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Question of lesser charges considered by attorneys in Abernathy case

Jurors need to know if they have option to convict beating suspect on lesser charges

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CHARLESTON — Attorneys have a week to find out whether a jury might have the option to convict Jason A. Abernathy of less-serious offenses than that with which he's charged.

At a brief hearing Monday, a week before Abernathy's trial is set to start, Circuit Judge Gary Jacobs said the jury will have to know, before it starts deliberation, if it can consider finding him guilty of the other charges.

Abernathy, 34, is charged with a single offense, aggravated domestic battery, and is accused of beating Gina Giberson with a baseball bat at her home at 211 Fourth St. in Charleston, on Oct. 16 of last year. The house was destroyed by a fire later the same day, but neither Abernathy nor anyone else is charged with setting the fire.

Jacobs on Monday noted that there's evidence that Abernathy was living with Giberson but that she had kicked him out of the home just before the alleged attack. That might not make Giberson a "household member" with Abernathy, which would be required for a conviction for aggravated domestic battery, the judge said.

Jacobs then told State's Attorney Steve Ferguson and defense attorneys Monroe McWard and Mark Wykoff to research whether the jury might be able to look at what's called "lesser included" offenses that might fit the circumstances of the case. Jacobs mentioned the possibility of the jury looking at aggravated battery and other offenses, none of which carry sentences as severe as the charge against Abernathy.

Abernathy's trial is expected to start Monday as scheduled. Jacobs and the attorneys said the trial should probably last the entire week.

Addressing the selection of the jury, Jacobs said he would see if news coverage of the case has led to a large number of potential jurors to have opinions about Abernathy's guilt or innocence for the trial to take place in Coles County. The defense has a pending motion for a change of venue, but McWard's and Wykoff's position is that Jacobs shouldn't rule on it unless jury selection problems make it

necessary.

Giberson was comatose in a hospital for about two weeks after the alleged attack, and evidence at earlier hearings in the case indicated that she received several brain contusions. Abernathy plans to claim self defense at the trial, and police at the time of his arrest said he told them Giberson first attacked him with the bat and she fell and hit her head while he was defending himself.

With self defense claim, the jury could acquit Abernathy if the group decides he did harm her but his actions were justified.

Abernathy is jailed without bond. The aggravated domestic battery charge would normally carry a possible sentence of three to seven years if there is a conviction, but a prison sentence of six to 30 years would be required for Abernathy because of his criminal record.

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