

Judge allowing other abuse accounts in Abernathy case

By **DAVE FOPAY, Staff Writer**
dfopay@jg-tc.com

CHARLESTON — A jury could hear about other fights or instances of domestic abuse between Jason Abernathy and Gina Giberson in addition to the alleged beating that put Giberson in a coma.

Circuit Judge Gary Jacobs on Wednesday denied a motion by Abernathy's attorneys to bar any reference to other domestic violence at his upcoming trial on a charge of aggravated domestic battery.

As long as prosecution witnesses can testify that they have first-hand knowledge of any earlier fights or arguments and won't say they only heard stories from others, the jury can hear the evidence, Jacobs said.

Defense attorney Monroe McWard said there seemed to be a "general thread throughout the investigation" that Abernathy and Giberson were in a "violent relationship going both ways." Jacobs then asked why that wouldn't be an issue when Abernathy is claiming self defense.

"You are making it an issue," Jacobs said. He then noted that while earlier but similar acts aren't allowed in other criminal cases, they are in domestic violence cases.

Abernathy, 34, is accused of beating Giberson with a baseball bat on Oct. 16, 2007, to the point that she was comatose in an area hospital for about two weeks, according to authorities. The incident is alleged to have occurred at her home at 211 Fourth St. in Charleston, where Abernathy had also apparently been living until just before that.

McWard and defense attorney Mark Wykoff are on record that they plan to use self defense as what's called an "affirmative" defense for Abernathy. If they can show Abernathy was justified in harming Giberson because he was defending himself, he could be acquitted of the charge even if evidence shows he did hurt her.

Abernathy claimed he knocked her against a table after she first tried to hit him

with the bat. Evidence at earlier hearings indicated that doctors said Giberson suffered several head injuries that doctors said were not consistent with falling against a table.

Jacobs scheduled Wednesday's hearing to work on pretrial motions after agreeing last week to delay Abernathy's trial, which had been scheduled for this week. The defense's pretrial motions led to the postponement, and the trial is now set to start Dec. 8.

Also Wednesday, Jacobs granted a defense motion to bar references to a drug deal between Abernathy and another man the day before Giberson was allegedly attacked.

State's Attorney Steve Ferguson said evidence of Abernathy's drug use could have contributed to his anger or "caused him to lose control," resulting in the attack on Giberson. He said he'd include a police officer's testimony that Abernathy appeared to be under the influence of drugs when he was interviewed.

Jacobs said the officer could testify about his observations without stating a conclusion, but called the evidence about a possible drug deal "highly speculative."

Meanwhile, Wykoff filed a new motion Wednesday asking that the prosecution not be allowed to use evidence found at Giberson's house after a fire destroyed it shortly after the alleged attack. The motion claimed a "warrantless search" of the property after the fire and police didn't obtain a search warrant until they'd already been at the site.

Jacobs scheduled a hearing for Nov. 12 to handle that motion and any others that might be filed, and gave attorneys a deadline of Oct. 22 to file any additional motions.

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.

Contact Dave Fopay at dfopay@jg-tc.com or 348-5733.