because he was beating me up and I was afraid.

Q. What was Ruben's condition? Was he drunk? Or did he appear to be intoxicated to you?

A. No, sir. He was drinking.

Q. You're positive this is what happened on that occasion?

A. Yes, sir.

Q. All right. What did you do afterwards?

A. Well, I looked at him. I think well he's dead. So I crawled back out the window and I went up to Mr. Geisle's and I told him, I said I'm so scared and nervous, I said will you call the law or someone for me.

Q. Did you tell him that you'd shot Ruben?

A. Yes, sir.

Q. All right. And so then did he call the police then?

A. Yes, sir.

Q. All right. What did you do then?

A. I stood up there and waited for 'em.

Q. All right. And when the police came you took them--did you actually show them the way back down to the house when the police came to Mr. Geisler's?

A. Yes, sir.

Q. Did any of the officers ever ask to see the marks on your legs?

A. No, sir.

Q. Had you ever told the officers about marks on your legs?

A. Yes, I told 'em I had 'em on there.

Q. Do you recall which officer you told?

A. No, sir. I didn't know--I don't know one from the other.

Q. When did the bruises actually appear on your legs?

A. They was on there the next day, they was completely black.

CROSS EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Mrs. McGhee, if I understand your testimony, you're testifying that you lived with Mr. Boyles off and on for a period of about seven years?

A. Off and on, yes, I kept house for him.

Q. Kept house for him?

A. Yes, sir.

Q. You were his housekeeper?

A. That's right.

Q. And I understood your testimony to be that you went up to Mr. Geisler's and told Mr. Giesler you shot Ruben and you were too nervous to call the Sheriff's Department, how about him calling the Sheriff's Department for you?

A. Yes, sir.

Q. You heard him testify this morning, didn't you?

A. Yes.

Q. I believe you heard him testify that actually it was he that said call the Sheriff's Department, you just came up there and said I shot Ruben. And he actually was the one that suggested calling the Sheriff's Department. Wasn't that the way it was?

A. Yes, I asked him to.

Q. You asked him to?

A. Yes, sir.

Q. He's testified that he suggested that be done and you're saying that's wrong. You asked him to call the Sheriff's Department.

A. Yes.

Q. All right. How much had you had to drink on this occasion?

A. Well, I'll say three or four beers.

Q. Where had the beer come from?

A. Well, he had bought it on Saturday.

Q. He had bought it on Saturday.

A. Yes.

Q. How do you know he bought it on Saturday?

A. 'Cause I was down there when he brought it in.

Q. How much did he bring in?

A. Brought twelve.

Q. Twelve. How many beers did he have--what kind of beers were they?

A. Schlitz.

Q. Schlitz. And had you drank any at the house that you and Ruben lived in that day?

A. Yes.

Q. How much had you drank that day?

A. I'll say I drank four, three.

Q. You drank four?

A. (Inaudible)

Q. When did you start drinking?

A. When did I start drinking?

Q. Yes, ma'am.

A. Well, that morning.

Q. That morning. And what time was it when you shot Ruben in the back?

A. It wasn't quite dark.

Q. It wasn't quite dark.

A. It was about dark.

Q. You'd been up to Ruben's mama's house?

A. Yes, sir.

Q. And you'd come back down the road together.

A. Yes.

Q. And I'm understanding your testimony to be here that before he went into the house he was beating on you?

A. Yes, he slapped me.

Q. He slapped you there outside the house before you went in?

A. Yes.

Q. How many times did he slap you outside the house?

A. Oh, I don't know, two or three.

Q. And where did he slap you?

A. On the side of my face.

Q. Was it hard slaps?

A. Yes.

Q. Very hard?

A. Yeah, hard.

Q. Now I understand that you had to climb through the window to get in the house.

A. Yes, sir.

Q. And your statement is that what he was mad at you about was he thought you had the keys?

A. That's right.

Q. All right. So who went in the house first?

A. He did.

Q. So he climbed in the house, the window. Were you scared of him at that point?

A. Well, no, I felt maybe he might settle down after he got in the house. But when he got in the house that's when he started.

Q. So you climbed over in the house too?

A. Yes, sir.

Q. All right. Did you have the beer with you when you came back?

A. Well, it could have been some in the refrigerator, I imagine.

Q. Who had the beer with you when you came back? Who brought the beer back from up at his mother's house?

A. We didn't bring any back from up there.

Q. Well, did you take all the beer with you up to his mother's house when you went?

A. No, sir.

Q. You did not?

A. No, sir.

Q. How much did you leave there?

A. Well, I really don't know how many he had drinked.

Q. Well, he started out with twelve, didn't he? You drank four of them?

A. Yes.

Q. And there was some there when you all got back? About how much was left there when you got back?

A. There might have been two or three, I don't know.

Q. Two or three.

A. Could have been.

Q. So about how many beers did Ruben have? I'm counting, the most he could have had would have been about six or seven. You started out with twelve and you drank four and there were two or three there left. Is that right?

A. I'd say something like that.

Q. So he had about five beers on this occasion?

A. Imagine so.

Q. Five beers between when and when?

A. That morning.

Q. You know he drank more than five beers, Mrs. Hale, don't you?

A. Well, I don't know.

Q. Was you all drinking anything else other than beer?

A. He might have drank some homebrew, I couldn't say.

Q. Where was the homebrew?

A. On the back porch.

Q. Well, if you all had been up to your mother's house since about 10:00 o'clock that--his mother's house since about 10:00 o'clock that morning, hadn't you?

A. Yes, sir.

Q. All right, now. So you got in--he slapped you two or three times real hard in the face before you went in the house?

A. Yes.

Q. He climbed in the window first, you climbed in the window after him. What happened after you got in the house?

A. That's when he started beating on me.

Q. What was he beating on you with?

A. Well, he had on these safety boots and he had me by my arms hitting me against the head and kicking me all at the same time.

Q. He was beating your head against the wall?

A. Yes, sir, he was.

Q. Was he doing this hard?

A. Yes, he was doing it hard.

Q. How many times did he beat your head against the wall?

A. Several times.

Q. Seven times?

A. Several times.

Q. How many? Was it as many as ten?

A. Well, five or six or something like that.

Q. Five or six times he beat your head against the wall. And I understand you to say all during this time he was kicking you with his boots?

A. That's right.

Q. All right. Now what did he do--how did you get this shotgun?

A. Well...

Q. Tell us how that happened, please.

A. I was scared to death, I really don't know how I got hold of the gun. Had eight guns in the same room.

Q. Had eight guns in the same room?

A. Eight.

Q. Three rifles and the rest pistols, I guess.

A. Well, we had five over behind the TV.

Q. Five behind the TV.

A. And two on one side of the window and one other side of the bed.

Q. Is this the shotgun you used to kill Ruben? The one right there in front of you there.

A. Yeah.

Q. That's it.

A. I imagine it is.

Q. Where was it in the house?

A. Sitting side the window.

Q. Was it loaded or unloaded?

A. Well, it was three of 'em loaded.

Q. There was three of them loaded?

A. Yeah.

Q. All three rifles and shotguns were loaded?

A. It was two shotgun and one rifle loaded.

Q. Two shotguns and one rifle loaded. Are they the ones shown in this picture?

A. Yes.

Q. All of these were loaded?

A. Yes.

Q. And how did you get over there to it, is the shotgun you got to kill Ruben?

A. Yes.

Q. You got this one over here?

A. Yeah, that's the rifle.

Q. You got this one. The officers testified that this weapon was here when they arrived there. You got the shotgun that was over here, didn't you? Is that your testimony here today, ma'am?

A. Well, I really don't know.

Q. You don't know about that.

A. I was scared, I don't know.

Q. All right. Let me ask you this. You said that he had a hold of you, was beating your head against the wall and kicking you. How did you get away from him?

A. What?

Q. How did you get away from him?

A. Well, he said it was going to be the last lick at me and that's when I got the gun.

Q. Where were you at the time that he said that to you?

A. I must have been near the foot of the bed.

Q. Well, I asked you, do you remember where you were?

A. No.

Q. You don't remember where you were. You don't know where it was in the house that you were when you had your head hit against the wall?

A. Yes, sir.

Q. Where was that, please? Now that's what I was asking you.

A. It was back on this side of the bed.

Q. Back on this side of the bed. About how far away from the bed were you?

A. Oh, about this far I imagine, something like that.

Q. Who was closer to the bed, you or Ruben?

A. Well, we both was on that side of the bed to start with.

Q. When he was beating your head against the wall who was closest to the bed? You or Ruben?

A. He was.

Q. He was. So you had to get by him and get the shotgun. Now after you got the shotgun you told the officers that you held the shotgun up to Ruben's head and said that you would shoot him.

A. Yes.

Q. And he said no you won't shoot me.

A. That's when he hit me again.

Q. That's when he hit you again, while you were holding the shotgun up against his head?

A. Yes.

Q. You had this shotgun up against his head. How were you holding the shotgun? Would you show me how you were holding it?

A. I don't remember that.

Q. You don't remember how you were holding it, but you had it up against Ruben's head and he slapped you with this shotgun up against his head?

A. Um.

Q. He knew the shotgun was loaded, didn't he?

A. I guess he did. Had the three of 'em loaded.

Q. Ma'am?

A. I reckon he did, he had three of 'em loaded.

Q. Had three of them loaded. He said you won't shoot me, and then that's when you shot him?

A. Yes.

Q. Isn't that right? He had no weapon.

A. Well, he had a hawkbill knife.

Q. He had a hawkbill knife?

A. Yes, sir.

Q. Where did he have the hawkbill knife?

A. In his pocket.

Q. In his what?

A. His pocket, I think.

Q. In his pocket, but did he ever have anything in his hand, did he ever threaten you with anything?

A. Yes, sir, he had drawed the knife on me.

Q. All right. Do you remember telling Officer Nester he asked you if he had, if Ruben had a gun or knife in his hand or if he had threatened to get one when you shot him, and you said no. Isn't that what you told him that night?

A. I don't exactly remember what I said that night, so scared as I was.

Q. You don't remember what you said that night?

A. No, I don't.

Q. Did you tell the police why you would tell them that night, you told them that night, that he didn't threaten you or didn't have any weapon, why you would say he didn't then and you did now?

A. Well, I don't know. I was in a...

Q. Did you tell the officers that really made you mad was the fact that he'd called you a bad name, that he'd used the word son of a bitch?

A. No, well, that wasn't it, I was scared of him.

Q. Do you remember telling Officer Nester that he won't call you a son of a bitch any more? Words to that effect.

A. No, I don't remember.

Q. You don't remember telling him that and laughing when you said it?

A. No, I didn't laugh.

Q. You didn't laugh?

A. No.

Q. He's wrong when he says you laughed that night?

A. I didn't laugh.

Q. Do you know Officer Nester?

A. I saw him up here.

Q. Did you know him before that?

A. No, sir.

Q. Do you know any reason why he would come to Court and say you laughed if in fact you didn't laugh that night?

A. No, sir.

Q. What did you do with the rifle after you shot, with the shotgun after you shot Ruben?

A. I reckon I set it back down.

Q. Where did you set it back down?

A. Well, I set it right there beside the window, that's a picture of it.

Q. You set it back beside the window.

A. Must have had.

Q. Where were you when you shot Ruben?

A. I must have been standing over at the window.

Q. You don't know where you were when you shot him?

A. Um.

Q. He fell right at the foot of the bed, didn't he?

A. Yes, sir.

Q. Which side of Ruben's head did you point the weapon, you pointed at him and said I'll kill you?

A. Well, he started toward me, uh, must have been on the right, on the right side of his head, far as I can remember.

Q. What time was it when this happened?

A. It was a little before dark.

Q. Do you recall the hour of the day?

A. No. It wasn't quite dark.

Q. What time was it when you left your, Ruben's mama's house?

A. Oh, well, it was up in the evening.

Q. About what time was it?

A. Oh, about between 6:00 or 7:00, I guess.

Q. Between 6:00 and 7:00 when you all left.

A. I imagine.

Q. How long does it take you to get back to the house?

A. Well, we rode part of the way and then we walked the rest of the way.

Q. How long did that take?

A. Oh, I guess we'd get up there in about forty minutes.

Q. About forty minutes?

A. Well, I mean walking (several words unintelligible)

Q. Mrs. McGhee, if I'm understanding your testimony correctly, you're saying that after this you pointed out to the officers any bruises you had?

A. They didn't ask me. They saw 'em up at Marion.

Q. Didn't I understand you to tell, in answer to Mr. Gregory's question, that on the day after this or the following day, you pointed out to some police officer whose name you don't remember these bruises?

A. Yes.

Q. Where was that?

A. It was up to the jail.

Q. In the Henry County jail?

A. Yes, sir.

Q. What did the officer look like?

A. Well, he---

Q. Whereabouts in the jail were you?

A. Back there where, uh, in a office where the nurse's office is, back.

Q. How long were you kept in the Henry County jail?

A. Two nights.

Q. And you say, what was it that this officer looked like, what color hair did he have?

A. I don't recall.

Q. How tall was he?

A. I don't know, kind of heavy set.

Q. Do you recall what he was wearing?

A. No.

Q. Don't remember what he was wearing?

A. No.

Q. How old was Ruben?

A. Fifty-six.

Q. You say Ruben was wearing boots when this happened?

A. Yes, sir.

Q. How high were the boots, how high up did they go?

A. Oh, about that high. They had...

Q. About that high above the ankle?

A. Yes.

Q. Would you point out to me, please, for the jury, about high the boots were, just show on me, where would they go to on somebody like me?

A. Oh, not,past your pants a little bit, not quite that high.

Q. About right here?

A. Yes. Something like that.

Q. You're sure of that?

A. Yes, something like that.

Q. How many pairs of boots did he have?

A. Well, you know the safety boots where you wear in the mills.

Q. High top boots, on up here above the ankle.

A. Yes.

RE-DIRECT EXAMINATION - QUESTIONS BY MR. GREGORY

Q. First, I may have misunderstood, but in response to the questions about the hawkbill knife, did you testify that your husband had the knife out, excuse me, that Ruben had the knife out?

A. I would think he did 'cause he has drawed it on me before.

Q. But do you know whether he had it out at this time or not?

A. I can't, I was so scared I don't know exactly/what went on except I know he beat me and I was scared to death.

Q. Do you actually remember where you got the gun from?

A. Well, it had to be sitting beside the window but I don't know how I got it though.

Q. What makes you think that all three guns in the room were loaded?

A. We kept 'em loaded all the time.

Q. Did, did you ever fool around with the guns?

A. No, sir.

Q. I want you to tell me, I'll walk towards you, approximately how far away Ruben was when you actually fired the gun. OK, you tell me when to stop. (Walks toward witness)

A. Right along there.

Q. Right along in here. And you testified that Ruben hit you while you had the gun. How do you explain that?

A. Yes, he did. He said that would be my last lick that he'd hit me.

Q. All right. How far away was he when he hit you?

A. He hit me and he started toward me and I got the gun...

Q. Did he hit you and then you backed away and he started towards you again or what?

A. Yes. And he said that'd be my last lick. That he'd hit me.

Q. How many shots did you actually fire?

A. One.

Q. You also testified that he was, had grabbed you and was shoving you up against the wall.

A. Yes, sir.

Q. What part of your head was hitting the wall?

A. The back of it.

RE-CROSS EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. How many times did he slap you after you got inside the house?

A. Several.

Q. How many?

A. Several times.

Q. As many as ten?

A. I imagine he did, my jaws was red.

Q. Slapped you all about the face?

A. Yes.

Q. Was he slapping you real hard?

A. Yes, he slapped me hard.

Q. All right. Now would you, I may have misunderstood your testimony, but I thought your testimony was before that you picked up the shotgun, that you held it up to the side of his head and told him you were going to shoot him.

A. Yes.

Q. Are you saying at that point in time that you all were this far away?

A. Something like that, it could have been a little closer.

Q. How much closer? You tell me to stop when I get as close to you as he was. (Walks toward witness)

A. It wasn't that close.

Q. How far was it?

A. About like that, I imagine.

Q. About like that?

A. Something like that, yes.

Q. And you had the shotgun up against his head.

A. Yes.

Q. Was the shotgun up against his head when you shot him?

A. No.

Q. Where was it when you shot him?

A. It wasn't against his head.

Q. How far away from his head was it?

A. Wasn't very far.

Q. Well, how far is not very far?

A. I don't know, something like that I guess.

Q. About eight to ten inches?

A. I imagine it was.

Q. And he hit you?

A. Yes, he did, he hit me and he said this is going to be your last lick.

Q. And the shotgun was between you and him?

A. Yes.

Q. And this is the shotgun and he reached and hit you while you had this shotgun six inches away from his head.

A. I think...

Q. How long were his arms? Did he have unusually long arms?

A. Yes, longer than mine.

Q. Longer than yours.

A. Yes.

Q. His arms, were they longer than this shotgun?

A. No.

RE-DIRECT EXAMINATION - QUESTIONS BY MR. GREGORY

Q. How were you--did you have the shotgun up on your shoulder?

A. Yes.

Q. You had the gun up on your shoulder.

A. I imagine I did.

MR. REYNOLDS: If the Court please, -- that's all right.

Q. Hold this. Show me how you were holding the gun.

A. Like this. (Demonstrates)

Q. All right. Like that right there. Now is this about the distance away?

A. Yes.

RE CROSS EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Mrs. McGhee, do you recall me asking you a while ago how you were holding the gun?

A. Yes, sir.

Q. What did you say?

A. I said I didn't know how I got a holt of the gun.

Q. How were you holding the gun?

A. Something like that.

Q. Something like what?

A. The way I just showed you.

Q. A while ago when I asked you to show me how you were holding the gun, what was your response to that?

A. I said I didn't know how I got a holt of the gun.

Q. You didn't know how you got a hold of it or you didn't know how you were holding it?

A. I remember how I was holding it but I don't know how I managed to get a holt of it.

Q. Didn't you just tell Mr. Gregory you imagined you were holding it that way?

A. Yes.

Q. Well, which is it? Do you remember or was it your imagination?

A. Well, I was so scared probably I don't know exactly how...

Q. As a matter of fact what you said the first time is right, you don't know how you were holding it. Isn't that correct?

A. Um...

Q. And that was your testimony a while ago that you were so scared you didn't know how you were holding it, wasn't it?

A. That's correct, but that's the way I would think I would do it.

MR. GREGORY: Have you ever held a gun any other way?

A. No.

MR. REYNOLDS: What do you mean you've never held a gun any other way?

A. 'Cause I don't use guns.

MR. REYNOLDS: That's the only time you ever held a gun was the time you held it on this occasion?

A. That's right.

MR. REYNOLDS: You'd never had a shotgun before?

A. No, sir.

MR. REYNOLDS: You'd never shot a weapon before?

A. No, sir.

The next witness, RACHEL CARTER, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. GREGORY

Q. Would you state your name and address, please.

A. Rachel Carter, Route 7, Martinsville, Virginia.

Q. All right. Mrs. Carter, you are this woman's sister, I believe.

A. Yes, sir.

Q. All right. Are you her younger sister or older sister?

A. Younger.

Q. OK. Now on the day after this occurred, in other words this would have been May 23rd, I guess, did you have occasion to go to the Henry County Sheriff's Department to see this woman right here?

Q. Who did?

A. Ruben Boyles.

THE COURT: Where, Mrs. McGhee, I didn't quite follow you.

A. Shot the back of the fender.

THE COURT: Shot the back of the fender.

A. Yes, sir.

THE COURT: The automobile in which you were riding with Mr. Prater.

A. Yes, sir.

CROSS EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. What happened after he shot in the back of the fender? Did you go to the police then?

A. No, sir.

Q. Did you ever report it to the police?

A. No, sir.

Q. I guess you quit living with him then and never lived with him after that?

A. Who? Me?

Q. Yes, ma'am.

A. No, sir, I went back house....

Q. You kept on staying there?

A. Yes, 'cause I loved him.

Q. Were you scared of him?

A. Not until he got to drinking we never had no arguments.

Q. Would you explain, please, why you stayed with him if you were scared of him?

A. Well, he hadn't never acted like this before.

Q. I understood earlier that you said that you were his housekeeper, but was there more to your relationship with him than being a housekeeper?

CROSS EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. You say this was how long ago?

A. It's been about three or four years ago.

Q. Three or four years ago?

A. Yes, sir.

Q. And what part of the car was shot into?

A. The front door on the driver's side and right at the back where it locks at.

Q. Are you sure it wasn't just a year ago?

A. It's been about three or four years ago.

Q. You're positive of that?

A. Yes, I am.

Q. If Mrs. McGhee testified it was about a year ago she's wrong about that?

A. Well.

Q. What part of the car was that that was shot into?

A. Right front and right back of the door, it scattered.

Q. Went into the fender or the trunk?

A. Part of it in the front and part of it in the side where it locks together at.

Q. The door there?

A. That's right.

Q. Any shots fired into the trunk or into the fender itself?

A. Just--the shot scattered on the fender and the front door and right at the back of the door.

Q. Did this scare you?

A. I didn't feel good.

Q. I guess the first thing you did after this happened was go and report it to the Sheriff's Department?

A. No, sir, the man's car it belonged to he was with me and

~~holding in the Mullaney case also pertaining to the burden of~~ proof in regard to malice. Judge, I would also object to Instruction No. 11 on the basis of the Mullaney decision and also on the basis that the term "adequate legal provocation" is so vague in, as it is used in Instruction No. 11 that the jury couldn't possibly understna d what it means and that this instruction should be changed to make it clearer. Judge, I would also object to either Instruction 13 or 14 because I believe that one or the other of them would be redundant. Judge, those basically would be the, ~~my objections to the individual instructions.~~

THE COURT: All right. I think the record clearly shows Mr. Gregory's objections to the instructions that are being given on behalf of the Commonwealth, which are 1 through 17, not including Instruction No. 5 which was omitted. Now on behalf of the defendant, the following instructions are being given: A, B, C, C1, Instruction D is being refused. Instruction E is being given, Instruction F is being given. Instruction G is being given and Instruction H is being given. Now I have marked on Instruction D that we've discussed considerably, I've noted that it's being refused. I've noted the defendant's objection and exception to the action of the Court in refusing that instruction.

MR. GREGORY: First, in regard to the refusal of instruction No. D of the defense, I would like to point out that in the event that the Court would allow this instruction with certain language deleted to the effect that the evidence has been presented by both the Commonwealth and the defense, which raises the issue of self defense, I'll be glad to omit that language and offer it in

that form if the Court would agree to grant it. In other words, I would omit the first clause, I suppose is what you would call that, of the instruction.

THE COURT: Well, I would just prefer that if you have another instruction to offer in its place that you offer it and then I'll just pass on it, Mr. Gregory, when I see it.

MR. GREGORY: Just to briefly state why I think these two instructions, or at least one of the two instructions, should be given, I would rely on the cases of Frazier Vs: Weatherholtz, 411 Fed. Supp. 349, Western District of Virginia, 1976. And also the recent Hodge case in 217 Va. 338. Basically pertaining to burdens of proof and I would point out that I think that the burden which is now placed upon the defendant is a violation of those two cases.

THE COURT: I don't think you're going to find anything in here, Mr. Gregory, where we put any burden on the defendant. There's nothing said about, anywhere in these instructions, about any burden being on the defendant. All right, be all that as it may, I think we've talked about it enough. I think the record clearly shows Mr. Gregory's concern and his position is fully and amply protected in the record.

IN COURTROOM

Instructions are given the jury by the Court.

Closing arguments not transcribed at this time.

The jury retires. After some time returns with the following verdict:

JURY VERDICT - READ BY CLERK

We the jury find the defendant guilty of second degree murder and set the sentence at 20 years in prison - and also find the defendant guilty of use of a firearm to commit murder with punishment of one year in prison. Foreman, Jesse L. Stevens.

The jury is polled. Each member replies "Yes" to the question "Is this your verdict?".

The jury is excused.

THE COURT: All right, Mr. Gregory.

MR. GREGORY: If the Court please, I would move that the verdict of the jury be set aside on the basis of previous motions made, in particular my motion concerning the burden of proof in self defense.

THE COURT: Mr. Reynolds, any comment?

MR. REYNOLDS: No, sir, Your Honor.

THE COURT: That's the only thing that gives me any concern at all is that one instruction we talked about so long, that relates to the, your feeling that the burden is on the Commonwealth to establish beyond a reasonable doubt that the defendant did not shoot the deceased in self defense. You seem to feel that the Hodges case was some authority for your position.

MR. GREGORY: Yes, sir.

THE COURT: Well,---

MR. GREGORY: If the Court please, I would be happy to submit authority or whatever the Court would want.

THE COURT: Well, if you have anything other than the, I personally feel like it's covered by all the other burden of proof that we have. And I

won't go into any detail, but we do have several instructions that relate to the burden of proof on the Commonwealth to establish the guilt of the defendant beyond a reasonable doubt by clear, distinct and reliable evidence to prove all the essentials, and what not. We have three instructions that relate to the burden on the Commonwealth in detail. None specifically point out what you're talking about. But if you feel that you've got some authority that supports your position that the jury should be specifically instructed that the burden is on the Commonwealth to establish beyond a reasonable doubt that the defendant did not shoot the deceased in self defense, I'll be happy to accept it, receive it and read it.

MR. GREGORY: Judge, the only two that I would cite and would argue are the two that I already have. The Hodge case and the Frazier case.

THE COURT: Well, really, the Frazier case is a federal case and their rules are so different from ours that I would rather, would rather pore over the Hodges case, which is a Virginia case and came up from the City of Martinsville. Mr. Reynolds?

MR. REYNOLDS: If the Court please, I would remind the Court as I did in Chambers of the recent case of, decided by the Supreme Court of the United States that I cited to the Court that dealt extensively with the burden on the Commonwealth in cases involving affirmative defense. And I will provide the Court with a copy of that decision.

THE COURT: All right. I think we probably have

it in our...

MR. REYNOLDS: In the Criminal Law decisions.

THE COURT: All right. You give me that if you will. Mr. Gregory, you have that Hodges decision. If you'll just leave that with me. If Mr. Reynolds will give me that together with the case you were talking about then I'll be happy to read those and then we'll govern ourselves accordingly. Today is Wednesday, maybe we could get back together on Wednesday of next week. I would like to have those opinions though.

MR. GREGORY: If the Court please, would it be possible to defer sentencing until then?

THE COURT: Oh, I will. I will not impose sentence on the defendant until I have passed on your motion, Mr. Gregory. But now in the meantime in light of our problems before I think she should be returned to Danville.

MR. GREGORY: If the Court please, just on that one narrow issue could I talk with her sister. Judge, it might be well if I talked with her at the bench.

THE COURT: All right. Let's talk with Mr. Reynolds. Mr. Reynolds should be in on this conversation too.

(Discussion regarding her release on bond - not recorded defendant to be returned to Danville jail)

INSTRUCTION D

Refused J.O.N.
Exception noted

THE COURT INSTRUCTS THE JURY, that evidence has been presented by both the Commonwealth and the Defense which raises the issue of self-defense, and it is therefore the burden of the Commonwealth to prove beyond all reasonable doubt that the Defendant did not shoot the deceased in self-defense, and if you believe that the Commonwealth has not proved beyond all reasonable doubt that the Defendant did not shoot the deceased in self-defense, then you must find the Defendant not guilty.

INSTRUCTION D(1)

Refused
Defendant
Withdrew
JDH D(1)

THE COURT INSTRUCTS THE JURY that it is the burden of the Commonwealth to prove beyond all reasonable doubt that the Defendant did not shoot the deceased in self-defense, and if you believe that the Commonwealth has not proved beyond all reasonable doubt that the Defendant did not shoot the deceased in self-defense, then you must find the Defendant not guilty.

INSTRUCTION 13

THE COURT INSTRUCTS THE JURY that before they can acquit the defendant on the ground of self defense two essential elements must first occur; first, the defendant must be without fault in bringing on the difficulty; second, there must have reasonably appeared to the defendant a present, impending necessity to shoot the deceased, in order to save herself from being killed or suffering great bodily harm. The law of self defense is a law of necessity, pure and simple, and before the defendant would be justified in shooting the deceased, she must be in danger, or apparently in danger, and the situation carefully adapted as to reasonably appear to the defendant of either losing her life or receiving great bodily harm at the instant when the shooting of the deceased occurred.

INSTRUCTION 14

THE COURT INSTRUCTS THE JURY that in order for one person to take the life of another in self defense, the acts and conduct of the deceased must be such as to cause the defendant to reasonably apprehend that she was in danger of death or serious bodily harm at the hands of the deceased.

THE COURT FURTHER INSTRUCTS THE JURY that if you believe from the evidence in this case beyond all reasonable doubt that at the time the defendant shot the deceased that the deceased was not conducting himself in such a manner that the defendant could reasonably apprehend therefrom that the deceased was about to take her life or to cause her serious bodily harm, then the defendant cannot justify such shooting as self defense.

INSTRUCTION 15

THE COURT INSTRUCTS THE JURY that even if you believe from the evidence that the deceased had directed words, however grievous and insulting, to the defendant, and even should you further believe that the defendant through fear believed that it was necessary to shoot as she did in order to save her own life or avoid serious bodily harm, unless you further believe from the evidence that the deceased had made some overt act indicative of imminent danger to the defendant, then the defendant cannot rely upon a plea of self-defense.

THE COURT: Now, gentlemen, we're here to continue our discussion on the defendant's motion to set the verdict of the jury aside. And Mr. Gregory as counsel for the defendant concerns himself in particular with the refusal of the Court to grant Instruction D and Instruction D1. Of course they are self explanatory but I will read them quickly if I may. Instruction D reads as follows: The Court instructs the jury that evidence has been presented by both the Commonwealth and the defense which raises the issue of self defense. It is therefore the burden of the Commonwealth to prove beyond all reasonable doubt that the defendant did not shoot the deceased in self defense. And if you believe that the Commonwealth has not proved beyond all reasonable doubt that the defendant did not shoot the deceased in self defense then you must find the defendant not guilty. Considerable doubt was expressed about the propriety or validity of that instruction so in lieu thereof Mr. Gregory submitted instruction D1, which is virtually the same. The opening paragraph is omitted. The Court instructs the jury that it is the burden of the Commonwealth to prove beyond all reasonable doubt that the defendant did not shoot the deceased in self defense. And if you believe that the Commonwealth has not proved beyond all reasonable doubt that the defendant did not shoot the deceased in self defense then you must find the defendant not

guilty. This instruction was refused and the defendant's exception was noted. Now, so there we are. Now Mr. Gregory, I'll be happy to hear anything that you have to say. We're on the record now and then we will of course give Mr. Reynolds an opportunity to respond if he so desires.

MR. GREGORY: If the Court please, as we discussed at some length in chambers, I'm not sure whether it was on the record or not, but as we discussed during the trial of the case, it was my feeling that the burden was on the Commonwealth as expressed in the instructions which you've read. My feeling in this regard is based primarily on two cases, that would be the Mullaney case, the recent Supreme Court of the United States case, and the Frazier Vs: Weatherholtz case, which is a Western District of Virginia case, in which it is, the rule of law in particular in the Frazier case states that the burden is on the Commonwealth to disprove self defense once the issue of self defense has been raised. Very simply, that's the issue that's involved in this case. We feel, as I've expressed to the Court, that the instructions which we offered should have been granted and move that the verdict of the jury be set aside on that basis.

THE COURT: Mr. Reynolds?

MR. REYNOLDS: Judge, I have nothing to add to the discussions that we've already had and the cases that I have cited in Chambers to the Court.

THE COURT: All right. Well, let me begin by saying that these were the only instructions that were offered by the defense that related to the burden of proof. Specifically to the defense of self defense. Now the Court gave the following instruc-

tions on behalf of the Commonwealth, all of which have to do with the burden of proof. Instruction E, H and I. And these instructions I think very succinctly and clearly and forcefully in substance tell the jury just exactly where the burden is, just exactly how long it lasts, and what not. The old stock instruction that's hoary with age that the Court instructs the jury that the Commonwealth must prove from the evidence beyond a reasonable doubt every material fact. And if the jury have a reasonable doubt as to the grade of the offense then they must resolve the doubt in favor of the defendant, and so forth. And this particular instruction concludes: If you have a reasonable doubt as to whether she be guilty at all then you must resolve that doubt in favor of the defendant and acquit her. Instruction E is even, doesn't concern itself with the grade of offense but it's an instruction that certainly the three of us are very familiar with, that the defendant is presumed to be innocent of any charge and that the burden of proof to establish her guilt rests upon the Commonwealth throughout the case and at every stage thereof, never shifts. The Commonwealth must prove that the defendant is guilty of the crime charged. It is not sufficient that the jury may believe her guilty probable, etc. The defendant does not have to prove her innocence. All that is necessary to entitle her to an acquittal is that from the evidence as a whole or lack of evidence that is raised

in the minds of the jury a reasonable doubt of her guilt. Then the next instruction that relates to the burden of proof, we're all familiar with these, they're given invirtually every criminal case that we have. That the burden is on the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. Then we go into what we mean by reasonable doubt and those instructions speak for themselves. Now, Instruction G that was given on behalf of the defendant--I said on behalf of the Commonwealth, I'm wrong, these instructions were given on behalf of the defendant, yes, they were--well, this Instruction G also, no occasion for me to read it, that relates to the presumption referred to in Instruction 9, etc. Now, what are the responsibility of the defendant, if any. Obviously the burden is on the Commonwealth to establish the guilt of the accused in that case beyond every reasonable doubt by clear, distinct and reliable evidence and that presumption remains with the defendant and did remain with her throughout the case. It never shifted. Now, as to the burden--as to the duty or the burden, if any, on the defendant. (one word unintelligible) talking about an old case of Simms Vs: The Commonwealth, where they're talking about the old instruction that the prisoner is presumed to be innocent of the crime charged against her until her guilt is established, and so forth.

Instructions should be read as a whole and when the above mentioned instruction is read in connection with Instruction 6/it is difficult to understand how the jury could have any doubt on the subject. The prisoner, that is the defendant in this case, Mrs. McGhee, never has to prove any fact even beyond a reasonable doubt or by a preponderance of the evidence. All that she has to do, all that she has to prove in any case, is such a state of facts as will raise a reasonable doubt in the minds of the jury as to the existence of the fact or facts sought to be established by the Commonwealth. And this was sufficiently stated. In other words, the only burden at all on Mrs. McGhee or any defendant in any criminal case, is in some way, in some way and some how to show such a state of facts as will raise a reasonable doubt in the minds of the jury as to the existence of the fact or facts sought to be established by the Commonwealth. Well, the fact or facts sought to be established by the Commonwealth was that the defendant was either guilty of murder in the second degree, murder in the first degree or murder in the second degree or voluntary manslaughter. Now, the only requirement at all on Mrs. McGhee was that after, I mean after these facts were set out, facts that were sought to be established by the Commonwealth, the only thing required on the part of Mrs. McGhee was to raise a reasonable doubt in the minds of the jury as to the existence of the fact

or facts sought to be established by the Commonwealth. Certainly there was no burden of proof that shifted to her. Now, Mrs. McGhee pled self defense. That I think we recognize to be an affirmative defense. Now, the recent case, fairly recent case from the Supreme Court of the United States of, now this is Mullaney I was looking for the Patterson case--this is a 1977 case. Gordon G. Patterson, Jr. Vs: The State of New York, June 17th, 1977. And it talks about burdens of proof, and it talks about affirmative defenses and what not. The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on the defendant. The limits are in substance these, the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation. Or at least upon a balancing of convenience or of the opportunity, etc. Now, we thus decline to adopt as a constitutional imperative that a state must disprove--this is very much in point with the defendant's position here--and I'll repeat, we thus decline to adopt as a constitutional imperative that a state must disprove beyond reasonable doubt every fact constituted any and all affirmative defenses related to the culpability of an accused. Traditionally due process has required that only the most basic procedural safeguards be observed. We will therefore not disturb balance

struck in previous cases, holding that the due process clause requires that the elements included in the definition of the offense of which the defendant is charged proof of the nonexistence of all affirmative defenses has never been constitutionally required and we perceive no reason to fashion such a rule in this case. In other words, Mr. Gregory and Mr. Reynolds, you're both probably familiar with this case, in this case the Supreme Court of the United States is saying that where the defendant has raised an affirmative defense whether ir be insanity, whether it be self defense, that the burden is definitely not on the Commonwealth to prove beyond, or to disprove beyond a reasonable doubt that the existence of this particular affirmative defense. This case has a good deal further to say but I won't bore you all, neither will I bore the record with it, I just simply cite it as a position of the Court. Now there's another rather interesting case, it came up from the City of Martinsville, that was decided on October 8th, 1976, which had a great deal to say about the Mullaney case, Mullaney Vs: Wilbur, which has given us all problems. But I think the Supreme Court of Virginia certainly from our standpoint has put to rest permanently many of the questions that had been raised by Mullaney, particularly about our criminal procedure. Now I think it interesting in that particular case the Court specifically approved an instruction that we gave in Mrs. McGhee's case,

the identical instruction and it has to do with the presumption that every unlawful homicide in Virginia is presumed to be murder in the second degree. Now I'll read it if I may, then I'll conclude my remarks. This is instruction that the Supreme Court of Virginia approved in the Hodge case and this is an instruction that we gave in the McGhee case, and I don't recall the number but it's in the suit papers. The Court instructs the jury that every unlawful homicide is presumed to be murder in the second degree. In order to elevate an unlawful homicide to murder in the first degree the burden of proving the element thereof is upon the Commonwealth. In order to reduce an unlawful homicide from murder in the second degree to manslaughter or excusable homicide,this is what we had in Mrs. McGhee's case, excusable homicide, or excusable homicide the burden is upon the defendant. It is your duty to consider all the testimony, no matter by whom introduced, and ascertain therefrom if the defendant is guilty or innocent, and if guilty of what offense. That's the identical instruction that we gave in the McGhee case. To repeat, it's the identical instruction that the Supreme Court of Virginia approved in the Hodge case. So, Mr. Gregory, it's my feeling that the instruction that you offered just singling out and simply saying and saying no more that the burden is on the Commonwealth to establish beyond, or to disprove beyond a reasonable doubt an affirmative defense of the

defendant would be very confusing, very misleading. So for that reason the instruction was refused and is being refused, and for that reason the motion to set the verdict aside for this reason will be denied. And to that action please let the record show the defendant objects and excepts.

Opal Marie Hale McGhee, you may stand, if you please. Opal Marie Hale McGhee, I sentence you to serve twenty years in the penitentiary of the Commonwealth of Virginia, that being your punishment determined and ascertained by the jury. Mr. Gregory, thank you for your services.

MR. REYNOLDS: If the Court please, there are two counts.

THE COURT: Right, please excuse me. There was a second count and it's my further judgment that you serve one year in the penitentiary, that being your punishment ascertained and determined by the jury on Count 2 of the indictment, which specifically was the use of a firearm in the commission of a felony. These sentences of course shall run consecutively. Yes, Mr. Gregory?

MR. GREGORY: If the Court please, in regard to the sentence which you just imposed, would it also be possible at this time, Mrs. McGhee has asked me to note an appeal to this decision, to make provision the transcript be made a part of the record, automatically.

THE COURT: Automatically, yes, sir. Very definitely, it will be, if you desire, the record will be transcribed and then you can take it from there. But I do want to commend you as Court-appointed

FINAL JUDGMENT ORDER

VIRGINIA:

In the Circuit Court for the County of Henry this the 16th. day of November, 1977.

COMMONWEALTH OF VIRGINIA

VS: #21,072

OPAL MARIE HALE MCGHEE

INDICTMENT: MURDER AND USE OF FIREARM IN COMMISSION OF FELONY

This day came again the Attorney for the Commonwealth, and Opal Marie Hale McGhee, date of birth 7-23-35, who stands convicted of a felony, to-wit: Murder and Use of Firearm in Commission of Felony was again led to the bar in the custody of the sheriff of this court and came also John L. Gregory, III her attorney heretofore appointed.

Thereupon the attorney for the defendant moved orally that the verdict of the jury be set aside as being contrary to the law, and the evidence and without evidence to support it, which motion was denied, to which action of the Court the defendant by counsel objected and excepted.

The Court then asked the defendant whether she desired to make a statement or to advance any reason why judgment should not be pronounced against her. The defendant having declined, the Court finds the defendant guilty of Murder and Use of Firearm in Commission of Felony as charged in the indictment, and sentenced the defendant to confinement in the penitentiary of this Commonwealth for the term of twenty(20) years for murder and one (1) year for Use of Firearm in Commission of Felony.

At all times during the trial fo this Case the defendant and her counsel were present.

The Court orders that the defendant be allowed 58 days credit for the time spent in jail awaiting trial.

It is adjudged that the Commonwealth recover from the defendant the sum of $313.72, the costs assessed in this proceeding.

John L. Gregory, III Esq., is allowed _____ for his services as court-appointed counsel for the defendant in this Court.

The defendant is remanded to jail to await transfer to the penitentiary.

The attorney for the defendant noted an appeal to the Supreme Court.

ASSIGNMENT OF ERROR

It is respectfully submitted that the Trial Court erred in denying Instructions D or D1 submitted by the Defendant, which Instructions shifted the burden of proof in proving self-defense to the Commonwealth.